4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

Re B (A Child) (Habitual Residence: Inherent Jurisdiction)

[2015] EWCA Civ 886

06/08/2015

Barristers
Private: David Williams QC
Alistair G Perkins

Court
Court of Appeal (Civil Division)

Practice Areas
International Children Law

Summary
The Court of Appeal re-stated the circumstances in which the court's inherent jurisdiction could be invoked in respect of a child outside the jurisdiction.

Facts
The appellant (X) appealed against a decision concerning a child's habitual residence and the court's inherent jurisdiction.

X's same-sex partner had the child using a sperm donor after IVF treatment. X's partner, the child's biological mother, was a British citizen of Pakistani origin. X did not have parental responsibility. They had lived as a family for three years after the child's birth. The mother was the child's main carer. The relationship between X and the mother broke down. X moved out but continued to have contact with the child. On 3 February 2014 the mother took the child to Pakistan to live permanently. X was initially unaware of this, and commenced proceedings on 13 February 2014, seeking to locate and have contact with the child. She subsequently asked for the child to be made a ward of court and for a return order. The judge concluded that the child had lost her habitual residence in England when she departed for Pakistan. She refused to exercise the court's inherent jurisdiction, concluding that the circumstances were not sufficiently "dire" to justify it.

X submitted that (1) the judge's finding as to habitual residence was wrong; (2) the decision in A v A (Children) (Habitual Residence) [2013] UKSC 60, [2014] A.C. 1 had resuscitated the inherent jurisdiction from the inhibiting effect of the decision in Al-H (Rashid) v F (Sara) [2001] EWCA Civ 186, [2001] 1 F.L.R. 951; (3) the judge failed to recognise the difficulties that a homosexual woman would face in litigating in Pakistan.

Held

(1) The Supreme Court had given clear guidance on the question of habitual residence, A v A, DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal) [2013] UKSC 75, [2014] A.C. 1017, LC (Children) (International Abduction: Child's Objections to Return), Re [2014] UKSC 1, [2014] A.C. 1038, and R, Petitioner [2015] UKSC 35, [2015] 2 W.L.R. 1583 followed. The judge's approach to the question of habitual residence was in line with the authorities. She conducted a factual inquiry focused on the correct meaning of the concept. She recognised that the child and her mother might be habitually resident in different countries and specifically considered the child's position separately. She took into account the child's relationship with X as a significant person in her life and she was well aware that X did not know about or agree to the move to Pakistan. She looked at what the child was leaving and what was awaiting her in Pakistan. There was no reason to interfere with her finding that the child lost her habitual residence in England when she left for Pakistan (see paras 14, 28, 30 of judgment). (2) The court could make a child who was a British subject a ward of court even if the child was outside the jurisdiction at the time the order was made, P (GE) (An Infant), Re [1965] Ch. 568 applied. However, the use of the inherent jurisdiction in cases where the child was outside the jurisdiction remained subject to long-established jurisprudence. Various words had been used over the years to describe the circumstances in which it might be appropriate to make an order including "extraordinary", "dire", and "exceptional". It was said that the jurisdiction should be used "sparingly" and "with great caution". Taken together, those words indicated very clearly just how limited the occasions would be when there could properly be recourse to the jurisdiction. The modern focus was on the protective rather than the custodial aspect of the inherent jurisdiction, such as cases where the child had been taken abroad for a forced marriage, for female genital mutilation or to travel to a dangerous war zone. There was also a trend towards habitual residence as the principal basis of the inherent jurisdiction. The decision in A v A had not overthrown more than 150 years of settled jurisprudence and had not disapproved the decision in Al H (Rashid), Al H (Rashid) considered, A v A explained. The occasions when the inherent jurisdiction could be invoked were even more limited given the effect of the Family Law Act 1986, which provided that the jurisdiction could not be exercised where the claim was for care of or contact with the child within the meaning of s.1(1)(d). The warning in F v S (Wardship: Jurisdiction) [1991] 2 F.L.R. 349, against using a return order as an artificial device to found jurisdiction, was as valid now as it was then, and was unaffected by anything said in A v A. The essential dispute between the parties related to X's claim for contact. Despite the application for a return order, X's attempt to invoke the inherent jurisdiction foundered on s.1(1)(d) and was an impermissible attempt to make "a devious entry to the court by the back door", F v S applied (paras 32, 35, 37-39, 42, 45-47). (3) The evidence established that there was pervasive societal and state discrimination, social stigma, harassment and violence against gay men and women in Pakistan. It was very unlikely that the courts in Pakistan would be prepared to recognise X as having any relationship with the child that would entitle her to relief. That was not enough by itself to justify the intervention of the English court. The situation fell short of the exceptional gravity necessary to consider the exercise of the inherent jurisdiction (paras 50-53).

Permission

To read the judgment, click here.