

Re J (A Child) (1996 Hague Convention) (Morocco)

[2015] EWCA Civ 329

01/04/2015

Barristers

Henry Setright KC
Teertha Gupta KC
Jacqueline Renton KC

Court

Court of Appeal (Civil Division)

Practice Areas

International Children Law

Summary

A judge had not had jurisdiction, either under the Hague Convention on Parental Responsibility and Child Protection 1996 or under the inherent jurisdiction of the High Court, to order the return of a child to Morocco. Although the Court of Appeal declined to give general guidance on how cases under the Convention should be handled, it indicated that in any case with a connection to another country, the court had to consider the question of jurisdiction from the outset and ask itself whether either the Convention or Regulation 2201/2003 (Brussels IIa) applied.

Facts

The appellant mother appealed against an order requiring her to return her eight-year-old son to Morocco.

The parents were Moroccan nationals who also had British citizenship. S had been born in the UK in 2005, and the family had returned to Morocco in 2011. The parents then divorced and, pursuant to an order made by the Moroccan court, S lived with his mother and had contact with his father. In September 2013, the mother wrongfully removed S to the UK. The father unsuccessfully applied to the Moroccan court for custody and then, in March 2014, applied to the English court for a return order. That application was heard in October 2014. The judge found that S had been habitually resident in Morocco up until September 2013, but did not consider his habitual residence as at the date of the hearing. He concluded that it would be in S's best interests for him to be returned to Morocco. Before the instant court, the issue which had crystallised was whether the judge had had the jurisdiction to make a return order.

Held

(1) Essentially, the question was whether the judge had had jurisdiction under the Hague Convention on the Civil Aspects of International Child Abduction 1980, Regulation 2201/2003 (Brussels IIa), the Hague

Convention on Parental Responsibility and Child Protection 1996 or the inherent jurisdiction of the High Court. The 1980 Hague Convention did not apply since Morocco's accession thereto had not been accepted by the UK. Given the absence of any finding that S had ever been habitually resident in England and Wales or any other Member State, there was no question of Brussels IIa applying either. The 1996 Convention did, however, apply because the order sought by the father fell within its ambit, *A v A (Children) (Habitual Residence)* [2013] UKSC 60, [2014] A.C. 1 applied. Article 5 of that Convention conferred jurisdiction on the Moroccan court, S having been habitually resident in Morocco immediately before his wrongful removal to the UK. Since none of the conditions in art.7(1) were satisfied, the jurisdiction of the Moroccan court was preserved. By virtue of art.7(3), the English court had jurisdiction only to the extent that it was conferred by art.11 which gave the court jurisdiction to take "any necessary measures of protection" in cases of "urgency". The instant case could not be said to fall within the scope of art.11. While there might be cases in which a return order was urgent and necessary, the instant case was not one of them. Urgency might exist where, if remedial action were pursued only through the normal channels of art.5 or art.10, there might be irreparable harm to the child, *Deticek v Sgueglia* (C-403/09 PPU) [2010] Fam. 104 applied. However, six months had passed before the father applied to the English court, and a year had passed before the matter was heard. The father's prior application to the Moroccan court showed that it had been possible to make a speedy application to the court with jurisdiction under art.5, and the father had not explained why he had applied for custody there rather than for a return order. The potential harm to S came not from his living arrangements, but from the fact that he was not maintaining a relationship with his father. While it was important for that to be remedied, it was not so urgent as to give the English court jurisdiction under art.11. Finally, the inherent jurisdiction of the High Court did not avail the judge. The purpose of the 1996 Convention was to determine, as between contracting states, which had jurisdiction to take measures directed to the protection of the child. That purpose would be defeated if, notwithstanding an absence of jurisdiction under the Convention, a contracting state could assume jurisdiction by virtue of a domestic rule. That was not to say that the English court could never have recourse to the inherent jurisdiction to order the return of a child to another country. The inherent jurisdiction could be both a basis for exercising jurisdiction and the source of power to make orders. In a 1996 Convention case, provided the English court had substantive jurisdiction under the Convention, the inherent jurisdiction could be used to make orders. In the instant case, the judge had had no jurisdiction to hear the father's application and he should have been invited to dismiss it. The return order would therefore be set aside (see paras 30-83 of judgment). (2) It was not appropriate to give general guidance on how cases under the 1996 Convention should be dealt with other than to say that whenever a case had any connection to another country, it was vital to consider the question of jurisdiction from the start. The court had to ask itself whether Brussels IIa applied, whether the 1996 Convention applied, and whether any other international instrument was relevant. Where the 1980 Hague Convention applied, however, its application was not affected by the 1996 Convention (paras 84-86).

Permission

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