

Al Habtoor v Fotheringham [2001]

[2001] 1 FLR 951

15/02/2001

Court

Court of Appeal

Facts

The English mother had a child, Tariq, by a citizen of Dubai. The relationship ended before Tariq was born and the mother later married someone else. She and her new husband adopted Tariq. When Tariq was 6 years old, the mother contacted the natural father to see if he would meet Tariq. He agreed and over time an agreement was made for the mother and her family to relocate to Dubai. The father's family agreed to provide, amongst other things, a job for the husband, a home, furniture and a car. The family made arrangements for their house in the UK to be rented out or sold, and shipped most of their possessions to Dubai. The family arrived on visitors' visas but moves were quickly made to gain residence visas. Approximately 3 months later, dissatisfied with the arrangements that had been made for them and in dispute with the father over contact with Tariq, the family decided to return to England. The father applied to a court in Dubai for a custody order over Tariq, on a without notice application which was obtained upon a number of serious misstatements of fact. The mother's efforts to fight this proved fruitless and she then negotiated with the father on what was termed a parental responsibility agreement. Terms were agreed but due to pending proceedings relating to Tariq the agreement had to be presented to court. The mother signed a power of attorney appointing a local lawyer to enter into a consent order in the terms agreed and returned to England without Tariq. The hearing was adjourned for 3 weeks and during that time the mother obtained an ex parte wardship order in England. At the subsequent adjourned hearing in Dubai the agreement was entered as a conciliated contract cancelling the dispute and determining the litigation. In the London proceedings, the judge ordered the return of Tariq to the jurisdiction. Permission to appeal was granted to the father on the question of whether, at the date of issue of the mother's summons in wardship, Tariq was habitually resident in England and Wales and whether the court had jurisdiction to make orders in respect of him.

Held

Held – allowing the father's applications and appeals –

(1) The judge had fallen into error in considering a line of reasoning that implied that if Tariq were not habitually resident in Dubai, then he must have been habitually resident in England and Wales. In reality there was a third alternative which was that Tariq was not habitually resident in either jurisdiction.

(2) On the facts, contrary to the decision of the judge, the evidence showed that the family had acquired habitual residence in Dubai after their arrival. Habitual residence may be acquired despite the fact that a move may only have been temporary or on a trial basis.

(3) The fact that Tariq's mother was habitually resident in England and Wales on the relevant day did not mean that Tariq must also have been habitually resident there. Habitual residence is not a legal concept – it is a question of fact. It is not possible for a person to acquire residence in one country while remaining physically present in another.

(4) The court had no inherent jurisdiction to rule on the matter derived from the fact that Tariq was a British national. The historic emphasis on the concept of domicile had had to cede to an acknowledgement that the simpler fact-based concept of habitual residence was the international standard. The *parens patriae* jurisdiction must seem even more esoteric to other jurisdictions than the concept of domicile, and in the interests of reciprocal understanding and co-operation, exorbitant jurisdictional claims founded on nationality should be abandoned.

(5) Whatever the father's litigation misconduct, the adjourned hearing in Dubai terminated the proceedings by embodying the contract in a consent order of the court. Having thus terminated the proceedings the mother could not now impugn the consent order on the grounds that the genesis of the proceedings was tainted by false or misleading evidence. If she wished to challenge the propriety of the father's litigation conduct it was in those proceedings rather than in competing proceedings in this jurisdiction that she should have moved.

Per curiam : the courts of this jurisdiction should be very slow to make orders that directly conflict with pre-existing orders in any friendly foreign state. The principle of comity requires no less. Particularly is this so where the order, as in this case, is unenforceable and thus empty. The temptation to make conflicting orders arises from a contemplation of the gulf between legal systems based on a Judaeo-Christian model and legal systems applying the Sharia law. But if there is to be progress in the development of understanding and collaboration in international family law it is vital that we should attempt to build bridges over the divide rather than to issue empty challenges.

Permission

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