

Re RD (2008)

(2009) 1 FLR 586

15/08/2008

Barristers

Private: Marcus Scott-Manderson QC
Teertha Gupta KC
Cliona Papazian

Court

Family Division

Summary

Where a non-return order had been made by a court on the basis of the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.12, no application to the home court under Regulation 2201/2003 art.11(7) could be made. Moreover, the court had no jurisdiction to “save” the art.11(7) application by amending it to substitute relief under the Children Act 1989 or under the court’s inherent jurisdiction.

Facts

The applicant father (F) sought the return of his son (R) from Portugal under Regulation 2201/2003 art. 11(7) (Brussels II Revised). R was the son of F and the respondent (M). R was born in England and had remained there until M had unilaterally removed him to Portugal some years after she and F had separated. While R was in England the court had made parental responsibility and contact orders in F’s favour. Following M’s removal of R she began proceedings in Portugal for parental responsibility and F began proceedings for R’s return under the Hague Convention on the Civil Aspects of International Child Abduction 1980. Because of delays by the Portuguese Central Authority in forwarding the documents, the Portuguese court, though finding that R had been wrongfully removed, declined to make an order for his return to England, finding that the proceedings had been begun more than a year after the wrongful removal. F had not been informed of the hearing date, was not present in court and had no opportunity to be heard. He therefore began proceedings in England under art.11(7) of Brussels II Revised, and as a fall-back position, made a separate application for a residence or contact order. The issues for determination were (i) whether the claim for art.11(7) relief was well-founded given that the non-return order had been made under art.12 of the Hague Convention as distinct from art.13; (ii) whether F could, under the inherent jurisdiction, amend his originating summons to seek a residence or contact order; (iii) whether the Portuguese or the English court should resolve the issues concerning R’s welfare; (iv) as to the interpretation of art.10 of Brussels II Revised.

Held

HELD: (1) It was only where the child’s non-return was pursuant to art.13 of the Hague Convention that

the home court was competent to examine the question of custody of the child as envisaged by art.11(7) of Brussels II Revised. F was not, therefore, entitled to apply under art.11(7). (2) The court had no jurisdiction to amend the art.11(7) summons to substitute a new cause of action. The relief originally sought was simply not available and no amendment could empower the court to entertain it. Though the court had, in *Rogers-Headicar v Headicar* (2004) EWCA Civ 1867, (2005) 2 FCR 1, underlined its power, of its own motion, to determine whether jurisdiction existed, in that case the alternative ground for jurisdiction had existed at the date of original filing, *Headicar* distinguished. (3) Article 19 of Brussels II Revised applied and F's proceedings under the Children Act 1989 did not fall beyond its scope. The Portuguese court clearly regarded itself as seised of a parental responsibility application at a date earlier than F's applications. In those circumstances the English court was obliged to stay F's proceedings until such time as the jurisdiction of the court first seised was established. (4) The "competent authorities" referred to in art.10(1)(b) of Brussels II Revised were the courts of the Receiving State, and "lodging" meant seising those courts of the Hague Convention application. That subsection therefore required that the application enter the list of the court in the Receiving State.

Permission

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