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Re P-J (Children) (2009)

[2009] EWCA Civ 588

23/06/2009

Barristers
Teertha Gupta KC

Court
Civil Division

Summary
In the light of the established principles concerning analysis of the issues of habitual residence and consent to the removal of children from the jurisdiction, the President had been entitled to find that five children were habitually resident in Spain and that their father had not consented to their removal to Wales by their mother. It had, therefore, been appropriate for him to have ordered that the mother return or cause the return of the children to Spain in accordance with the Hague Convention on the Civil Aspects of International Child Abduction 1980 and Regulation 2201/2003.

Facts
The appellant mother (M) appealed against a decision of the President that she should forthwith return or cause the return of her five children to the jurisdiction of Spain. M was Welsh and the respondent father (F) was a Spanish national serving as an officer in the Spanish army. The couple had five children aged between 4 and 12 years. The family had lived together in Spain where the family home was. In August 2007, M and the children went to stay at M's mother's home in Wales, M and F having agreed that it was desirable and convenient for the children to have a school year in England without unduly interfering with their Spanish schooling and at a time when their proposed new home was undergoing refurbishment. F returned to Spain and army accommodation. In June 2008, M informed F that she wanted a divorce and did not wish to return to Spain. F persuaded her to return to give the marriage another chance. The family returned and the children started schooling in Spain in September. The effort to keep the marriage together failed, and in October 2008 M removed the children from Spain and took them to Wales. F issued an originating summons pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980 and Regulation 2201/2003 seeking the return of the children to Spain. The President, having found that there had been no change in the habitual residence of the children from Spain, ordered their return. M contended that, in respect of habitual residence, the President had erred in failing to direct himself that the purpose to establish habitual residence might still be settled even though it was of temporary or limited duration, and that the only proper conclusion was that the children had become habitually resident in Wales and never lost that habitual residence even when they returned to Spain. M further submitted that F had given advance consent to the return of the children to Wales if the attempted reconciliation in Spain were to break down and that consent remained extant at the time of removal, and that a unilateral change of mind should not be permitted.

Held

HELD: (1) The established principles concerning analysis of the issue of habitual residence included: (a) the expression “habitually resident” was not to be treated as a term of art with some special meaning, but was to be understood according to the ordinary and natural meaning of the two words which it contained, J (A Minor) (Abduction: Custody Rights), Re (1990) 2 AC 562 HL applied; (b) “habitual residence” and “ordinary residence” were interchangeable concepts and there was no difference in the core meaning to be given to the two phrases, Mark v Mark (2005) UKHL 42, (2006) 1 AC 98 applied; (c) there was a distinction to be drawn between being settled in a new place or country and being resident there for a settled purpose which might be fulfilled by meeting a purpose of short duration or one conditional upon future events, R v Barnet LBC Ex p Shah (Nilish) (1983) 2 AC 309 HL applied; (d) whether or not a person was or was not habitually resident in a specified country was a question of fact to be decided by reference to all the circumstances of the particular case, Re J applied. In the light of those general principles, it could not fairly be said that the President had misdirected himself. Spain was where the family ordinarily lived, and their sojourn in Wales was extraordinary: M’s unilateral change of mind in June 2008 could not alter that. Spain was and remained the children’s habitual residence. (2) Consent to the removal of a child had to be clear and unequivocal. It could be given to the removal at some future but unspecified time or upon the happening of some future event; such advance consent had, however, still to be operative and in force at the time of the actual removal. The happening of the future event had to be reasonably capable of ascertainment and the condition had not to have been expressed in terms which were too vague or uncertain for both parties to know whether the condition would be fulfilled. Fulfilment of the condition had not to depend on the subjective determination of one party: the event had to be objectively verifiable. Consent, or the lack of it, had to be viewed in the context of the realities of family life, or more precisely, in the context of the realities of the disintegration of family life and not in the context of nor governed by the law of contract. Consequently, consent could be withdrawn at any time before actual removal. The burden of proving the consent rested on him or her who asserted it. The enquiry was inevitably fact specific but the ultimate question was a simple one: whether the other parent had clearly and unequivocally consented to the removal. In the instant case, the answer was plain: F had not consented to the removal of his children from Spain. There was, accordingly, no reason to interfere with the President’s decision.

Permission