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Re S (Care: Jurisdiction) (2008)

[2008] EWHC 3013 (Fam); (2009) 2 FLR 550

10/12/2008

Barristers
Private: Marcus Scott-Manderson QC
Teertha Gupta KC
Mark Jarman KC

Court
Family Division

Summary
Brussels II Revised art.17 and art.20 empowered a local authority to take interim protective steps, and empowered the court to make interim orders, in respect of a child who was in the United Kingdom but who was habitually resident in another member state. The court gave guidance on how the court was to proceed in such circumstances.

Facts
The court was required to consider ordering the summary return of a child (C) to Romania on an application under Regulation 2201/2003 (Brussels II Revised). C had been brought to the United Kingdom by her father (F) as part of a child-trafficking operation in which her mother (M) was complicit. She had come to the attention of the local authority, an interim care order had been made, and her father had been convicted of child trafficking offences. The High Court, disposing of an application by M under the Hague Convention on the Civil Aspects of International Child Abduction 1980, found that although C was habitually resident in Romania, the Convention did not apply. In those proceedings, the local authority had challenged the ability of the authorities in Romania to adequately protect C. At the instant hearing, however, it abandoned that stance, seeking only the continuation of the interim care order until C was returned to Romania and responsibility for her passed to the courts and authorities there. While it assessed her as being at risk of being re-trafficked or of suffering reprisals by criminal gangs, the Romanian authorities did not share those concerns. Their plan was to place C away from her family until the Romanian court made a decision as to her future. C, meanwhile, was expressing the clear wish to return to Romania, claiming that her parents had done nothing wrong. The local authority invited the court to revisit the issue of habitual residence and to make findings in respect of the risks of re-trafficking and reprisals.

Held
HELD: (1) It was not appropriate to revisit the High Court's finding on habitual residence, and nor could it be said that there had been a change of residence by reason of acquiescence or prorogation based on the family's participation in the care proceedings. They had had no option but to participate and had

made clear their desire that C return to Romania. (2) Given the divergent and competing factors to be weighed in the welfare decision, the real possibility that the balance of risk would favour C's return to Romania, and the local authority's proper abandonment of its challenge to the Romanian authorities' reliability, the court and public authorities in Romania were clearly the most appropriate decision-makers. They were best placed to assess the relevant risks and to provide appropriate support. It would therefore be inappropriate for the instant court to embark on any course designed to enable it to make findings as to the risks of re-trafficking and reprisals. Rather, its proper role was to seek to ensure that the Romanian court had a full picture and that C was protected from identified risks pending its decision. (3) Brussels II Revised applied to the care proceedings, and the combination of art.17 and art.20 empowered the local authority to take interim protective steps, and empowered the court to make interim orders, in respect of a child who was habitually resident in another member state. Brussels II Revised, the European Convention on Human Rights 1950 and the Council of Europe Convention on Action against Trafficking in Human Beings were not mutually exclusive and had to be applied constructively and sensibly. The English court was not to embark on a determination of issues under the art.16(7) of the Trafficking Convention, that was part of the welfare decision to be taken in Romania pursuant to Brussels II Revised. Moreover, there was no real risk of a breach of C's human rights because the relevant risks had been recognised and were being addressed pending decision by the Romanian court. The correct approach was to best promote C's welfare having regard to the balance of possible risks; to implement and pay proper regard to the overlapping provisions of Brussels II Revised, the Trafficking Convention and the 1950 Convention; and to further the private interests and rights of the family and the international obligations of the UK and Romania. (3) In summary, interim measures in care proceedings could be sought under art.20 of Brussels II Revised, and whenever a Brussels II Revised right might be engaged or there was a potential issue as to whether the UK court should make medium to long-term welfare decisions, the issue of jurisdiction had to be addressed in the application or as soon as possible. Consideration was to be given to having the case heard by a High Court judge, and discussions with foreign authorities had to recognise the jurisdictional points and the roles of the respective authorities. Any interim measures relying on art.20 were by definition interim, and what was properly to be regarded as interim was fact-sensitive and would be informed by liaison. It would be unusual for the English court to embark on a fact-finding hearing. Rather, the focus would be on the identification of the range of possible issues for decision by the foreign court and the putting in place of interim measures to minimise any harm arising from identified risks. European Convention rights and international obligations had to be considered in the context of co-operation and the putting into place of interim measures. If the issues could not be resolved it would be necessary to ensure that they were clearly defined; that the court was invited as soon as possible to make findings in respect of them; and that proper directions were given to identify the issues, the parties and the appropriate evidence.

Permission
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