

Re K (Children) (2009)

[2010] 1 FLR 782; [2009] EWCA Civ 986

24/06/2009

Barristers

Private: Marcus Scott-Manderson QC
Christopher Hames KC

Court

Civil Division

Summary

The court indicated, obiter dictum, that in determining whether a father had exercised rights of custody of his children in Spain, a two-stage approach should have been adopted. The extent of his rights of custody under Spanish law should have been decided before determining the ultimate question of his rights of custody under the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.3 and art.5.

Facts

The appellant mother (M) appealed against a preliminary ruling ((2009) EWHC 1066 (Fam)) that the respondent father (F) had exercised rights of custody of their two children in Spain. F and M were both English but had cohabited in Spain, where the children were born. F did not have parental responsibility. When their relationship broke down, M took the children to England without any notice to F. F issued an originating application, seeking the return of the children to Spain under the Hague Convention on the Civil Aspects of International Child Abduction 1980. M filed a defence relying on art.13 of the Convention but also challenging F's claim to have exercised rights of custody for the purposes of art.3. It was decided that rather than seeking a declaration from the Spanish court under art.15, it would be quicker to have the extent of F's rights of custody in Spain determined as a preliminary issue in the English jurisdiction. Both parties obtained expert evidence as to the law of Spain. It was determined that under the Spanish Constitution art.39(2), the Spanish court would hold the law of England to be contrary to public policy because the result would be discriminatory as between the children of unmarried parents and because the application of English law in this case would have the effect of attributing custody of the children to the mother alone without taking into account their welfare interests as recognised and protected by Spanish law. M submitted that the decision of the judge was wrong as it was plainly at variance with the approach taken in JB (Child Abduction: Rights of Custody: Spain), Re (2003) EWHC 2130 (Fam), (2004) 1 FLR 796.

Held

HELD: (1) There was no doubt that the judge had adopted the correct approach in concluding that the Spanish court would hold the law of England to be contrary to public policy. He delivered a particularly

full and conscientious judgment in which he set out the relevant provisions of Spanish law with great care. He reviewed the contrary evidence of the two experts and decisively recorded his conclusions, saying that he preferred the opinion of F's expert and explaining clearly why he preferred him. His judgment was simply not open to challenge. (2) (Obiter) The judge decided the issue solely on an evaluation of F's rights of custody according to the law of Spain and did not express any opinion on his rights of custody according to the autonomous law of the Convention. It was surprising that counsel for neither F nor M developed that issue during their submissions in the instant appeal. There was a clear line of authority to the effect that the ultimate determining factor had to be the international law of the Convention, *Hunter v Murrow* (2005) EWCA Civ 976, (2005) 2 FLR 1119 applied. That meant that when the judge held that according to the law of Spain the English view of F's rights of custody would not be recognised, he decided only the first stage of the issue before the court and did not determine the ultimate issue. If the ultimate question concerned rights of custody under the international and autonomous law, the decision in *Re JB* was not conclusive since it did not look beyond the law of England but, in any event, the international and autonomous law of the Convention had plainly moved significantly since *Re JB* was decided. The Adoption and Children Act 2002 accorded automatic parental responsibility to the father if registered on the birth certificate as the father. It was perfectly apparent that F had rights of custody under the international and autonomous law of the Convention within the meaning of art.3 and art.5, *Re JB* considered.

Permission

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