4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

Re I (A Child) (2009)

[2009] UKSC 10

01/12/2009

Barristers
Henry Setright KC
Teertha Gupta KC

Court
The Supreme Court

Practice Areas
International Children Law

Summary
The right of prorogation contained in Regulation 2201/2003 art.12 could apply to a child who was lawfully habitually resident outside the European Union.

Facts
The appellant mother (M) appealed against a decision ((2009) EWCA Civ 965) that the court did not have jurisdiction under Regulation 2201/2003 art.12 (Brussels II Revised) to hear a contact dispute between her and the respondent father (F) in respect of their son (Q), who was habitually resident outside the European Union. M, F and Q were all British citizens, Q having spent the first four years of his life with both parents in the United Kingdom. Following the parties' divorce, F had obtained a residence order in the English court and had obtained the court's leave to take Q to live in Pakistan. It was accepted that by the time of the instant proceedings, Q was habitually resident in Pakistan. M had invoked the jurisdiction of the English court with respect to issues of contact, and an order had been made requiring F to bring Q to the UK to facilitate contact. Though F had expressly accepted the court's jurisdiction, when he applied to set aside that order the court itself raised the question of whether or not it had jurisdiction to hear the matter. The judge at first instance held that it did not and, in her appeal to the Court of Appeal, M argued for the first time that Brussels II Revised applied. The issues were (i) whether the right of prorogation contained in art.12 of Brussels II Revised could apply to a child who was lawfully habitually resident outside the EU; if so (ii) whether the criteria in art.12.3 were made out in the instant case.

Held
HELD: (1) Article 12 could apply where the child was lawfully resident outside the EU. There was nothing in either art.12.1 or art.12.3 to limit jurisdiction to children who were resident within the EU. While that conclusion was arrived at via ordinary principles of construction, it was confirmed if the term 'third state', referred to in art.12.4, meant 'a non-Member State'. While there was no case law on the meaning of the term 'third state', the Practice Guide to Brussels II Revised indicated that the option of voluntarily accepting the jurisdiction of a Member State was not limited to situations where the child was habitually

resident within the territory of a Member State. Moreover, other sources emanating from the EU defined the term to mean a state outside the EU. (2) While the criteria in art.12(3)(a) were clearly satisfied, more complicated questions arose under art.12(3)(b). There was an issue as to whether the words 'at the time the court is seised' referred to a particular moment in time or, as held by the Court of Appeal, at any time while the proceedings were continuing. It was clear from art.16 that the court was seised at a particular moment in time, and that the time of seisin was fixed when the document initiating the proceedings was lodged with the court or, if it was to be served before lodging, at the time it was received by the authority responsible for service. Whether the words 'at the time the court is seised' were intended to describe the time at which the parties accepted jurisdiction, or whether they were intended simply to describe the parties whose acceptance was required 'at the time the court was seised' was not acte clair and might have to be the subject of a reference to the European Court of Justice in another case. However, the jurisdiction of the court had been accepted by F both expressly and in an unequivocal manner both before and after the proceedings had been begun and it was therefore not necessary to express any concluded view on the issue. The final requirement in art.12.3(b) was that the jurisdiction of the English court should be in the best interests of the child. That question would not depend on a profound investigation of the child's situation, but would rather turn on the sort of considerations that came into play when deciding on the most appropriate forum. The fact that the parties had submitted to the jurisdiction and were both habitually resident was relevant, but was by no means the only factor. In the instant case there were two reasons to conclude that the exercise of jurisdiction by the English court would be in Q's interests. The first was the presumption in art.12.4, Pakistan not being a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980, and the second was the view of Q's guardian ad litem that it would be best for the case to be heard in England. The nub of the case was as to the contact that M and Q should enjoy in the UK. Any risks associated with that contact would be better assessed in the UK, which was also the place in which any safeguards would have to be implemented. (3) While the UK-Pakistan Protocol on Children Matters provided that in normal circumstances the welfare of the child was normally best determined by the courts in the country of his habitual residence, it was not directly applicable to the instant case, in which there had been no wrongful retention and in which the circumstances were far from 'normal'. Moreover, the protocol was not an international agreement between states and the proper interpretation of Brussels II Revised could not be affected by the terms of a private agreement between the judiciaries of one Member State and a non-Member State.

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