4 Paper Buildings
Temple, London
EC4Y 7EX
T: 020 7427 5200
E: clerks@4pb.com
W: 4pb.com

Barbara Mercredi V Richard Chaffe (2011)

[2011] 2 FLR 515 : [2011] 2 FCR 177 : [2011] Fam Law 584 : (2011) 108(13) LSG 21;[2011] EWCA Civ 272

17/03/2011

Barristers
Henry Setright QC
Private: Marcus Scott-Manderson QC
Private: David Williams QC

Court
Civil Division

Practice Areas
International Children Law

Summary
The United Kingdom courts lacked jurisdiction to make orders in respect of an infant taken by her mother to France since the French court was first seised of matters concerning the child by the mother's earlier applications. The assumption had been made too readily and too early that the case concerned child abduction, rather than lawful removal, which had led the UK court to make orders which were exorbitant and insensitive to the legitimate exercise of responsibility by the French court

Facts
The appellant mother (M) appealed against orders making her infant daughter (C) a ward, granting the respondent father (F) parental responsibility for C, and ordering M to return C from France. M was French and F was English. They had co-habited in England, but their relationship ended shortly after C's birth in 2009. In early October, when C was two months old, M took her to France. F applied in the English court to engage the Hague Convention on the Civil Aspects of International Child Abduction 1980 to begin the process for C's return, and requested that C be made a ward, that he be granted parental responsibility, and that C be returned to the United Kingdom. A brief order was issued requiring M to return C to the UK. On October 28 2009, M applied in France for a ruling as to habitual residence, parental responsibility, residence and contact, whilst F applied in the French court for a return order under the Hague Convention. He did not await the outcome of that application and in January 2010 issued an originating summons in the UK for an order that C be made a ward and for declarations as to C's habitual residence, jurisdiction, rights of custody and wrongful retention. M asserted that C's removal was lawful, that she had immediately acquired habitual residence in France and that the English court, accordingly, had no jurisdiction. The French court dismissed F's Hague Convention application on the basis that he had not demonstrated that he was exercising rights of custody prior to C's removal under art.3, and M was given sole parental authority to determine C's place of habitual residence. The judge in the UK court found that, since C was still habitually resident in England when F had achieved rights of custody in relation to

her, the English court had jurisdiction. He made orders making C a ward, granting F parental responsibility, and requiring M to return C. M contended, inter alia, that the judge had wrongly regarded the case as one of child abduction when it was, in reality, one of lawful removal. She submitted that even if the judge had jurisdiction derived from C's habitual residence in the UK, he had nevertheless been wrong to have made an order under art.15 of the Hague Convention ordering summary return and wrong not to have transferred the case to France under Regulation 2201/2003 art.15 (Brussels II Revised). F argued that there had not been a lawful removal but a wrongful retention once an order for return was breached.

Held

HELD: (1) A lawful removal could become a wrongful retention if a return order, made by the court of the child's habitual residence, was not complied with, S (A Minor) (Abduction: European Convention), Re (1998) AC 750 HL followed. The judges below had, however, consistently erred in approaching the instant case as one of child abduction. In many civil states of Europe a parent with sole rights of custody had the right to relocate to another jurisdiction without notice to the other parent or application to the court for permission. Whatever M's moral responsibility may have been in taking C to France, she had exercised her right of freedom of movement with her baby. There was no restriction on her right to relocate: the Children Act 1989 s.13 was not engaged since no residence order was in force in respect of C, nor did F have parental responsibility. F's application under the Hague Convention was doomed since he could not possibly satisfy art.3. The French court's judgment was principled and as a matter of comity and collaboration of courts within the European Union, the judge in the UK had an obligation to support the proper conclusions of the French court. The assumption had been made too readily and too early that M was an abductor; that led the UK court to make orders which were exorbitant and insensitive to the legitimate exercise of responsibility by the French court (see paras 53, 55-57, 63, 65 of judgment). (2) The general rule was that jurisdiction was established in the state of the child's habitual residence at the time the court was seised. Once seised, that court retained jurisdiction even if the child changed habitual residence during the course of proceedings. If the question to be asked was where C was habitually resident when F made his applications for wardship and parental responsibility, the balance swung heavily to France. In the circumstances, the UK judge should not have claimed jurisdiction. F's earliest applications for wardship and parental responsibility were not truly live. Whilst F might have pursed them consistently to achieve his desired goals, he had issued an originating application for C's return under the Hague Convention which implicitly recognised that his initial applications, and the orders they produced, were no longer to be relied on. The judge was specifically conducting final hearings on the applications of January 2010, and the question was, therefore, where C was habitually resident at that time. Manifestly, the answer was not the UK. M's application of October 28, 2009 in France seised the French court first. The judge's order would, accordingly, be set aside in such a way as not to deprive F of parental responsibility (paras 67, 75, 82-84, 91).

Permission

Lawtel