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Re H-K (Children) (2011)

[2011] EWCA Civ 1100

10/10/2011

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

Court
Civil Division

Practice Areas
International Children Law

Summary
Where two children born in Australia to an Australian father and English mother had been brought to England, by their parents, to stay for a one-year period a judge had erred in ruling that habitual residence had not been established in England. As such she was wrong to order that the children be returned to Australia to live with their father.

Facts
The appellant mother (M), a British national, appealed against a decision in favour of the respondent father (F), an Australian citizen, that their two children (X) be returned to Australia. X, who were aged eight and two years' old, had been born in Australia. F and M's relationship deteriorated and they agreed to come to England for a period of one year. F subsequently returned to Australia but it was agreed that M could remain in England with X on the assurance that she would return a few months later. M led F and members of his family to believe that she would return to Australia, however, she had no intention of doing so. F issued proceedings under the Hague Convention on the Civil Aspects of International Child Abduction, 1980 on the basis that M's refusal to return X amounted to a wrongful retention of them in breach of his rights of custody. The issue for determination was whether X were habitually resident in Australia at the time of the retention. The judge found in favour of F and ordered the return of the children to Australia.

Held
The judge had not fallen into error when considering whether the stay in England was transient and her finding that living in England was for a temporary time was correct but that was not enough; she had to bear in mind that habitual residence could be acquired despite the fact that a move was only temporary, R v Barnet LBC Ex p Shah (Nilish) (1983) 2 AC 309 HL applied, P-J (Children) (Abduction: Habitual Residence: Consent), Re (2009) EWCA Civ 588, (2010) 1 WLR 1237 and Mercredi v Chaffe (C-497/10 PPU)

(2011) ILPr 23 ECJ considered. The judge found that the parties' life in England was not the regular order of life that was required to establish habitual residence in another country. However, it was notable that the reason she gave for that was that there was no agreement between M and F to change their habitual residence. That was an error in her approach; she elevated the fact that F had not abandoned his intention to return to Australia to being the defining factor which tipped the balance. Reading the judgment as a whole, the judge had erroneously required more permanence for the family's visit to England than was necessary to determine that the family's habitual residence became established in England, if only for a temporary stay of 12 months (see paras 16, 19, 23 of judgment)

Permission

Lawtel