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ZA & PA v NA (2012)

[2012] EWCA Civ 1396

26/10/2012

Barristers
Henry Setright KC
Alistair G Perkins

Court
Court of Appeal (Civil Division)

Practice Areas
International Children Law

Summary
When considering an appeal against an order for four children of a family to be returned from Pakistan to England, the Court of Appeal held that habitual residence was a question of fact and required the individual child to have been physically present within the jurisdiction at some point.

Facts
The appellant father (F) appealed against a decision ordering the return of his four children from Pakistan to their respondent mother (M) in England.

F and M were married but separated. Their three eldest children had been born in England. In 2009, M had taken them to Pakistan for a holiday, intending to return to England. However, she was prevented from returning and the children were entered into schools in Pakistan. She was effectively kept under house arrest. The youngest child (H) was born in Pakistan in 2010. Following H's birth, M returned to England without him but obtained an order in wardship for the immediate return of all four children on the basis that they were all habitually resident in England. The judge held that H had acquired habitual residence in England at birth.

Held
(Thorpe L.J. dissenting regarding H) (1) The issue regarding the three older children was whether their removal to Pakistan and subsequent living there had, by the time of M's wardship proceedings, resulted in their having ceased to be habitually resident in England. F's appeal against the judge's finding that the older children remained habitually resident in England was hopeless. Whether one treated both parents or only M as having the care and control of the children, it was well-established that the habitual residence of children could not be changed by the unilateral action of one parent which was not consented to or acquiesced in by the other. That would be a charter for abduction. The forced retention of the children in Pakistan could not therefore found the basis of a claim that by passage of time and their inevitable involvement in family life and education in Pakistan the older children had ceased to be

habitually resident in England (see paras 42, 46-48, 52-56 of judgment). (2) The issue regarding H was whether the court could approve an exception to the rule in the case of a child who was born abroad of parents, or a custodial parent, who were at the time habitually resident in England. The repeated emphasis by the courts, including the European Court of Justice, that habitual residence required a multi-factorial inquiry into all the relevant circumstances, was not inconsistent with there being some limits to the concept of residence. A number of principles of general application had been established which did not detract from the need to decide the child's place of habitual residence as a question of fact, but nonetheless respected the nature of the jurisdictional concept in operation. It was clearly artificial as a matter of ordinary language to say that a child was habitually resident at birth in a country to which it had never been. Residence denoted, and involved, a physical presence. Where the parents or parent had established a place of habitual residence in a particular country, it usually required no more than a moment's presence in that jurisdiction for a newly-born child to acquire the same status. The child's integration into the family and social life of his parents already centred in that location would be completed by his physical presence. His situation would be completely different from that of an adult or child who already had a place of residence in one country which he left to establish a life elsewhere. In such a case, an appreciable period of time might have to pass before the process of transition to a new place of habitual residence was complete, J (A Minor) (Abduction: Custody Rights), Re [1990] 2 A.C. 562 applied. A rule could be constructed by which a newly-born child was presumed to take the habitual residence of its parents or custodial parent. However, such a rule would be a legal construct divorced from actual fact. It would also run contrary to the fact that a child's habitual residence was not to be treated as necessarily the same as that of his parents, M (A Minor) (Abduction: Habitual Residence), Re [1996] 1 F.L.R. 887 and Al-H (Rashid) v F (Sara) [2001] EWCA Civ 186, [2001] 1 F.L.R. 951 applied. The pressure to create such a rule was obvious but should be resisted. Although there were obvious concerns about the wrongful retention of children in countries which were not party to the Hague Convention, the rules of jurisdiction could only operate if applied in a consistent and uniform manner regardless of the competing jurisdiction involved. To adopt a special rule for newly-born children was likely to create as many problems as it solved, by derogating from a purely factual analysis of where a child was resident, Mercredi v Chaffe (C-497/10 PPU) [2012] Fam. 22 considered. The return order in respect of H was made without jurisdiction and had to be set aside, B v H (Habitual Residence: Wardship) [2002] 1 F.L.R. 388 overruled in part (paras 59-64). (3) (Per Thorpe L.J.) As a general rule, habitual residence was dependent on the physical presence of the individual within the jurisdiction, although that presence could be intermittent. However, that did not mean that a person who had never been present within a jurisdiction could not be habitually resident there. In exceptional cases, jurisdiction could be established (paras 29-30).

Appeal allowed in part