

Re S (A Child) [2013]

[2013] EWHC 647 (Fam)

25/03/2013

Barristers

Henry Setright KC

Court

High Court (Family Division)

Practice Areas

International Children Law

Summary

High Court – Jurisdiction, recognition and enforcement of foreign judgments in matrimonial and parental responsibility matters under EC Regulation 2201/2003

Facts

The case concerned a child “S” born to an English mother and Spanish father. The father commenced litigation in Spain, the mother, subsequently, in England, where (following father indicating an intention to retain “S”) she obtained declarations as to jurisdiction and habitual residence and an order for the child’s return. After his return, notwithstanding the High Court declarations, the mother submitted by agreement to Spanish jurisdiction and entered into negotiations which resulted in an agreement (a “convenio”) under which she and child lived in England. The agreement (dated 20.10.2010) was then approved and adopted by the Spanish Court, thus bringing the litigation there to its conclusion.

Shortly afterwards, the mother issued fresh proceedings in this jurisdiction and the father issued further proceedings in Spain. During the course of these, the mother decided not to resist enforcement of the terms of the previous Spanish order but indicated she would, thereafter, seek transfer of jurisdiction to England. Upon her application for transfer, the Spanish Court ruled that as there were no extant proceedings, there was “no reason to declare the lack of jurisdiction applied for.”

The issue for the Court to resolve (before consideration could be given to welfare based decisions) was the jurisdictional “anomaly” which had arisen,

The issues were:

- Whether the Spanish Court, having exercised jurisdiction (with the mother’s agreement) in October 2010, continued to have jurisdiction notwithstanding the conclusion of the proceedings.
- If the Spanish Court had continuing jurisdiction, whether the English Court should request transfer to this jurisdiction and, if so, how, given the absence of any actual proceedings to transfer.

- If the Spanish Court did not have continuing jurisdiction, whether the English Court could and should exercise jurisdiction.

Held

Mr Justice Cobb set out the positions of the parties; that of the Mother being that her prorogation of the Spanish jurisdiction ended with the final Spanish order, that “S” was now habitually resident in England and the court should assume jurisdiction under BIIIR [Article 8], or (if Spanish jurisdiction did endure) that the English Court should seek transfer under Article 15(2) (c). That of the father was that, the mother having prorogued jurisdiction in the Spanish courts, Spanish jurisdiction should hold sway, notwithstanding that the proceedings had been concluded.

Cobb J also provided details of both the inquiries made of the Spanish Court for clarification as to how to interpret its ruling and of the response received (which was to the effect that the Judge considered there was “no room” for “extension” of the Spanish jurisdiction and that even if jurisdiction had been retained, he would not have opposed transfer to England under Article 15.)

Held

Cobb J considered the interplay of Articles 12 and 15 of BIIIR, considered the relevant case law (including the Supreme Court case of *Re I (A Child) (Contact Application: Jurisdiction)* [2009] and provided a detailed analysis of issues relevant to the “key question” of whether or not the prorogation by the mother of the Spanish jurisdiction under Article 12(3) survived beyond the making of the final order in those proceedings.

In reaching his determination that the prorogation of jurisdiction did not endure beyond the final order, he noted that the language of Article 12(3) and that of the BIIIR Practice Guide was couched in terms of the court being “seised” and proceedings being “pending”. He also noted that Article 12 (1) did not seem open ended and that to hold prorogation open for the duration of a child’s childhood would both discourage parents from submitting to a particular jurisdiction for a particular (appropriate) purpose and might give rise to applications such as this (which were at best “cumbersome”, at worst “not possible”) being more common.

He also determined that Article 15 transfers apply only to “live” proceedings (not to jurisdiction generally) as, in the absence of proceedings, there would be nothing to transfer.

Accordingly, the court was satisfied that the prorogation under Article 12(3) ended on 20.10.2010 with the final order; that there was no residual jurisdiction in Spain; that the English court did not need to seek an Article 15 transfer (there being, in any event. nothing to transfer) and that the court of England and Wales could properly assume jurisdiction pursuant to Article 8 BIIIR.

Permission

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