

DL (Appellant) v EL (Respondent) & (1) Reunite International Child Abduction Centre (2) Centre for family law and practice (Interveners) (2013)

[2013] EWCA Civ 865

16/07/2013

Barristers

Henry Setright KC
Teertha Gupta KC
Private: David Williams QC
Michael Gration KC
Michael Edwards

Court

Court of Appeal (Civil Division)

Practice Areas

International Children Law

Summary

The Court of Appeal considered the remedies available to a parent whose child was removed from the country of habitual residence pursuant to a return order made under the Hague Convention on the Civil Aspects of International Child Abduction 1980 which was subsequently set aside by an appellate court. The language of the Convention did not support the interpretation that the effect of the appellate decision was to render a lawful removal wrongful.

Facts

The appellant father (F) appealed against a decision that he was not entitled to a return order in relation to his child (K) who had been brought to the United Kingdom from the United States by the respondent mother (M).

F and M had married in the US and had K in 2006. In 2008 F petitioned for divorce and in July 2008 M brought K to the UK where she remained until March 2010. A final order in March 2010 in the US divorce and custody proceedings granted F custody of K and the exclusive right to designate his place of residence. M issued an application for a return order under the Hague Convention on the Civil Aspects of International Child Abduction 1980 on the basis that K was habitually resident in the UK by March 2010 and F had wrongfully retained K in the US. The resulting order required F to deliver K to M immediately. F appealed and M sought the dismissal of F's appeal on the basis that it was academic, as she had established K's residence in the UK even before the appeal was launched. The US Court of Appeal allowed F's appeal but M refused to return K. M's failure in the US Supreme Court and F's failure to obtain

a return order from the UK court left the orders of the US and UK courts in conflict.

F submitted that (1) the judge was wrong in law as K's US habitual residence was not lost during the appeal process; (2) M's removal of K to the UK was clearly wrongful once the appellate decision removed its lawfulness and F held rights of custody pursuant to the orders of the US court and was merely exercising those rights; (3) the judge failed to give proper weight to the US court orders and proceeded on the basis of K's return in the abstract whilst F had offered a range of protective undertakings that would have allowed M to return with K to create a regime of shared care in the US, at least during the currency of any proceedings then issued by M.

The Court of Appeal considered issues of habitual residence and wrongful removal. The Court of Appeal concluded that the tests for habitual residence under EU and English law are indistinguishable and that the return of a child in accordance with a court order was not rendered wrongful by a subsequent appeal which quashed the order relied on.

To read the full judgement [click here](#)

Held

(1) There was no distinction to be drawn between the test according to domestic law, the test expounded by the Court of Justice of the European Union in *Proceedings Brought by A* (C-523/07) [2010] Fam. 42 and *Mercredi v Chaffe* (C-497/10 PPU) [2012] Fam. 22 and the autonomous law of the Convention. The application of the law to the facts did not necessitate a finding that K did not lose his habitual residence in the US. K's departure from the US was a lawful removal pursuant to the order of the Court of Competent Jurisdiction and, albeit acting under compulsion, F had co-operated in K's departure. K had been obviously resident in UK jurisdiction for an extended period and in all probability had acquired habitual residence by the date of the filing of F's appeal. It was artificial, indeed almost fanciful, to label his residence in the UK as conditional upon the outcome of F's appeal and therefore transient (see paras 48-51 of judgment). (2) It was artificial to assert that the effect of the appellate decision was to render a lawful removal wrongful and that F was exercising rights of custody prior to the issue of his Convention application and/or at the date of trial. The language of art.3 of the Convention did not support that interpretation. The Convention was never foreseen or intended to be used in the instant circumstances. Once there had been a lawful departure, annulled 12 months later by a successful appeal, only art.18 provided a remedy for the successful appellant (para.52). (3) Ideally the judge would have referred to the protective undertakings and the extent to which they would have resulted in M and K returning together. However it must be doubted whether any protective undertakings would have cleared the obvious impediments. There was insufficient evidence to allow any welfare conclusion to be drawn. Whether a case required further investigation, further evidence or more expertise was essentially one for the discretion of the trial judge who bore the responsibility for the outcome of a welfare based judgment (paras 54-55).

Permission

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