4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

Re LC (Children) (2013)

[2013] EWCA Civ 1058

15/08/2013

Barristers
Henry Setright KC
Teertha Gupta KC
Private: David Williams QC
Christopher Hames KC
Michael Edwards

Court
Court of Appeal (Civil Division)

Practice Areas
International Children Law

Summary
Although a judge had been entitled to find that four children retained in the United Kingdom by their father were habitually resident in Spain, in ordering their return to Spain to live with their mother, he had failed to give sufficient weight to the eldest daughter's robust and determined objections to leaving the UK. The decision to return her was reversed, and the question of the other three children's future was remitted to the Family Division for determination as soon as possible.

Facts
The appellant father (F) appealed against a decision ([2013] EWHC 1383 (Fam)) ordering the return of his four children to Spain to live with the first respondent mother (M).

M, who was Spanish, and F, who was British, were unmarried and had lived in the United Kingdom with their four children: the second respondent (T), a 12-year-old girl, and three boys: the third respondent (L), aged 10, the fourth respondent (X), aged nine, and the youngest child, aged four. The children were Spanish nationals. Their relationship broke down and in June 2012, M took the children to live permanently in Spain. They visited F over Christmas 2012. Shortly before they were due to return in January 2013, the children indicated their wish to remain in the UK. F began proceedings to secure protective orders in the UK. M applied under the Child Abduction and Custody Act 1985 for their return to Spain. T applied to be joined as a party on the basis that she was mature enough and had a strong view that she did not want to return to Spain. The judge rejected that application, having found that the need to respect the autonomy of a mature child, who had expressed her wishes forcefully and intelligently, was outweighed by the desirability of shielding a child from the court process. The judge found that the children were habitually resident in Spain and that F's retention of the children was in breach of M's rights under the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.3. He

noted T's strong objections, but considered that they were not determinative and did not amount to an exception to her returning to Spain under art.13 of the Convention. The judge found that since the boys had a preference not to return to Spain falling short of an objection, he was obliged to return them there. In the course of F's application for permission to appeal, T was joined as a party. It fell to be determined whether (i) T, L and X should have been joined as parties; (ii) the judge's finding that the children were habitually resident in Spain was wrong, given their assertions to the contrary; (iii) the judge had erred in failing to categorise L and X's views as objections; (iv) the judge should have given determinative weight to T's views; (v) if T remained in the UK, what should happen to the boys.

Held

(1) It was important to allow children of a proper age and maturity to participate appropriately in proceedings which affected them. However, welfare considerations were by no means out of place in the court's consideration of whether they should be joined as parties. It was difficult to criticise the judge for failing to join L and X as parties because of their age and the fact that he had never even been asked to consider joining them. In respect of T, the judge's balancing of the various factors was unassailable. Although T's views were clear, F could be expected to put forward comprehensive arguments in favour of the result T wished to achieve (see paras 33, 36-37, 39 of judgment). (2) Habitual residence was essentially a question of fact to be determined by reference to all the circumstances of a particular case. Part of the relevant factual circumstances in a suitable case might be the way in which the children reacted to their move of residence. In the instant case, even if the children's perspective was capable of being influential in the decision as to habitual residence, the judge had not ignored it or failed to give it proper weight in his deliberation. He had been entitled to conclude that their habitual residence was in Spain (paras 74-75, 80, 85-86). (3) The judge had gained the sense from oral evidence and other relevant material that L and X's feelings fell short of objections. It was for the judge to determine whether a child's views amounted to an objection, and he had been entitled to categorise the boys' views as preferences (para.96). (4) Sufficient weight had not been given to the fact that the whole of T's life had been spent in England, with only a short interlude in Spain. Moreover, her objections to returning were so robust and determined that very considerable weight had to be given to them. That was not sufficiently recognised. In those circumstances, the judge's decision to return T to Spain was reversed (paras 110-112). (5) If the boys were returned to Spain the siblings would be separated for some months. It was difficult to tell on the basis of the present material whether that would place the boys in an intolerable situation. The appropriate course was to remit that question to the Family Division for determination as quickly as possible (paras 120, 123).

Permission