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In the matter of A (Children) (2013)

[2013] UKSC 60

09/09/2013

Barristers
Alex Verdan QC
Baroness Scotland QC
Alistair G Perkins
Hassan Khan
Michael Gration
Jacqueline Renton
Rachel Chisholm

Court
Supreme Court

Practice Areas
International Children Law

Summary
The instant case would be remitted to the judge below for her to consider whether the court should exercise its jurisdiction to order the sending of a very young child from Pakistan to the UK on the ground that he was a British national; should the judge decide not to exercise such jurisdiction, it would be necessary to ask the European Court of Justice to rule on whether a child like this, who had been conceived while the mother was staying with the father against her will in Pakistan and who had never lived here, was habitually resident in this country.

Facts
The appellant mother (M) appealed against a decision of the Court of Appeal ([2012] EWCA Civ 1396, [2013] Fam. 232) that the judge at first instance had been wrong to order the sending of her youngest child (H) to England and Wales.

M and the respondent father (F) were of Pakistani origin. F was born in England and had dual British and Pakistani nationality. F and M married in Pakistan in 1999. M came here in 2000. Between 2001 and 2005, they had three children. The marriage began to break down in 2006. In 2008, M moved with the three children into a refuge following complaints of physical abuse by F. F had begun to spend time in Pakistan. In 2009, M went to Pakistan with the children to visit her father. While there, she was coerced into reuniting with F. She became pregnant with H. She managed to leave the country but had to leave the children behind. On her application, the judge made all four children wards of court and ordered that they be returned to England and Wales forthwith. Those orders were confirmed by Parker J., who held that all four children were habitually resident in England and Wales. The Court of Appeal allowed F's appeal but only in relation to H; the court held that the acquisition of habitual residence in any country

required the child to be physically present there.

Held

(1) The order made by the judge and repeated by Parker J. did not fall within the Family Law Act 1986 s.1(1)(a) or s.1(1)(d) and was therefore not covered by the jurisdictional prohibitions in s.2 of that Act. The order was one that related to parental responsibility within the scope of Regulation 2201/2003, which embraced cases where there was a rival jurisdiction in a non-Member State. Article 14 of the Regulation provided that, where no court of a Member State had jurisdiction under arts 8 to 13, jurisdiction should be determined, in each Member State, by the laws of that state. In that respect, the inherent jurisdiction of the High Court could be exercised if the child was a British national. The case would be remitted to Parker J. for her to consider whether to exercise jurisdiction on that basis. As Thorpe L.J. had said in Al-H (Rashid) v F (Sara) [2001] EWCA Civ 186, [2001] 1 F.L.R. 951, the court should be "extremely circumspect" when deciding to exercise that jurisdiction. But all would depend on the circumstances of the case. Here, for example, the circumstances in which the children came to be in Pakistan, and the coercion to which M was subject, would be highly relevant, Al-H considered (see paras 23, 28-30, 59-60, 65, 68 of judgment). (2) Should Parker J. decide not to exercise jurisdiction on the basis of H's nationality, it would be necessary to decide whether he was habitually resident here for the purposes of art.8 of the Regulation. The parties should have liberty to apply to the instant court for a reference to be made to the European Court of Justice on that issue, since the matter was not acte claire. The court would be asked to decide which approach accorded most closely with the factual situation here: an approach which held that presence was a necessary precursor to residence and thus to habitual residence or an approach which focused on the relationship between the child and his primary carer. The instant court inclined to the view that the former approach was correct but could not say so with confidence; among other things, there was judicial, expert and academic opinion in favour of the child acquiring his mother's habitual residence in circumstances such as these. Principal among those judicial opinions was the conclusion reached by Lord Hughes in this very case today (paras 55-57, 67). (3) As to habitual residence, all were agreed that it was a question of fact and not a legal concept such as domicile. The test adopted by the ECJ was "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. That depended on numerous factors, including the reasons for the family's stay in the country in question. It was now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Convention on the Civil Aspects of International Child Abduction 1980. The test adopted by the ECJ was preferable to that earlier adopted by the English courts, the ECJ's test being focused on the situation of the child, with the parents' purposes and intentions being merely one of the relevant factors. The test derived from R. v Barnet LBC Ex p. Shah [1983] 2 A.C. 309 should be abandoned when deciding the habitual residence of a child, Ex p. Shah considered. Further, the essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce (para.54).

Appeal allowed

Permission

Lawtel