

Re B (A Child) (2013)

[2013] EWCA Civ 1434

13/11/2013

Barristers

Henry Setright KC

Court

Court of Appeal (Civil Division)

Practice Areas

International Children Law

Summary

It was outside the scope of the European Judicial Network for it to be used to obtain an authoritative determination from the court of the network judge in receipt of the request on issues relating to a particular child where there were no proceedings relating to that child before that court, or the determination sought was outside of any proceedings. If a child was habitually resident in a Member State, its courts had jurisdiction under Regulation 2201/2003 art.8 in matters of parental responsibility regardless of whether there were extant proceedings in the State.

Facts

The appellant mother (M) appealed against a decision that the English court had jurisdiction over her child (X) in relation to matters of parental responsibility, child protection and welfare.

X had been born in Sweden and was habitually resident there. When X was five years old M brought her to England for a short visit and the first respondent local authority applied for a care order. The judge made an interim care order under the jurisdiction to make protective orders in Regulation 2201/2003 art.20. The judge made a request under art.15 for the Swedish court to transfer jurisdiction to the English court, but that was rejected as there were no on-going proceedings in Sweden. Through the European Judicial Network the judge asked whether the Swedish court considered that it had jurisdiction in respect of X under art.8 as being a child habitually resident at the time the court was seized, and if not, whether the Swedish court considered that the English court had substantive jurisdiction outside that conferred by art.20. The Swedish judicial network member replied that there was no case concerning X pending in Sweden and therefore the questions could not be answered, but that it was highly likely that the Swedish court would consider that it did not have jurisdiction. The judge recognised that the opinions of the Swedish network judge were not opinions of the Swedish court, but concluded that the Swedish courts had declined jurisdiction.

Held

(1) It was outside the scope of the European Judicial Network for it to be used to obtain an authoritative

determination from the court of the requested network judge on the issues relating to a particular child where there were no proceedings relating to that child before that court, or, if there were proceedings, the determination sought was outside those proceedings. That would breach the parties' rights to a fair trial under the European Convention on Human Rights 1950 art.6. The questions asked by the judge fell well outside of what could properly be requested via the judicial network. Even taken at their highest, the Swedish judge's expressions of opinion as to the "highly likely" view of the Swedish court could not form the basis for a finding that the courts in Sweden had actually declined jurisdiction. Courts in a Member State could only decline jurisdiction, or declare under art.17 that they did not have jurisdiction, in the context of a proper judicial process, conducted within ongoing court proceedings in that State where that court was seized of the case. The merits of the case could not justify inflating the communications over the judicial network to providing an authoritative determination from Sweden in which it abdicated jurisdiction with respect to X. The process and internal reasoning adopted by the judge could not stand and had to be set aside (see paras 67, 69, 71-73 of judgment). (2) Article 8 did not only confer jurisdiction on the State where a child was habitually resident when proceedings were issued in that State. The phrase "the courts" and "the court" in art.8 referred to the same court and they referred to a court that became seized of a case; if the child was habitually resident in the State then its courts would have jurisdiction under art.8. It followed that the fact that there were no extant proceedings relating to X before a Swedish court when the instant proceedings began did not mean that the Swedish court lacked jurisdiction. Accordingly, the English court should have made a declaration under art.17 that the English courts did not have jurisdiction. The fact that more than a year had passed and that it could be argued that X was now habitually resident in England could not justify ignoring the mandatory terms of art.17 that a declaration had to be made, particularly where X had been kept in England by compulsory order that M had opposed. The only remaining jurisdiction of the English court was under art.20 in relation to short-term holding arrangements. A declaration was made that the English court had no jurisdiction and the interim care order would remain in force until discharged or varied at a substantive hearing (paras 75-76, 80, 85).

Permission

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