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

LC v RRL & Others [2014]

[2014] EWFC 8

16/05/2014

Barristers
Henry Setright KC
Private: David Williams QC
Christopher Hames KC
Jacqueline Renton KC

Court
High Court (Family Division)

Practice Areas
International Children Law

Summary
Re-hearing by Mr Justice Roderick Wood of a mother's application for the return of four children to Spain under the Hague Convention and BIIR, pursuant to the decisions of the Court of Appeal [2013] EWCA Civ 1058 and the Supreme Court [2014] UKSC 1. Consideration of habitual residence and the "intolerability" defence where a sibling group is to be separated.

Facts
The parties had four children, the oldest of whom (L) was 13 at the time of the hearing. The children were born and raised in England, but would fly regularly to Spain to visit the maternal family. By summer 2012 the parties' relationship had broken down and in July the children flew with the mother to Spain, with the consent of the father. They were enrolled in schools for the new term. By agreement the children visited the father in England for Christmas 2012 and were to return on 5 January 2013. The children refused to return.

After Hague Convention proceedings issued by the mother, Cobb J ordered the summary return of all four children on 23 May 2013, reported at [2013] EWHC 1383. The father appealed to the Court of Appeal, reported at [2013] EWCA Civ 1058, which discharged all orders relating to L and stayed the return orders for the youngest three for consideration of question (2) below at a re-hearing. The Supreme Court, reported at [2014] UKSC 1, remitted a further question (1) for determination at the re-hearing.

Mr Justice Wood heard the case over two days. The detailed background to the proceedings is helpfully set out in a schedule attached to his judgment.

The questions for determination were as follows:

1. From the Supreme Court: Were all, or any, of the children habitually resident in Spain on the

relevant date (5 January 2013) and what order should be made in respect of the three youngest children?
2. From the Court of Appeal: In light of the return order for L being discharged, was there a grave risk that the return of the younger children would expose them to physical or psychological harm or otherwise place them in an intolerable position by virtue of their separation from their older sister (Article 13(b) Hague Convention)?

Held

Habitual Residence

The judge summarised the law on habitual residence, noting that at first instance Cobb J had not had the benefit of the Supreme Court's decisions in *A v A* [2013] UKSC 60, *Re KL* [2013] UKSC 75, and indeed this case, *Re LC*.

The latter case had considered, for the first time, the relevance and weight to be attached to the state of mind of a child when considering his place of habitual residence. Looking in detail at the views of the Supreme Court in *Re LC* [see paragraphs 19 – 26], the judge had to revisit the findings of Cobb J for 3 reasons: (i) there was now a new test for habitual residence; (ii) each child now had party status; and (iii) there was a raft of child-focused new evidence not previously before the court.

Wood J [at paragraph 55] made several findings as to the state of mind of the children when they moved to Spain, including the following: they were removed from their English schools without warning; they took few material possessions; there were emails evidencing a desire to come 'home'; and the mother was ignoring the children's wishes to benefit her desire to start a new life. Having found the mother's evidence to be 'woefully unreliable', the judge concluded none of the children had been habitually resident in Spain [paragraphs 61 – 68]. Of particular interest to practitioners might be the judge's reasoning in respect of the youngest child (aged only 4 at the time), basing his conclusion on the unity of the sibling group and the shared experiences of all the children.

Article 13(b) "Intolerability" defence [paragraphs 81 – 103]

Given the children were not habitually resident in Spain it was not strictly necessary to consider this question. However, the judge did so in the event that he was wrong on habitual residence. He spent some time setting out the current opinions of the children, expressed to the Cafcass Guardian and their legal representatives, about the prospect of separation between L and her three brothers. It was clear to professionals and the judge that they were a close-knit sibling group and separation was 'almost too painful to comprehend'. In light of all the evidence, the judge was of 'no doubt' that the defence under Article 13(b) was made out.

Child's objections [paragraphs 115 – 124]

Although not asked to consider this question by the Court of Appeal or Supreme Court, the judgement ends with a 'second look' at the child objections defence under Article 13, which had failed before Cobb J. It was submitted on behalf of the mother that the judge had no jurisdiction to do so. He disagreed. He accepted that to permit a second look might play into the hands of a manipulative parent engineering delays in the court process, but the Cafcass High Court team were experienced in these matters. Therefore, if there had been a 'change of circumstances', the court could reconsider the question. The primary change of circumstance in this case had been the egregious delay between the first hearing and the re-hearing (some 15 months).

Looking at Lady Hale's decision in *Re M* [2007] UKHL 55 and considering his previous findings of intolerability and psychological harm, the chances of any court returning a child to such circumstances was nil and the defence was made out.

Permission

Family Law Week