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Re H (Jurisdiction) (2014)

[2014] EWCA Civ 1101

29/07/2014

Barristers
Deirdre Fottrell KC
Private: David Williams QC

Court
Court of Appeal Civil Division

Practice Areas
International Children Law

Summary
Regulation 2201/2003 art.10 provided that the English courts retained a residual jurisdiction in respect of a child who had had habitual residence in England immediately before a wrongful removal or retention to a non-European Union Member State. The jurisdiction ended when the child acquired habitual residence in another Member State.

Facts
The appellant father (F) appealed against a decision ([2013] EWHC 2950 (Fam), [2014] Fam. Law 38) dismissing his application for the return of his two young children (X) from Bangladesh, where they were living with the respondent mother (M).

F and M originated from Bangladesh and moved to the United Kingdom. X were born in the UK in 2007 and 2008. The family travelled to Bangladesh in 2008. F returned to the UK some months later. There appeared to be a dispute as to whether M refused to return from Bangladesh or whether F had abandoned her there. Proceedings had been started in Bangladesh. F sought a return order, arguing that the English courts had jurisdiction on the basis that X had habitual residence in England. The judge rejected that argument. The court considered whether (i) there was still a rule that, where two parents had parental responsibility for a child, neither could unilaterally change the child's habitual residence; (ii) the English courts had jurisdiction under Regulation 2201/2003 art.10.

Held
(1) Three recent Supreme Court decisions, A v A (Children) (Habitual Residence) [2013] UKSC 60, [2014] A.C. 1, DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal) [2013] UKSC 75, [2013] 3 W.L.R. 1597 and LC (Children) (International Abduction: Child's Objections to Return), Re [2014] UKSC 1, [2014] 2 W.L.R. 124, represented a new departure for habitual residence and it was appropriate to consider the continued existence of the rule in light of them. A v A and DL v EL indicated a general disinclination to encumber the factual concept of habitual residence with supplementary rules,

and in particular to perpetuate the rule at issue in the instant case, provided that an approach could be found which prevented a parent undermining the Hague Convention on the Civil Aspects of International Child Abduction 1980 and the jurisdiction provisions of the Regulation. The solution involved treating the act of wrongful retention of the child as occurring as soon as the parent engaged in unilateral acts designed to make permanent the child's stay in the new country rather than only when the child's scheduled stay there ended. That prevented a parent establishing a habitual residence in the new country before the act of wrongful retention occurred, A v A, DL v EL and Re LC considered. Accordingly, the rule should be consigned to history in favour of a factual enquiry tailored to the circumstances of the individual case. F's submission that the judge had been constrained by the rule to find that X had remained habitually resident in England therefore failed. The judge had been unable to exercise jurisdiction on the basis of habitual residence (see paras 26-37 of judgment). (2) There was, however, jurisdiction based on art.10 of the Regulation. The Regulation applied even where the issue related to the retention of a child in a country outside the European Union, I (A Child) (Contact Application: Jurisdiction), Re [2009] UKSC 10, [2010] 1 A.C. 319 and A v A applied. Article 10 provided that the courts of the Member State where the child was habitually resident immediately before wrongful removal retained their jurisdiction for a period, and that that period ended when the child acquired habitual residence in another Member State. That was not to be interpreted so as to end the retained jurisdiction even when it was a non-Member State in which the child was now living: policy considerations did not dictate that, and it was contrary to the Regulation's express words. Accordingly, the English courts' jurisdiction under art.10 had not been lost, because X had not yet acquired habitual residence in another Member State (paras 38-53). (3) The court considered the exercise of the art.10 jurisdiction. The court was not in a good position to determine whether there was power to decline to exercise the art.10 jurisdiction on forum non conveniens grounds as there had not been full argument. It was unnecessary to do so, as the outcome of an exercise of the jurisdiction on the instant facts would be dismissal of the proceedings in any event. The judge had not considered how to exercise discretion, rather than whether to exercise it. The instant court was therefore not reviewing the judge's decision but deciding, on the material before it, whether the welfare decision should be remitted for consideration or determined by the instant court, and if not remitted, what the decision should be. X's welfare was the paramount consideration in determining what orders to make. F had argued that the judge should have sought further information, but parties could not expect the family courts to bridge gaps in their preparation or direct what steps should be taken to assemble information needed to address jurisdictional and welfare questions. The story emerging from the evidence was unclear. No English court would readily intervene in the instant circumstances in relation to children living abroad, particularly where the order sought was for the return of children after a long time to a country of which they had no recollection. F's proceedings would be dismissed forthwith with no substantive order being made, C (Family Proceedings: Case Management), Re [2012] EWCA Civ 1489, [2013] 1 F.L.R. 1089 applied (paras 57-74).

Appeal dismissed

Permission