

In the matter of J (a child)

[2015] UKSC 70

04/12/2015

Barristers

Henry Setright QC
Teertha Gupta QC
Private: David Williams QC
Michael Gration
Jacqueline Renton
Michael Edwards

Court

Supreme Court

Practice Areas

International Children Law

Judgment of the Supreme Court unanimously allowing the father's appeal, holding that it is open to the English courts to exercise the article 11 jurisdiction in cases of wrongful removal under the 1996 Hague Convention, and ordering that the case be returned to the High Court for a decision as to whether it is appropriate to do so in the circumstances of this case.

Background

The 1996 Convention came into force in the United Kingdom on 1 November 2012 and has not previously been considered by the Supreme Court. The subject of the proceedings is a child, called Saleem in the judgment, who was born in January 2007. His parents are both from Morocco and hold Moroccan and British citizenship. The parents lived in England when Saleem was born but moved first to Saudi Arabia in 2009 and then to Morocco in 2011. The marriage broke down in December 2011. Saleem lived with his mother, who was granted residential custody by the local Family Court in 2012. His father was granted and exercised visiting rights. Saleem's mother moved to England in January 2013 but Saleem remained in the care of his maternal grandparents until 14 September 2013, when the mother brought Saleem to England. Since then he has lived here with her and her new husband, whom she married in January 2013 and with whom she now has another child. Saleem's father has had no face to face contact with him since.

Saleem's father applied on 23 September 2013 to the Moroccan Family Court for an order granting him residential custody of Saleem but this was refused on 16 January 2014.

On 14 March 2014 the father brought proceedings in the High Court seeking an order that Saleem be made a ward of court and directions for his summary return to Morocco. The judge found that the father had not consented to the removal of Saleem from Morocco, which was wrongful, and that Saleem had

been habitually resident in Morocco before his removal. He ordered the mother to return Saleem to Morocco. It was not argued before him that the effect of the 1996 Convention was that he had no jurisdiction to make the order he did.

Court of Appeal

The mother appealed to the Court of Appeal, which held that the English courts did not have jurisdiction under the 1996 Convention, or on any other basis, on the facts of this case. In cases where a child was habitually resident in another state, as in Saleem's case, jurisdiction only arose in cases of urgency under article 11. This was not such a case because the father could have made an immediate application to the Moroccan court for a return order.

Supreme Court

The Supreme Court unanimously allows the appeal, holding that it is open to the English courts to exercise the article 11 jurisdiction in cases of wrongful removal under the 1996 Convention, and it orders that the case be returned to the High Court for a decision as to whether it is appropriate to do so in the circumstances of this case. Lady Hale, with whom the other justices all agree, gives the only substantive judgment.

Reasons for the Supreme Court judgment

The focus of the 1996 Convention is on the care and upbringing of the child and an order for the return of a child to the country of his or her habitual residence is a 'measure of protection' falling within its scope [23]. Jurisdiction in wrongful removal cases remains with the authorities of the contracting state in which the child was habitually resident immediately before the removal (article 7) and article 11 supplies an additional jurisdiction to the courts of the territory where the child is present in the limited circumstances of 'cases of urgency' [26]. An order made under article 11 can have extraterritorial effect and can thus be contrasted with the purely ancillary power in article 20 of the Brussels II Revised Regulation [26-29]. It is not limited to cases of wrongful removal but extends to safeguarding children who are lawfully present in another country [30]. It can secure a valuable 'soft landing' for children whose return to their home country is ordered under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the 1980 Convention') [31].

Lady Hale said that it would place these objectives in jeopardy if the courts could not invoke the article 11 jurisdiction without first assuring themselves that it was impossible for the courts of the home jurisdiction to take action [32]. In the absence of this pre-condition, the interpretation of article 11 demands a holistic approach. It is consistent with the overall purpose of the 1996 Convention that measures of protection which the child needs now should not be delayed, provided they are in support of rather than in opposition to the jurisdiction of the home country. It is a secondary, not the primary jurisdiction [33-34]. Although this approach does not emerge from either the Explanatory Report of Paul Lagarde in 1996 or from the Practical Handbook on the operation of the 1996 Convention, they should not be treated as if they were words in the Convention, and the focus of both is orders in the context of proceedings for abduction governed by the 1980 Convention, rather than cases to which the 1980 Convention does not apply [39].

An abduction case governed solely by the 1996 Convention is not invariably one of 'urgency' but it is difficult to envisage a case in which the court should not consider it to be so and go on to consider whether it is appropriate to exercise the article 11 jurisdiction. The courts of the country where the child is present are often better placed to make orders about the child's return, as they can take steps to locate the child and exert any necessary coercive powers. The machinery of obtaining and then enforcing orders made by the home country may be cumbersome and slow. The child's interests may be compromised if the country where he or she is present is not able to take effective action in support of

their return [39]. Accordingly the appeal is allowed.

It is not right, however, simply to restore the judge's order for return. The case should be returned to him for a new decision approached on the proper footing, namely whether the English court should exercise the jurisdiction conferred by article 11 of the 1996 Convention and, if so, in what way. The question will be answered on the basis of up to date information about Saleem and, if necessary, about Moroccan law, and attention can also be given to the important question of whether an order for interim contact between Saleem and his father should be made [41-44].

Permission

 Family Law Week