

Re B – Supreme Court Decision

3rd February 2016

Supreme Court decides that a lesbian parent can seek the return of daughter from Pakistan

David Williams QC, Alistair Perkins and Michael Gration acted for the successful appellant mother. Henry Setright QC, Hassan Khan & Dorothea Gartland acted on behalf of the International Centre for Family Law, Policy and Practice. Michael Edwards acted for the AIRE centre.

On 3rd February 2016 the United Kingdom Supreme Court gave Judgment on a case concerning a child, B, who was taken to Pakistan by her biological mother, without the knowledge or consent of her non-biological mother. The appeal, brought by B's non-biological mother, who was represented on a pro bono basis by solicitors and counsel, considered whether the English court had the power to make orders about B's welfare notwithstanding that the removal of B to Pakistan was not unlawful as the Appellant did not have parental responsibility for B at the relevant date. B's biological mother argued that the English court had no power to consider what was in B's best interests, and furthermore disputed that the Appellant would be considered a "psychological parent" for B.

The Supreme Court decided that at the time that court proceedings were issued in England in relation to B, she had not lost her habitual residence in England and accordingly the English court had the power to make orders about B's welfare. The case is being returned to the High Court for a decision regarding B's welfare and B will be represented within those proceedings by the CAFCASS High Court team.

The Supreme Court also considered the power of a court to take action in relation to a child who is a British national (the "parens patriae" jurisdiction), and whether such a power can only be exercised in "exceptional" circumstances.

The child, "B", was conceived by Intrauterine Insemination ("IUI") using donor sperm. The parents had been in a relationship for some four years before B was born. From her birth until the breakdown of the parents' relationship in December 2011 she was cared for by her biological and non-biological mothers as a family together in a home they had jointly purchased together prior to the birth. Members of both families of both mothers were fully involved in her life. She grew up in England and attended nursery and then primary school. She therefore had the benefit of care from both mothers for the first 3 ½ years of her life, however the Appellant, who is the non-biological mother of B, did not acquire parental responsibility for B.

Following the breakdown of their relationship B continued to live with her biological mother, but had regular contact with the Appellant mother. On 3rd February 2014, B was taken to Pakistan by her biological mother. This was done without the Appellant's knowledge and therefore without her consent. At the time of the removal the two mothers were in mediation about the care arrangements for B. That process was brought to an abrupt end by B's removal. The Appellant mother issued court proceedings for the return of her daughter to England, but remained unaware of her daughter's actual whereabouts for a further three months until the birth mother's solicitors wrote a letter to her informing her that her

daughter had been taken to Pakistan.

The proceedings were, unbeknown to the Appellant, issued only 10 days after B had been removed to Pakistan. Despite this the High Court held that at the time that court proceedings were issued, B had lost her habitual residence in England and Wales thereby removing its jurisdiction to make decisions regarding her future, despite her parents continuing differences regarding where she should live and whether she should continue to see her mother in the UK. The court declined to exercise its powers to order B's return on the basis of her being a British National (the "parens patriae" jurisdiction), as the court considered that B's situation was not sufficiently "exceptional" or "dire".

Whilst the Court of Appeal found that the Appellant would not be able to bring any application concerning B in Pakistan due to societal attitudes towards same-sex relationships, it nonetheless upheld the High Court's decision. The Appellant argued that the outcome of that decision was that there was no court anywhere in the world which could make a decision about what relationship B should have with her non-biological mother, therefore leaving B in "limbo".

The Supreme Court has found by a majority that, contrary to the High Court judge's decision, B did not lose her habitual residence in England and Wales at the relevant date as her ties to England had not been uprooted, nor had sufficient roots been established for B in Pakistan. In particular, the Appellant, who the Supreme Court considered a "central figure in B's life, indeed probably the second most important figure" remained in England and as such B retained a strong link to England even after she had physically left the country.

The Supreme Court's decision is significant in clarifying the concept of habitual residence and in particular confirming that the modern concept of habitual residences is such that it is unlikely that a child will be placed in "limbo" – having lost habitual residence in one country but not yet acquired it in another. The Supreme Court also confirmed that the parens patriae jurisdiction was not restricted to cases where there was an extreme risk to the child but rather could be used where appropriate and where making orders would be unlikely to conflict with orders made by another court.

David, Alistair and Michael together with Mehvish Chaudry were instructed by Freemans Solicitors. They all acted pro bono. Alistair Perkins explained "the Appellant feared the consequence of the High Court and Court of Appeal's decisions was that she would lose her relationship with B entirely, and further that B would be unable to live a life in Pakistan where her origins could be known and accepted. The consequence of the Supreme Court's decision is that the English court can properly consider what is in B's best interests, and, if appropriate, order contact or B's return to England. Further, the Supreme Court has brought welcome clarity to the law relating to a child's habitual residence, and their interpretation of this legal concept means that it is unlikely that children such as B will be placed in a situation where there is no court that can make decisions about their welfare."