Habitual residence test in Hague Convention cases

03/06/2015

Family analysis: Following the Supreme Court's judgment in AR v RN, Michael Gration, a barrister at 4 Paper Buildings, and Anne-Marie Hutchinson OBE, a partner and head of the children department at Dawson Cornwell, examine the continuing issue of wrongful retentions both generally and specifically in the context of Hague Convention cases.

Original news

AR v RN [2015] UKSC 35, [2015] All ER (D) 201 (May)

The claimant father brought proceedings in the Scottish court concerning a residence order that the defendant mother sought in relation to two children. He maintained that the mother's proceedings were a wrongful retention within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). The Lord Ordinary granted the father's application, but the Extra Division dismissed it on appeal. The Supreme Court held that the Extra Division of the Inner House of the Court of Session had not erred, and that the children had been resident in Scotland as contended by the mother.

What were the key issues raised in the appeal?

The appeal concerned the determination of the habitual residence of two children following their relocation from France to Scotland. The mother's case was that this move was undertaken as part of a joint plan, agreed between the parents, pursuant to which the family were to leave France to settle in Scotland or elsewhere depending on how things developed during the period of the mother's maternity leave. The father's case was that the agreed plan was for the mother and children to remain in Scotland during the mother's maternity leave, which was to last for one year, on the basis that at its conclusion the children would return to France.

During the mother's maternity leave the parental relationship broke down and the mother applied to the Scottish courts for a residence order. At the time of the mother's application the children had been in Scotland for approximately four months. Seemingly in response to the mother's application the father applied for the children's return to France pursuant to the Hague Convention.

The key issue in the case was whether the children had lost their habitual residence in France by the time of the mother's retention of them in Scotland. It was primarily this issue that formed the basis of the judgments at first instance and on appeal in Scotland, and which founded the father's appeal to the Supreme Court. On the father's analysis of the issue, this involved consideration and determination of the role played by the intention of the parents where children have moved internationally, as he argued that his intention was that the children would remain in Scotland for a temporary period (one year) for a limited purpose (to allow the mother to spend her maternity leave in Scotland).

Why is the case significant?

The Supreme Court has examined the question of determination of habitual residence on three previous occasions:

- *Re A (children) (jurisdiction: return of child)* [2013] UKSC 60, [2013] 3 FCR 559,
- *Re KL (a child) (abduction: habitual residence: inherent jurisdiction)* [2013] UKSC 75, [2014] 1 FCR 69, and
- *Re LC (children) (abduction: habitual residence: state of mind of child)* [2014] UKSC 1, [2014] 1 FCR 491

Further, the Court of Justice of the European Union (CJEU) has considered the issue on three occasions--twice prior to the judgment of the Supreme Court in *Re A:*

- *Family proceedings concerning A*: C-523/07 [2009] All ER (D) 286 (Jun), and
- *Mercredi v Chaffe*: C-497/10PPU, [2012] Fam 22

and once since that judgment, in *C v M*: C-376/14 PPU [2014] All ER (D) 160 (Oct).

It is therefore apparent that the proper approach to the determination of a child's habitual residence remains a difficult issue, notwithstanding extensive guidance given by the two aforementioned courts.

On the analysis of the issue offered by the father, this case would have given the Supreme Court an opportunity to examine a further facet of the question of habitual residence which was not specifically dealt with in any of the previous appeals--that of parental intention and the weight that is to be given to that factor when conducting the overall factual analysis. It is strongly arguable that the proper approach to differing parental intentions remains an undetermined issue, as it did not arise in any of the three previous judgments that address this point (aside from in obiter comments made by Lord Hughes in his dissenting judgment in *Re A*). The recent decision of the CJEU in *C v M* directly addresses this point, so this case might have given the Supreme Court the opportunity to deal with this important aspect of the habitual residence enquiry in the light of recent authority from the CJEU.

To what extent does the decision clarify how the court will approach determination of the habitual residence of a child for the purposes of an application under the Hague Convention?

Although the issues that appeared to be engaged on the appeal were relatively wide-ranging (and, indeed, were expanded before the Supreme Court as a result of new arguments raised on behalf of the mother which had not been aired in full at first instance and on appeal) the ambit of the case before the Supreme Court was rather reduced when it was accepted on behalf of the father that there was, in fact, a joint parental intention that the children would remain in Scotland for a period of up to 12 months. That concession (which is recorded at para [23] of the judgment) served to remove questions of parental intention from the court's consideration, with the result that the court was only required to determine whether the first instance court had erred in its approach to the issue (which the Supreme Court found it had) and whether the Court of Appeal had itself erred (which it found it had not).

The appeal therefore fell to be determined on the basis of the facts of the case and the application of the lower courts of the established law (arising from the cases referred to above) to those facts, without any further consideration of the approach to be taken to determining a child's habitual residence in Hague Convention cases. The court applied the approach espoused in its previous judgments, and particularly *Re A* and *Re KL*.

What are the implications of the decision for lawyers and their clients? What should they do next?

The issue of wrongful retentions remains a prevalent and difficult problem both generally and specifically in the context of Hague Convention cases. There is an obvious downside in the removal of the 'rule' (if there ever was such a rule) that habitual residence cannot change without parental consent (see *Re A* and the later decision of the Court of Appeal in *Re H (Children) (Jurisdiction: Habitual residence)* [2014] EWCA Civ 1101, [2014] 3 FCR 405) as it has the potential consequence of allowing a parent to engineer a successful retention of a child by causing their habitual residence to change prior to declaring an intention to retain them, thereby depriving the left behind parent of a remedy pursuant to the Hague Convention. This potential difficulty was identified by Lord Hughes within his dissenting judgment in *Re A*, but the comments on that issue within that judgment were undoubtedly obiter and were not endorsed or approved by the Court of Appeal in *Re H* (they were not engaged in that case), as a result of which the point remains arguable. There was some hope that the Supreme Court would address that issue in this appeal, but as a result of the approach taken they did not do so.

It is, therefore, arguably quite difficult to properly advise parents in situations such as this. That is perhaps particularly so if a lawyer is asked to advise a parent that will be 'left behind' while the other parent removes a child or children to another jurisdiction for a period of time. How is that parent to ensure that they have an expeditious and certain means of enforcing a return should the removing parent breach any agreement to return the children to the country of origin at the conclusion of the agreed period?

The decision of the Supreme Court in this case might suggest that the Hague Convention cannot be relied upon to provide a guaranteed remedy in situations such as this, as a result of which other options will have to be canvassed. The most certain of those is likely to be to obtain an order in the country of origin prior to the removal of the children directing the removing parent to return the children to the country of origin by a set date. If the country of origin is an EU member

state that order could then be certificated pursuant to the Brussels II Regulation (EC) No 2201/2003 (Brussels II revised) and then registered for enforcement in the country to which the children are to be removed.

Alternatively, if the countries involved are not EU member states but are contracting states to the Hague Convention the order made could still be registered for enforcement without any certificate being required from the country of origin.

Without such an order the advice to parents in situations such as the one which faced the court in this case could only be that they will not necessarily be able to rely on the Hague Convention to secure the return of the child at the conclusion of the agreed period.

How does this decision fit in with other developments in this area? Do you have any predictions for future developments or trends?

This decision fits exactly with the previous decisions of the Supreme Court (as referred to above) in making it very clear that habitual residence is a question of fact to be decided with reference to all of the circumstances of the case. In that sense, the approach taken by the Supreme Court is welcome in that it maintains the simplicity of a factual approach without the 'gloss' that was previously added to the habitual residence enquiry pre *Re A*. That simplicity arguably comes at the perhaps considerable price of reducing certainty in circumstances where parents have agreed a temporary move abroad.

It seems unlikely that there will be any further development of the test to be applied to determination of a child's habitual residence, as the Supreme Court has now confirmed on four occasions that it is a question of fact to be determined on an evaluation of all of the circumstances of the case.

There may, however, still be scope for argument about how the court should address the question of when a wrongful retention takes place so as to ensure that the Hague Convention remains effective notwithstanding the change in the approach to determination of habitual residence, as per the dissenting judgment of Lord Hughes in *Re A*.

Michael Gration specialises in cases involving the international movement of children, appearing regularly in the High Court and the Court of Appeal in cases involving (but not limited to) Hague and non-Hague abduction, jurisdictional disputes, the recognition and enforcement of orders (pursuant to Brussels II revised and the Hague Convention), relocation (both internal and external) and forced marriage.

Anne-Marie Hutchinson OBE specialises in all aspects of domestic and international family law and the international movement of children. She has expertise in international divorce forum and jurisdictional disputes on divorce. She is a specialist in the law relating to forced marriage, as well as surrogacy. In 2014 Anne-Marie was awarded the prestigious International Academy of Matrimonial Lawyers President's Medal.

In AR v RN, Michael and Anne-Marie acted for the intervener, Reunite International Child Abduction Centre.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor