No. FD11P01347

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IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Monday, 7th October 2013

Before:

MRS. JUSTICE PARKER

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B E T W E E N :

A	Applicant
- and -	
A	Respondent

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MR. J. TURNER QC (of counsel) and Mr A. PERKINS (of counsel) appeared on behalf of the Applicant.

MR. E. DEVEREUX (of counsel) appeared on behalf of the Respondent.

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J U D G M E N T

MRS. JUSTICE PARKER:

1. On 9th September of this year the Supreme Court handed down a judgment *A v. A (Children: Habitual Residence)* UKSC [2013] 3 WLR 761. It remitted to me the issue of whether the youngest of the four children of this family (referred to in those proceedings as "H") should be returned to this country, relying not upon habitual residence but upon the fact that he is a British national as the basis of jurisdiction.

2. The three older children, born and brought up in this jurisdiction, had been undoubtedly wrongfully retained (to use Hague terminology) in Pakistan as found by me in February 2012 and accepted by the Supreme Court. Their mother had travelled to Pakistan with the three children to be met by a concerted family action which led her to be detained against her will. She was subjected by various measures to an enforced reconciliation with her estranged husband. H was born as a result of their resumption of marital relations. He has never visited this country. The mother managed, with the assistance of her father, who had originally supported the actions of the husband (his nephew), but then relented, to escape to England, but without the children. She has been trying to secure their return for well over two years.

3. I had no hesitation, against those briefly described facts, in holding that the three older children remained habitually resident in this jurisdiction. The Court of Appeal agreed and the father did not seek to argue otherwise in the Supreme Court.

4. The sole question in respect of H's habitual residence was: Can a child who is integrated into his family of origin; in this case, the mother and the other children who are habitually resident in this country, be said to be habitually resident in this jurisdiction if he has never been here? The Court of Appeal ruled that he could not. The majority of the Supreme Court held that it was not established that H was habitually resident in this jurisdiction, but neither was it established that he was not. For reasons set out in detail in the judgment of the Supreme Court, the mother is, however, entitled to rely on H's British nationality. Where habitual residence is not established Article 14 of Brussels II Revised allows the court to look at national law and the 1986 Family Law Act specifically retains a jurisdiction to order, amongst other things, return orders as opposed to custody, access and education orders, on the basis of nationality.

5. In paragraph 62 of the Supreme Court judgment, the court repeated Lord Justice Thorpe's view that the court should be "extremely circumspect" and "must refrain from exorbitant jurisdictional claims founded on nationality" over a child who was never habitually resident nor present here because claims were "outdated, eccentric and liable to put at risk the development of understanding and co-operation between nations." In *Re B (Forced Marriage: Wardship: Jurisdiction)* [2008] 2 FLR 1624, Hogg J exercised jurisdiction in respect of a fifteen year old girl with

British and Pakistan citizenship who had gone to the High Commission in Pakistan asking to be rescued from a forced marriage. Hogg J was prepared to accept jurisdiction as she thought the circumstances "sufficiently dire and exceptional". In *Re N (Abduction: Appeal)* [2013] 1 FLR 457, paragraph 29, McFarlane LJ commented that: "If the jurisdiction exists in the manner described by Hogg J. then it exists in cases which are at the very extreme end of the spectrum". The Supreme Court comments that the facts of that case were not such as to require the High Court to assume jurisdiction over the children in question.

6. The Supreme Court did not express a view one way or another as to whether the formulations recited above were intended to operate to limit the exercise of the jurisdiction. The Supreme Court did not doubt the existence of the nationality jurisdiction and accepted that there are reasons for "extreme circumspection". It seems to me that it all depends on the circumstances of the particular case.

7. The court guided me as to how I should approach this evaluation by setting out six factors in clearly directive terms. Only if I were able to and could give good reasons to disregard their applicability should I decline to take them into account.

8. Mr. Devereux, on behalf of his client, who remains in the jurisdiction in Pakistan with the four children, tells me that his client has now accepted that he should bring the children back here. That decision was communicated to the mother's legal representatives and, in due course, the mother, as recently as last Friday afternoon. No specific proposals are put forward as to how and when the children will return. It is asserted that the father will have to make arrangements to obtain a British passport for H from the relevant authorities.

9. The history of this case demonstrates that the father and his two brothers have fought tooth and nail to avoid returning these children. Their position, maintained through this litigation until now, was that, if H were not habitually resident here, the jurisdiction in respect of all four children should be exercised in Pakistan.

10. In the light of the litigation tactics demonstrated in February of last year, and the difficulties in obtaining co-operation and participation, and the degree of obstruction which I encountered, I must take an extremely circumspect view of this late concession. I can foresee continued asserted problems being raised. I can see delaying tactics as a real possibility. Mr. Devereux, for the father accepts that I should not only accept the father's concession, but that I should anchor that concession within the discipline laid down by the Supreme Court by specifically addressing the six factors. I do not want it to be said that the court has simply rubber-stamped an agreement without considering the merits which underly it. I do not want the husband to be able to argue that he has been misled as to what the issues are or that he has not given his true agreement. I do not want him to be able to raise those points either before me or another English Judge or in Pakistan. The parties agree that this judgment should be published.

11. Mr. Devereux submits to me that I must be cautious about laying down any principle which does not strictly relate to this case. I agree. It is not my job to complicate and confuse matters by going outside the facts which underline this decision. He says that there is a danger that the habitual residence basis of jurisdiction, so firmly now underpinning our international child regime, will be undermined and frayed away by the exercise of the nationality jurisdiction. He asserts that, in principle, at least, Pakistan is a jurisdiction which is as well placed to take decisions as this jurisdiction.

12. Mr. Turner submits to me and I accept that, because of the structure of the jurisdictional regime, it will only be in the rarest possible cases where its nationality jurisdiction will be relied upon.

13. Baroness Hale, in a number of decisions, has discouraged the use of the word "exceptional" as a criterion in international child law cases and indeed in many areas as well. I follow that guidance. Exceptionality is not the test. In any event reliance on the nationality jurisdiction has been endorsed by the Supreme Court in circumstances which are, if not unique, certainly of a very special nature.

14. Mr. Devereux accepts that the father cannot now seek to raise again his argument that the three older children are habitually resident in Pakistan. The three elder children had the closest connection with this jurisdiction until they were prevented from leaving Pakistan in November 2009. The father has not sought to raise any other argument in relation to the older children.

15. I have to consider the appropriate forum in which to decide H's future. It seems to me crucial in this case that the older children have spent their lives in this jurisdiction; that it is a jurisdiction to which the father owes primary allegiance in the sense of nationality (although he also has Pakistani nationality) and also, in the sense of his having been born here and having grown up here and having spent his adult life here. The only reason why the older children are in Pakistan and the only reason why H remains there is because of coercive measures by the father.

16. I need to look at the practicability of the mother litigating the children's future in Pakistan. Mr. Devereux argues that there is no evidence to indicate that she would be at a disadvantage in Pakistan simply because she is a woman and a mother. But that is not the point the Supreme Court was making. The issue is the coercion to which she was subject there. It is not just the practical problems which she may face - the concerted opposition which she is likely to experience from the father and members of his family - but the fact that she is likely to have extremely limited support bearing her family's behaviour on the last occasion. It is also an established fact that the father and his two brothers have attempted to manipulate the English legal system through their litigation behaviour. It will be much easier for the father to continue to do that in the country in which he has been living for

almost four years now while the mother is now firmly rooted in this jurisdiction. Furthermore, the mother will have no capacity financially to access legal advice there. For the father it will be easiest thing to return here to the country which is, in reality, his home where there is family property, members of his family live and where he has a dormant business.

17. It is obvious that the three eldest children's future should be litigated here. The return order in respect of these children stands. H is one of a sibling group of four. Their futures should be decided together.

18. The Supreme Court raised the question of the lack of any voice of the child in these proceedings. CFAB suggested in the Supreme Court proceedings how this might be done. It is not suggested by the father that the children's wishes and feelings are any barrier to their return. It will be relevant to the order which this court eventually will make. It is not now relevant to the evaluative exercise which I am conducting.

19. The father must bring the children back to this jurisdiction. I have given Mr. Devereux time to think about his submissions and considerable time to deliver them and I am quite satisfied that he has had every opportunity to address me as to how I should approach this case. I am quite clear that, even had the father not made this concession and even if the children's voices had not been heard, I would have returned them to this jurisdiction. In any event it seems to me that since they have been within the father's sphere of influence and that of his family over the last nearly four years, they might well be incapable in the Pakistan setting of expressing any independent voice.

20. I shall direct the father to bring the children back to this jurisdiction immediately and to take all steps within his power to implement that return. The children will not be removed thereafter without the agreement of this court. Other directions and recitals I need not deal with in this judgment.

21. As long ago as 2011, freezing orders were made against jointly owned properties held by family members and the father's modest savings of about £11,200. A number of applications were made earlier in these proceedings for release of funds, which I declined. In July 2013 before the hearing in the Supreme Court the father sought the release of £11,200 to meet ongoing legal costs. The mother's solicitors responded saying that they could not consider the request on a properly informed basis until they had been provided with a formal witness statement providing full disclosure of the complete worldwide financial position of each with supporting documents and which was expected to contain details of the costs. In a letter of 16th September the father's solicitors indicated the matter was to be pursued, the implication being that he still sought release of funds. They stated that the father was in the process of providing the evidence in order for this to be considered on a properly informed basis and this was only respect of the father and

not the second respondent, his brother, PA, who has been in court for the whole of today. The brother has never sought to be discharged from these proceedings and indeed appeared in the proceedings when they came before me, although he then absented himself. I am no doubt that the wife's solicitors have made it quite clear what is required from the husband's side.

22. A draft unissued noticed of application for variation of the asset freezing order was sent to the mother's solicitors on 4th October. I was only in fact shown this document this afternoon. This did not deal with the second respondent's position, but only the purported position of the father. It completely fails to explain how the father has maintained himself in Pakistan, and indeed the children, and is scant in the detail which he gives, asserting merely that his parents will no longer lend him any money and that he requires the frozen funds in order to fund further litigation.

23. In response Mr. Turner submitted that the father was seeking to hijack this hearing which had been fixed for a different purpose, the return of the children. It would have been possible for me simply to refuse to hear it. However, Mr. Devereux has been insistent on raising this matter and I permitted him to address me at appropriate length. He, first of all, submits that the orders are defective because they do not provide for living expenses. He says that was an oversight.
Mr. Perkins for the mother cannot recall whether it was an oversight, he thinks it was probably not, because the draft contained such a reserve. In any event, this is a point that has been made previously. This type of order is wholly different from a freezing order in financial proceedings, which is unlikely to freeze the totality of the assets or may not freeze the totality of the assets. This is order is in the nature of a sequestration order and is designed to encourage compliance with orders and to provide a fund for the mother if she needs to litigate further. Mr. Devereux accepts if the court cannot clearly understand the financial affairs of the parties and thinks that there are matters which require to be disclosed, it can decline to provide for litigation or other expenses in the freezing order.

24. I am wholly unsatisfied that I have been given a clear and accurate picture of the father's resources or the family's resources, when they could not have had more clear notice over many months that this was required. I am quite satisfied that there are gaps in the information which appear on the face of the papers. I am troubled also that this application is being made and pursued before the father has actually returned the children.

25. Another hearing is set for next week. I have brought in CAFCASS Legal and the High Court team to represent the children. I shall not simply stand out this difficult case for it to be restored once it is known that the children are on their way. It is quite likely that pressure will need to be maintained and the court will have to keep a firm grip on the case. I have already directed that, if the children are not returned by 15th October 2013, a clear and documented explanation must be given. This is not an invitation for delay. In particular, if it is asserted that travel documentation

is the problem then the clearest possible support must be given from a reliable source to support that.

26. Until the children are in this jurisdiction, I do not intend to release any funds unless something happens to demonstrate to me that that is appropriate. I accept Mr. Devereux submission that, once the children are here, the purpose of the freezing order goes, so far as these proceedings are concerned, although the mother may have grounds to say that assets should be frozen in order to support her costs application and her application pursuant to Part 3 of the 1984 Act, in which event she would need to invoke a separate procedure. I ignore the potential capacity to freeze any funds in respect of those applications for the purpose of today.

27. In February of last year Mr. Perkins conceded that, if the father was co-operating with these proceedings and the children were here, he would agree to release of funds and I accepted that approach. It still remains potentially appropriate. What order I might make if I am satisfied that the father is here and co-operating, I do not know. I must bear in mind that the father has been the subject of return orders in respect of the three older children, which have been systematically disobeyed over a period of about two years. Thus Mr. Turner is entitled to argue, and I take into account, that the father is in contempt of court and that in itself is a reason for not releasing funds to him. If all goes well, there will be no necessity for any hearing in advance of return for the children. I am sure that if they are not back by 15th October, but the flights are booked and Mr. Turner's legal team is satisfied that the children are almost on their way, I could take a different approach. But I am concerned not to create a situation where the release of funds for litigation gives more opportunity for obstruction, for further applications to adjourn, or to seek other relief which may stand in the way of the return of the children. That, together with the necessity to preserve what funds there are to support the mother's efforts to have the children returned to this jurisdiction, leads me to the conclusion that I must reject Mr. Devereux's application.