H v H (JURISDICTION TO GRANT WARDSHIP) [2011] EWCA Civ 796

Court of Appeal

Thorpe and Black LJJ and Sir Henry Brooke

8 July 2011

Jurisdiction – Wardship – Habitual residence – Whether it could be founded on parental habitual residence if child had never visited country in question – Whether prorogation possible on basis of concession that parent intended child to be resident in jurisdiction

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The father was a British citizen of Afghan origin; he married the Afghani mother in Afghanistan. About 20 days after giving birth to the child in Afghanistan, the mother came to England on a visa, leaving the child in Afghanistan in the care of an uncle. Less than a year later, the mother left the father, alleging domestic violence. Shortly afterwards the child was allegedly 'abducted' from the uncle's home; both the father and the uncle claimed they did not know the child's whereabouts. The mother believed that the father had arranged for the child to be removed and hidden from her, and issued wardship proceedings. At an ex parte hearing the judge ordered the father to bring the child into the jurisdiction. At the hearing on notice the father challenged the jurisdiction of the English court, while claiming that he wanted the child to live in England once found. Eventually the judge decided that the child was habitually resident in England, notwithstanding that he had never been to England, because both his parents were habitually resident in England and both parents were agreed that the child should live in England. He went on to find that the father was responsible for and complicit in the child's removal and made various orders against him, with penal notices attached, requiring him to return the child to the jurisdiction. The father appealed on the question of jurisdiction. At the appeal hearing the mother conceded that the child was not habitually resident in England, but argued that jurisdiction could be founded on prorogation and Art 12(3) of Brussels II Revised.

Held – allowing the appeal; setting aside the orders against the husband; discharging the wardship; requiring the father's passport to be returned to him – there was no jurisdiction over a child who was not and never had been habitually resident or present in the country in circumstances in which jurisdiction had not been conceded, even implicitly. In this case jurisdiction had been challenged at the first opportunity and that challenge had been maintained thereafter at every hearing, albeit not always in the clearest of language (see paras [47], [50], [52]).

Statutory provisions considered

Family Law Act 1986, ss 1(i)(d), 2(iii), 3(i)

Children Act 1989, s 9

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 6

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003), Art 12(3)

Cases referred to in judgment

A (Area of Freedom, Security and Justice), Re (Case C-523/07) [2009] 2 FLR 1, ECJ
Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FLR 951, CA
B; RB v FB and MA, (Forced Marriage: Wardship: Jurisdiction), Re [2008] EWHC 1436, [2008] 2 FLR 1624, FD
B v H (Habitual Residence: Wardship) [2002] 1 FLR 388, FD
I (A Child) (Contact Application: Jurisdiction), Re [2009] UK SC 10, [2010] AC 319, [2009] 3 WLR 1299, [2010] 1 FLR 361, [2010] 1 All ER 445, SC
Mercredi v Chaffe (C-497/10) [2011] 1 FLR 1293, CJEU
P-J (Abduction: Habitual Residence: Consent), Re [2009] EWCA Civ 588, [2009] 2 FLR 1051, CA
W and B v H (Child Abduction: Surrogacy), Re [2002] 1 FLR 1008, FD

Ruth Kirby for the appellant
Teertha Gupta for the respondent

Cur adv vult

THORPE LJ:

[1] This is an appeal, with the permission of my lady, Black LJ, from the judgment of His Honour Judge Cliffe sitting as a judge of the High Court in Leeds on 8 April 2011.

[2] In order to explain that hearing and to resolve the issues on this appeal it is necessary to set out in some detail the course of the proceedings prior to that hearing.

Family background

[3] However, before doing so, I will record in briefest detail the family history. The father is an Afghani who came to this country in 2001. He has acquired British citizenship. However, it was in Afghanistan that he subsequently married his first cousin. She gave birth to their son, S, in 2009. There is a second child of the marriage, born after its breakdown, with whom this appeal is hardly concerned.

[4] S was born in Afghanistan and when he was about 20 days of age his mother came to this country on a visa. S was left in the care of an uncle. He has not seen either parent since his mother's departure.

[5] Last autumn the mother left the marital home for a refuge alleging domestic violence.

[6] S left his uncle's care in January 2011. Mystery surrounds the circumstances as well as his location thereafter. The uncle and the father say that he was abducted from the garden. The mother believes that the husband has conveniently concealed his whereabouts having arranged his removal.

The proceedings

[7] On 3 February 2011 the mother issued wardship proceedings and at a hearing without notice on that day, Mostyn J confirmed the wardship and ordered the father to bring S within the jurisdiction.

[8] The return on notice was before Her Honour Judge Cahill QC sitting as a deputy High Court judge. The position statement of the mother's counsel in preparation for that hearing recorded that the wardship jurisdiction was challenged by the father. The position statement filed by the father's counsel

contained a firm challenge to jurisdiction on the simple ground that since S has never been within this jurisdiction it could not be held that he was habitually resident here.

[9] The order of Judge Cahill is prefaced with a recital that the father contested jurisdiction and then ordered determination, or further consideration, of the jurisdiction issue before a judge of the division on 31 March.

[10] In preparation for that hearing counsel for the mother recorded the father's challenge to jurisdiction and continued: 'It must be accepted that there is a valid jurisdictional question in this case that must be determined.'

[11] It was then acknowledged that the issue was not yet properly prepared for determination and an order was sought that the issue of jurisdiction should be listed upon receipt of the evidence with a time estimate of half a day.

[12] However, the writer commented that it would be open to the father, if he sought the assistance of the courts of this jurisdiction in locating S to vest the court with jurisdiction pursuant to Art 12(3) of Brussels II Revised.

[13] The position statement filed by the father's counsel on the eve of the hearing repeated and developed his case that the English court had no jurisdiction and that the continuation of the proceedings risked the waste of public funds.

[14] It was submitted that the issue of jurisdiction should be determined as a preliminary point at an early hearing before a judge of the division. However an agreement between the parties that the issue was not yet ready for trial was finally recorded.

[15] We have a transcript of the hearing before Mostyn J on 31 March. In opening, the mother's counsel submitted that the issue of jurisdiction should be adjourned with a timetable for the filing of evidence in preparation for a half day hearing before a judge of the division.

[16] Mostyn J took a pro-active line. He questioned the need for a preliminary issue since both parents sought to locate their lost child.

[17] Ms Kirby did not retreat from her challenge to jurisdiction. Mostyn J then sought to record mutual acceptance of the intention of the parties to bring S to this jurisdiction when arrangements could be made. Ms Kirby accepted that could be recorded as a matter of fact but on the basis that it did not invalidate her case on jurisdiction.

[18] The judge then turned to practicality and said that the half-day hearing should be listed before a s 9 judge on 8 April in Leeds.

[19] In response counsel for the mother suggested that the issue merited listing before a judge of the division and added that the issue would hardly be ready for determination on 8 April.

[20] Mostyn J was not impressed and by his order in para [6] directed that the hearing on 8 April should be before His Honour Judge Cliffe, in Leeds on 8 April:

> 'For further directions upon, and if possible determination of, the following issues:
>
> (a) the ongoing wardship of the subject children and, if appropriate, what, if any, further orders the court may wish to make in its exercise of its inherent jurisdiction, informed by the evidence of the parties, in seeking to

> ascertain the location of the child S and to secure his return to the jurisdiction of England and Wales.'

[21] The other two issues need not be recorded for the purposes of this appeal.

[22] Thus His Honour Judge Cliffe's first task was to determine, and if not, give directions upon, the ongoing wardship of S and what further orders might be made in the exercise of its inherent jurisdiction.

[23] What did that mean? The language is unfortunately ambiguous. Was it a direction for trial of the preliminary issue of jurisdiction or was it a determination of the court's powers to make protective orders pending the resolution of the jurisdiction issue? The latter alternative is live given observations made by Mostyn J on 31 March in that regard.

[24] Paragraph 6(a) of the order was drafted by counsel on 31 March but its language is essentially adoptive of the judge's words which we now see at para [8] of the transcript.

[25] The lack of clarity in the definition of the first issue to be determined by His Honour Judge Cliffe is regrettable and certainly contributed to the difficulties that surfaced on 8 April.

[26] The father's public funding on 31 March was for that day only. Funding for 8 April was sought but not authorised until late on 7 April and that authorisation was not communicated to his solicitors in Leeds until the morning of April 8. That was too late to instruct counsel and the solicitor with conduct of the case was not available. Mr Fox, another member of the firm, went to court to represent the father who he did not know. Nor had he had any previous acquaintance with the father's case. However a position statement was drafted on the eve of the hearing. Paragraph [2] records that despite the funding difficulties a sworn statement on the jurisdiction issue had been filed by the father, whilst the mother's affidavit was awaited.

[27] Then in para [5] the father's core case was repeated: no jurisdiction and a wrongful expenditure of public funds.

[28] As well as the judgment of His Honour Judge Cliffe we have a transcript of the proceedings. At para [7] the record demonstrates Mr Fox plainly challenging jurisdiction on the obvious ground that even had there been parental intention to import S it could never be said that he was habitually resident here.

[29] The judge then invited submissions from Mrs Cross who represented the mother. She had clearly prepared to meet the challenge to jurisdiction since she handed in an authorities bundle which certainly included *B v H (Habitual Residence: Wardship)* [2002] 1 FLR 388, *Re B; RB v FB and MA, (Forced Marriage: Wardship: Jurisdiction)* [2008] EWHC 1436, [2008] 2 FLR 1624 and *Re I (A Child) (Contact Application: Jurisdiction),* [2009] UK SC 10, [2010] AC 319, [2009] 3 WLR 1299, [2010] 1 FLR 361.

[30] In response, and in relation to *Re I (A Child) (Contact Application: Jurisdiction)*, Mr Fox pointed out the requirement for unequivocal acceptance. This exchange then followed:

> 'Judge Cliffe: I know that he is not accepting it in this case.
> Mr Fox: He is not.

> Judge Cliffe: I accept that he is not accepting it. I need to look at the issue of habitual residence. What is the habitual residence of this child and where does he get it from?'

[31] Debate between Mr Fox and the judge continued until the judge asked Mr Fox what was S's habitual residence at 14 days of age. When Mr Fox responded 'Afghanistan' the judge stated:

> 'He had one parent habitually resident in England, one parent wanting to be habitually resident in England and both parents with parental responsibility agreeing that he should live in England.'

[32] When Mr Fox conceded those facts the judge asked if there was anything else he wanted to say on the issue of habitual residence. Mr Fox responded: 'My Lord, no. I sense the way the wind is blowing in relation to this matter.'

[33] Mr Fox had not misjudged the situation. His Honour Judge Cliffe claimed habitual residence jurisdiction. His reasoning is all contained in para [15] of his judgment:

> 'This, it seems to me, goes to the central issue of determining the habitual residence of S. He was born in Afghanistan to parents who were married and therefore, according to English law, had parental responsibility for him. He was born at a time when it was the settled intention of both parents that he should reside in England with them. He was born to a father who had British nationality and a British passport and to a mother whose settled intention, as I have indicated, was to live in England and become habitually resident in England and who now can properly say that she is habitually resident in England. The child took his habitual residence as a result of those circumstances and it is absolutely clear that in considering those matters he was habitually resident in England, notwithstanding the fact that he had never been here. There is no other person who has any say in the matter who could have argued differently and that, in my view, gives this court the jurisdiction to continue to consider the application for wardship and what arrangements might be made to secure this child coming to England, which is actually what both parties want, and that is again confirmed to me today.'

[34] As well as legal argument the judge tackled an issue not defined in para 6 of the order of 31 March, namely, the circumstances surrounding S's removal from his uncle's house. On that issue he heard oral evidence from the mother by video link and from the father. An interpreter was found at short notice on Mr Fox's submission that it was necessary for the father. His Honour Judge Cliffe terminated the investigation on the completion of the father's evidence in chief, accepted the mother's evidence, rejected the father's evidence and held that the father was responsible for, and complicit in, S's removal. He went on to make swingeing orders against the father. He said that the father must bring S within the jurisdiction by 4 pm on 1 May. He continued:

> 'There will be a penal notice attached to that order because, as I have found, he is a man who can make sure that that happens. If he fails to do it he will be in contempt of court and the matter will be listed for further directions in the week commencing 3 May. If the child is not then back in England I shall deal with the father's contempt. What Mr [H] needs to understand is that the court is not going to be hoodwinked by these stories. The court has now made an order based on hearing evidence. The order will be complied with or Mr [H] will be sent to prison. 2 pm, 3 May. The case will be heard in Leeds.'

[35] His Honour Judge Cliffe was not deterred by the consideration that S did not have either a passport or visa clearance.

[36] On this appeal for the father Ms Ruth Kirby settled a full skeleton argument in which she developed her primary contention that His Honour Judge Cliffe was wrong in law to find jurisdiction. She rightly submits that jurisdiction is governed by s 1(i)(d), s 2(iii) and s 3(i) of the Family Law Act 1986.

[37] She relies on the decision of this court in *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951, recently confirmed by the decision in this court *Re P-J (Abduction: Habitual Residence: Consent),* [2009] EWCA Civ 588, [2009] 2 FLR 1051.

[38] She emphasised that the decision of Charles J in *B v H (Habitual Residence: Wardship)* was reached on exceptional facts and contains no proposition of general application. She relies upon the subsequent judgment of Hedley J in *Re W and B v H (Child Abduction: Surrogacy)* [2002] 1 FLR 1008, para [23], in which he observed:

> 'It seems to me that if Charles J's proposition cited above, if taken out of the context of his particular case, run the very risk against which the Court of Appeal have repeatedly warned namely confusing a legal and a factual proposition. If Charles J is asserting as a matter of law that a baby takes the habitual residence of his parents then that is to confuse domicile with habitual residence and I would have to respectfully disagree. If what he asserts is a proposition of fact, then, by definition, it cannot be good for all cases. Each one must stand alone.'

[39] Of *Re B; RB v FB and MA, (Forced Marriage: Wardship: Jurisdiction)*, Ms Kirby submits that the decision was driven by the circumstances of a marriage forced on a 15 year old and that the judge had relied on 'dire circumstances' in order to 'rescue her'.

[40] Finally, Ms Kirby submits that His Honour Judge Cliffe's reasoning is not sustainable in the light of the decisions in the Court of Justice of the European Community, namely *Re A (Area of Freedom, Security and Justice), (Case C-523/07)* [2009] 2 FLR 1 and *Mercredi v Chaffe* [2011] 1 FLR 1293.

[41] I have taken Ms Kirby's legal submission at a pace because at the close of his submissions Mr Teertha Gupta made the concession implicit in his skeleton argument that he could not support the judge's finding of jurisdiction based on S's habitual residence.

[42] Ms Kirby also advanced a well prepared argument that the hearing before His Honour Judge Cliffe was procedurally deficient and flawed and

violated her client's Art 6 rights. Although that submission appeared arguable on a reading of her skeleton, it dissipates on an examination of the full transcript. The father was represented throughout by Mr Fox. Mr Fox laboured under very great difficulties. However, he did not unfold those difficulties to the judge as grounds of an application for adjournment. He did not object to the judge's determination of the issue on the grounds that it had not been anticipated by either side as fit for determination on 8 April. Having asserted his challenge he found himself drawn into a determination for which he was hardly prepared. He asked for an interpreter and the judge ensured that an interpreter was found.

[43] In all the circumstances His Honour Judge Cliffe is not be criticised for the robust way in which he went to the heart of the dispute both factually and legally. Counsel for the mother cited the authorities that supported her core submission and the judge's attention was not drawn to the authorities that undermined her submission. It would hardly be fair to criticise Mr Fox who was doing his best in very difficult circumstances.

[44] In conclusion I would not uphold Ms Kirby's submissions of procedural unfairness and violation of Art 6 rights.

[45] It remains to deal with the submissions raised by Mr Gupta to support a basis of jurisdiction which cannot rest on the foundation of habitual residence. He seeks to shore up the judge's conclusion by reliance on prorogation and Art 12(3) of Brussels II Revised. Despite all the skill with which the argument is advanced it is, in my view, hopeless.

[46] At the first hearing on notice before Her Honour Judge Cahill the father's challenge to jurisdiction is clearly recorded. Mr Gupta seeks to suggest that the father accepted the court's jurisdiction at the hearing before Mostyn J on 31 March.

[47] Whilst Ms Kirby's submissions were not as clear as they might have been in asserting a steadfast challenge to jurisdiction, she certainly never conceded jurisdiction even implicitly and her case overall is one of persistent challenge.

[48] Mr Gupta relies upon a sentence in para 13 in Ms Kirby's skeleton for the purposes of this appeal: 'The issue of jurisdiction was not on the 'agenda' for the hearing on 8 April.' That statement can only be justified by a construction of para 6(a) of the order of 31 March which is not tenable.

[49] Mr Gupta points to the fact that the position statement of 30 March expressly drew attention to the father's option to confer jurisdiction under Art 12(3) in order to enlist the aid of the court to safeguard S. However, that is no more than a paragraph in a position statement which was pursued by no one on 31 March.

[50] Thus the clearest picture emerges. Jurisdiction was challenged on 16 February. The challenge was not withdrawn but maintained on 31 March, albeit not in the clearest of language. It was emphatically maintained on 8 April and the judge himself recorded that the father was not accepting a prorogued jurisdiction.

[51] Even more fatal for Mr Gupta is that Mrs Cross, in her submissions on the authority of *Re I (A Child) (Contact Application: Jurisdiction)*, accepted that there was no acquiescence or agreement.

[52] The consequence of my conclusion is clear: the appeal should be allowed, the orders of His Honour Judge Cliffe should be set aside and the

wardship in relation to both the children discharged. The wardship in relation to S is discharged because there is no jurisdiction over a child who is not and has never been habitually resident or present here. The wardship is discharged in relation to his sister, who is here, because whatever orders are required in her case can more properly be made under the provisions of the Children Act 1989. Once the proceedings in relation to S are dismissed the father is clearly entitled to the return of his passport and this court will make whatever order or direction is necessary for its release.

BLACK LJ:
I agree.

SIR HENRY BROOKE:
I agree.

Order accordingly.

Solicitors: *Jones Myers llp* for the appellant
Dawson Cornwell for the respondent

PHILIPPA JOHNSON
Law Reporter