9 September 2013

PRESS SUMMARY

In the matter of A (Children) (AP) [2013] UKSC 60
On appeal from [2012] EWCA Civ 1396 and [2013] EWCA Civ 232

JUSTICES: Lady Hale (Deputy President), Lord Wilson, Lord Reed, Lord Hughes, Lord Toulson

BACKGROUND TO THE APPEAL

The issue in this appeal is whether the High Court of England and Wales has jurisdiction to order the 'return' to this country of a small child who has never been present here on the basis that he is habitually resident here or that he has British nationality.

The child, called Haroon in the judgment, was born on 20 October 2010 in Pakistan. His father was born in England and his mother in Pakistan. They married in Pakistan in 1999 and lived in England from 2000. They have four children: two daughters, born in 2001 and 2002, and two sons, one born in 2005 and Haroon. The father and the first three children, who were born in England, have dual British and Pakistani nationality and the mother has indefinite leave to remain in the United Kingdom.

From 2006 the father began to spend a lot of time in Pakistan. The marriage was unhappy and in 2008 the mother moved into a refuge with her three children complaining of abuse. The mother arranged a three week trip to Pakistan in October 2009, in order to visit her father with the children. When she was there she was put under pressure by her father, her husband and his family to reconcile with her husband and was forced to give up the children's passports. She strongly wished to return to England and telephoned the refuge asking for their help to return from February 2010, when she became pregnant with Haroon. Eventually in May 2011 her family helped her to return to England without the children and she began proceedings for their return in the High Court. On 20 June 2011 all four children were made wards of court and the father was ordered to return them forthwith.

The father challenged the jurisdiction of the court to make orders for the return of the children. The judge found that all four children were habitually resident in England and Wales as the mother had not agreed that the children should live in Pakistan. The older children had retained their habitual residence in England. Haroon had habitual residence because he was born to a mother who was being kept in Pakistan against her will. The Court of Appeal by a majority allowed the father's appeal in relation to Haroon only, on the ground that habitual residence was a question of fact (rather than deriving from the habitual residence of the parents) and required physical presence in the country.

JUDGMENT

The Supreme Court unanimously allows the mother's appeal and holds that the court had inherent jurisdiction to make the orders in this case on the basis of Haroon's British nationality. The case is however remitted to the judge to consider as a matter of urgency whether it is appropriate to exercise this exceptional jurisdiction. Lady Hale gives the main judgment, with which Lord Wilson, Lord Reed, and Lord Toulson agree. Lord Hughes gives an additional judgment explaining why he would have held that Haroon was habitually resident in the circumstances of this case.

REASONS FOR THE JUDGMENT

- The orders exercising the court's wardship jurisdiction in this case did not fall within Part 1 of the Family Law Act 1986 ('the 1986 Act') [**26-28**]. They did relate to parental responsibility within the scope of Council Regulation (EC) No 2201/2003 (the Brussels II revised Regulation)('the Regulation') [**29**], which applied regardless of whether there was alternative jurisdiction in a non-member state [**33**]. The question was whether there was jurisdiction under article 8 of the Regulation, which depended on where the child was habitually resident [**34**].
- Habitual residence is a question of fact and not a legal concept such as domicile. It is desirable that the test for habitual residence be the same for the purposes of the 1986 Act, the Hague Child Abduction Convention and the Regulation, namely that adopted by the Court of Justice of the European Union ('CJEU')for the purposes of the Regulation [**35-39**]. The CJEU has ruled that habitual residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. This depends on numerous factors including the reasons for the family's stay in the country in question [**54**].
- Four of the justices held that presence was a necessary precursor to residence. A child could not be integrated into the social environment of a place to which his primary carer had never taken him. Lord Hughes, by contrast, would have held that in these circumstances the child acquired the habitual residence of his mother. The CJEU had not had to consider a case with facts as stark as this, where the only reason that the child had been born in a particular place was because the mother had been deprived of her autonomy to choose where to give birth, and if it had been necessary to decide the appeal under the Regulation, the Supreme Court would have made a reference to it [**58**].
- There was however another basis of jurisdiction which was open to the court to exercise in this case. By Article 14 of the Regulation, the common law rules as to the inherent jurisdiction of the High Court continue to apply if the child is not habitually resident in a Member State. The Crown retained the ancient power as *parens patriae* over those who owe it allegiance as British nationals. For most types of order this jurisdiction was removed by the 1986 Act but not for the order for return made in this case [**60**]. The judge below did not address herself to this basis of jurisdiction and whether it would be appropriate to exercise it. The case should be remitted to the High Court for it to be considered, in the light of the particular circumstances of this case [**64-65**]. If the court declined to exercise this jurisdiction, it would remain open to the mother to seek a reference to the CJEU on the issue of habitual residence [**67**].
- Lord Hughes in an additional judgment did not accept that it was a minimum legal requirement of habitual residence that there had at some time been physical presence. This was tantamount to a rule when a purely factual enquiry was required. With a very young child the important environment was essentially a family one. Haroon's family unit had its habitual residence in England. He therefore would have held that Haroon was habitually resident in England and Wales [**93**].

References in square brackets are to paragraphs in the judgment