RE S (WARDSHIP: PEREMPTORY RETURN) [2010] EWCA Civ 465

Court of Appeal

Wall LJ and Baron J

25 March 2010

Care – Wardship – Peremptory removal of child to Spain by parent after justices refused to make emergency protection order – Retention in Spain by both parents – Whether habitual residence in England lost – Whether order for peremptory return justified

The local authority, having discovered the 7-year-old child living in unsanitary conditions, was concerned that the Italian mother was seriously neglecting the child. However, the justices refused to make the emergency protection order sought by the authority because, by the time the application came before them, the mother had made an effort and the child was reasonably well fed and quite cheerful. The mother immediately removed the child, who had spent her life hitherto in England, to Spain, where the father was living. The authority initiated care proceedings, and made an emergency application for leave to invoke the wardship jurisdiction under s 100(4)(a) of the Children Act 1989 with a view to ensuring that the child returned to the jurisdiction. The court accepted that the authority could not achieve the result sought by any means other than wardship, made the child a ward of court and required the parents to return her to the jurisdiction. The parents appealed, arguing that the child had lost her habitual residence in England and was now habitually resident in Spain and that, therefore, there had been no jurisdiction to ward the child. They contended that the child's removal from the jurisdiction had been entirely lawful, in that the mother had merely exercised her parental responsibility in choosing to take the child abroad, and that they were, as parents, entitled to retain the child in Spain.

Held – allowing the appeal in part; upholding the wardship but setting aside the order for peremptory return and staying the child's return until determination of the local authority's application for interim care within 14 days –

(1) The issue of habitual residence was an open question, to be decided on proper evidence and after full argument, but for the purposes of an emergency application the judge had been entitled to proceed on the basis that a child who had lived in England all her life and had been peremptorily removed, albeit by a parent, had not lost her habitual residence in England (see para [13]).

(2) A judge was entitled to say that if there had been a lawful removal and a lawful retention abroad, and if the Hague Convention did not apply, then the only basis upon which the child could be returned to the jurisdiction was by wardship, and to conclude that s 100(4)(a) of the Children Act 1989, therefore, applied. On the information provided by the local authority in this case it had been open to the judge, on an emergency basis, to say that there was a likelihood that if the inherent jurisdiction were not exercised the child was likely to suffer significant harm and to ward the child (see para [14]).

(3) However, an order for the peremptory return of the child was not justified in a case in which, unlike a conventional kidnap case, the child had been taken by the mother, exercising parental responsibility, to live with the father and the father's relations. This welfare equation was not so stark as to require the immediate removal of the child from Spain; that was a welfare decision to be taken on proper evidence (see para [15]).

(4) If the local authority were to exercise its statutory functions it could do so only by way of interim care order; there needed to be an interim care hearing swiftly (within

14 days). Importantly it should be possible in that time for the judge to have a full and proper report from the Spanish authorities as to the circumstances in which the child was currently living (see para [17]).

Statutory provisions considered

Children Act 1989, s 100(2), (4), Part III

Hague Convention on the Civil Aspects of International Child Abduction 1980

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) OJ L 338/1

Jane Rayson for the father
Marianna Hildyard QC leading *Keiran Pugh* for the mother
Richard Balchin for the local authority
Sandra Fisher for the child/guardian

WALL LJ:

[1] This is an application by the parents of a young girl, called A, born on 19 November 2002, so 7 years' old, for permission to appeal against various orders made by Her Honour Judge Hughes QC on 19 March 2010.

[2] The case has come very quickly to this court, as will be apparent, and it has been listed for permission with the appeal to follow if permission is granted. It is a very interesting case in a number of ways because it raises a number of issues. I would, if I may, like to congratulate counsel on the very full preparation which they have managed to achieve in a very short space of time.

[3] The essence of the background is as follows. The mother is 34; she is Italian by origin, although she has strong ties with Spain. The father is himself Spanish and lives in Spain with his family. He is 35. Apparently he has lived there for most of his life and is a Spanish speaker. A has spent most of her time, we are told, in England, although she has travelled to Spain from time to time and she has dual Italian and Spanish citizenship.

[4] The parents are not married, although, as I say, the extended family on the father's side, and I think possibly even on both sides, lives in Spain. There have been a number of contacts between the mother and local social services and it is quite plain that there have been a number of anxieties about the way that A has been brought up by her mother, and during the course of the early part of this year there were several reports from third parties about A's condition. This led to visits by the local authority and, as is so often the case, initial access was not obtainable, and eventually entry had to be made using the assistance of the police. To put the matter shortly, it was plainly found that A was living in what I think one of the workers, or possibly one of the police officers, described as a tip: clearly in unsanitary conditions. There was a question as to whether the mother was under the influence of alcohol or drugs, or both, and quite clearly the local authority had legitimate cause for concern about the circumstances in which A was living.

[5] What happened was, initially, the police took a police protection order, and then the local authority applied to the Inner London Family Proceedings Court for an emergency protection order. However, by the time they did that the mother had made some effort to sort herself out. A appeared to be reasonably well fed and quite cheerful, and the justices refused to make an

EPO. That meant, of course, that there was no statutory power on the local authority's part for further intervention. The mother had refused the question of A being accommodated under Part III of the Children Act 1989; so the local authority, quite properly in those circumstances, took care proceedings in the local family proceedings court.

[6] What they also did was to apply, initially to Ryder J and then to Her Honour Judge Hughes, to ward A with a view to getting her back to the UK, because the one part of the story which I have left out so far, which, of course, is the most important, is that, once the justices had refused to make an emergency application order, the mother upped sticks and went to Spain with A and handed A over to her father and, as far as we are aware (and we have a very short report from Spanish social services based largely on information given by the father), A, mother and father are all now in Spain.

[7] Ryder J declined to intervene on the grounds that the case was better dealt with by way of interim care proceedings; and so it was that the matter came before Her Honour Judge Hughes later the same day. The judge decided that she would ward the child. She made a series of orders in relation to the child, having warded her, that she was to be returned by the specified time – that is, by midnight on 24 March – and that, in the event of her being returned, evidence was to be filed; there was to be a penal notice attached; there was to be a hearing on Friday, 26 March in the Principal Registry, and there was leave for the local authority to inform the local social services in Madrid of the existence of the order, which was to be translated into Spanish, and the local authority was also to inform the mother of the order that had been made. The order itself does not give the local authority permission to apply to invoke the inherent jurisdiction, and the oversight is no doubt due to the speed with which the matter came before the judge.

[8] Both parents now come to this court, and they say a number of things. The first thing they say is that the removal of A to Spain was perfectly lawful. The mother has parental responsibility as the child's mother. Lawfully exercising that parental responsibility she has taken the child abroad; there was, therefore, no unlawful removal under the Hague Convention on the Civil Aspects of International Child Abduction 1980; and the retention of the child in Spain by her father is, once again, a single event, perfectly lawful, and, therefore, the child is lawfully in Spain. They apply to this court today effectively to set aside the order of the judge, saying that she should not have warded the child; she should have been given permission for the local authority to invoke s 100, and in any event the order for returning the child was, in the circumstances, wrong.

[9] Section 100(4) which is relevant for this purpose reads as follows:

> 'The court may only grant leave if it is satisfied that—
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> (a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and
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> (b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.'

[10] Subsection 5 reads thus:

'This subsection applies to any order—

(a) made otherwise than in the exercise of the court's inherent jurisdiction; and
(b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted).'

[11] The position taken by the parents, therefore, today is that the child has lost her English habitual residence; that she is now habitually resident in Spain. There was no jurisdiction in the first place to invoke the wardship jurisdiction because the child was no longer habitually resident in England and was not here, and in any event the court should not have granted leave under s 100(4). Furthermore, it is said that the welfare decision to order the peremptory return of the child was itself plainly wrong. The proper course was for there to be a contested interim care order application to be heard with both parties, or all parties, present, and for the court then to make welfare decisions based on the outcome of that hearing.

[12] For the local authority it is said that here is a child who was plainly at risk. The local authority is very concerned about her welfare. If she is returned to this jurisdiction it will likely be to the care of foster parents, but she should be back within this jurisdiction so that the local authority can exercise its statutory functions in relation to her, and that is the position which, as I understand it, is also supported by the duty guardian instructed on behalf of Cafcass.

[13] In my judgment, bearing in mind that this was all done with great speed, it remains an open question, and one which needs to be decided on proper evidence and after full argument, as to whether this child has indeed lost her habitual residence in England. Certainly, for the purposes of an emergency application it was, in my view, properly open to the judge to take the view that, as the child had lived here throughout and had been peremptorily removed, albeit by one parent, nonetheless she had not lost her habitual residence in England. That may or may not be true on ultimate analysis, but, in my judgment, it was open to the judge to proceed on the basis that she did have jurisdiction because the child was habitually resident in England.

[14] Secondly, although I find this slightly more difficult, it seems to me that, on the emergency basis, a judge in the position of Her Honour Judge Hughes is entitled to say that if this has been a lawful removal, and if there is a lawful retention, and if the Hague Convention does not apply, then the only basis upon which this child can be returned to the jurisdiction of England and Wales is by wardship; and therefore subs (b) of s 100(4) applies. Equally, it seems to me, on the information provided to her by the local authority, given the circumstances in which the child had been found only a few days before, that it was open to the judge on an emergency basis to say that there is a likelihood in those circumstances that, if the court's inherent jurisdiction is not exercised, she is likely to suffer significant harm. So, in my judgment, the court was in the circumstances entitled to ward the child.

[15] Where I part company from the judge – and I do so with hesitation – is in the welfare decision which she then took, which was that the child should be immediately and peremptorily returned to this country. This is not, if I may

say so, on the face of it at least, an ordinary kidnapping case. It is not a case in which a child has been snatched from one parent and removed to a foreign jurisdiction by another; this is a case in which a child has been taken by her mother, exercising parental responsibility, to live with her father and her father's relations. There is a powerful case for saying this, therefore, is not a case within the Hague Convention; it is not a conventional kidnap and, moreover, when one comes to balance welfare issues and one looks on the one side at the child living, as she has done in the past, with her paternal family in Spain, and, on the other hand, with foster parents in England, the welfare equation, in my view, is not so stark as to require the immediate removal of the child from Spain and her immediate peremptory return to England. That seems to be a welfare decision which ought to be taken on proper evidence, with evidence from the parties and no doubt with a report from the local social services.

[16] Speaking for myself, what I would do is uphold the order of the judge in so far as it makes A a ward of court, but I would stay the order for peremptory return in the circumstances I am about to describe.

[17] Clearly, if the local authority is to exercise its statutory functions in this case, the only way it can really properly do so, in my view, is by way of an interim care order, and therefore, as indeed the local authority submits, there needs to be a hearing, swiftly, to deal with the question of interim care. Where should this child reside, and what status should she have pending a full determination of her future? It so happens that pursuant to the order the matter can be returned to Her Honour Judge Hughes tomorrow. The judge predicated the order for return tomorrow on the basis that the child would be returned, but in my view, that predication should be set aside. What should happen, in my view, is that there should tomorrow be a directions hearing before the judge in which she can give directions for the filing of appropriate evidence in relation to A's welfare, and then a hearing of an interim care order within the ensuing fortnight, at the very latest within 14 working days, to decide where A should live for the foreseeable future and under what regime. That, it seems to me, will give the parents the opportunity to file appropriate evidence; it will give the opportunity for inquiries to be made in Spain. Spain is, after all, a member of the EC. It is not very far away, and with modern methods of communication it should be possible for the judge to have, very shortly, a full and proper report as to the circumstances in which the child is currently living. The judge can then decide on proper evidence, having heard both sides, or having heard all sides, including, I hope, the child's representative, as to whether or not there should be an interim care order and, if so, whether or not the child should be returned.

[18] Clearly, in those circumstances the court took the view that the child's welfare required peremptory return. The only process for return would be wardship. The court was plainly of the view that it was in the interests of the child to return to this jurisdiction, and the court might well find itself within s 100 of the Act in those circumstances; these are all matters for the judge. Equally, on the other side, speaking for myself, I would leave open to the parents the arguments that they wish to advance, namely that the child is no longer habitually resident in the UK and that the Hague Convention does not apply. But it would seem to me, particularly with the advent of 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) OJ L 338/1, the possibility is that the parents might well take proceedings in Spain in relation to this child, and the English court would be foolish to discharge the wardship on a technical basis at this point only for it to be reimposed in a few days' time.

[19] Speaking for myself, the order I propose would be as follows: the wardship should stand; the order for the peremptory return of the child should be set aside, and the return of the child should be stayed until such time as the court has determined the application for interim care. The matter should be listed before Her Honour Judge Hughes tomorrow morning. I imagine it will have to be a directions appointment with all arguments left open to all sides to develop, and for the hearing of the application for interim care to be finally determined within a period of 14 days from tomorrow.

[20] I hope that covers the ground. The only point outstanding is whether or not the child can be represented at the hearing before the judge. We all know the difficulties that Cafcass faces, in particular in the London area, but I hope very much that, as the duty guardian who has been able to attend today has indicated, the particular individual could be appointed for the hearing before the judge, but that application can be made to the judge tomorrow and, if need be, the judge can appoint a guardian tomorrow. I do not think it would be for us to do so this afternoon. Therefore, I would propose that we allow the appeal to the extent of setting aside the order for the peremptory return and directing that the question of return be reconsidered as and when the judge determines the application for interim care. That is the order I propose.

BARON J:

[21] I agree with that. I think it is vital that the case is heard within the next 14 days and that, if it requires certification that it is fit for vacation business, I would certify that as just.

Application granted.

Solicitors: *Miles and Partners* for the father
Farrell Matthews and Weir for the mother
A local authority solicitor
TV Edwards LLP for the child

PHILIPPA JOHNSON
Law Reporter