Case no: B6/2013/0328

Neutral Citation Number: [2013] EWCA Civ 1060
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PRINCIPAL REGISTRY
FAMILY DIVISION
(HER HONOUR JUDGE NEWTON)

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 2 July 2013

B e f o r e:

LORD JUSTICE SULLIVAN
LADY JUSTICE BLACK
and
LORD JUSTICE RYDER

- -

Between:

SAWARD

Applicant

-and-

SAWARD

Respondent

- -

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Mrs C Kumar (instructed by the Bar Pro Bono Unit) appeared on behalf of the **Applicant.**

The **Respondent** did not appear and was not represented.

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J U D G M E N T **LADY JUSTICE BLACK**:

1. This is an application for permission to appeal against an order made by HHJ Newton on 25 October 2012 in divorce proceedings. The judge set aside a decree nisi that had been granted on 11 November 2011 in relation to the marriage of Mrs Saward (the wife) and Mr Saward (the husband). The basis for the order that the judge made was that the English court had no jurisdiction to entertain the divorce proceedings.

2. The decree nisi had been granted on the wife's divorce petition and she now seeks to appeal against Judge Newton's decision arguing that there was in fact jurisdiction in the English court under Article 3.1 of Council Regulation (EC) No 2201/2003 on the basis that the respondent husband is habitually resident here. She argues that Judge Newton erred in her approach to the question of habitual residence under the Regulation and should have found that the husband was habitually resident in this country.

3. Both parties are in their 60s. The husband is a British national. The wife is a national of Romania and Canada. The husband has been living in Spain since 2002. The parties met in Spain in 2005 and started to live together there that year. They were married in Gibraltar in 2009. The marriage finally broke down in June 2011. The wife petitioned for divorce on the basis of the husband's behaviour in a petition issued on 1 July 2011.

4. The question of jurisdiction was not dealt with satisfactorily initially. In the petition the space where the basis for jurisdiction is meant to be specified was left blank. The husband did not take any point on jurisdiction in his acknowledgment of service, but he did indicate in response to questions which were posed on the acknowledgment of service form that he was habitually resident and domiciled in Spain.

5. Ancillary relief is at the heart of the dispute over whether the English court has jurisdiction. That has been clear from the submissions made to us this morning by Mrs Kumar. It is no surprise, therefore, that after the issue of the petition, ancillary relief proceedings were speedily got under way.

6. On 11 December 2011 a decree nisi was pronounced, as I have said, then the husband instructed new solicitors, who wrote to the court on 28 February 2012 challenging jurisdiction, and an application to set aside the decree nisi was filed and made its way to Judge Newton. It was common ground between the parties in front of Judge Newton that the fact that the husband had apparently accepted jurisdiction in his acknowledgment of service and participated in the proceedings thereafter, both the divorce and ancillary relief proceedings, did not prevent him from making an effective challenge to jurisdiction later, and the court had to determine whether or not there was in fact jurisdiction.

7. Habitual residence has, as Judge Newton recognised, an autonomous meaning for the purposes of the Brussels Regulation. It is not the same as habitual residence under domestic law. The judge worked on the basis, correctly, that a person's habitual residence is the place where they have established on a fixed basis the permanent or habitual centre

of their interests, with all the relevant factors being taken into account for the purpose of determining such residence. There is no criticism of her statement of that approach. The wife's criticism is, as originally drafted, that the judge focused on the husband's intention as to where he resided, rather than reflecting his intention as to his centre of interests which, it is said, would have driven her to the opposite conclusion, that is that he is habitually resident here rather than in Spain.

8. Various High Court decisions on the subject of habitual residence for the purpose of this Council Regulation have been cited, but as there is no complaint about the way in which the judge dealt with the law as opposed to its application to these facts, I do not need to go into those.

9. As put to us today, it seems to me that the argument put forward on behalf of the wife can be stated very simply. It is really that the judge focused on residence rather than on the husband's centre of interests, and that led to her giving insufficient weight to a number of factors which would have suggested to her that he was in fact habitually resident in this country. In particular, it is argued that she should have given weight to (1) his business interests and the sources of his income which are in this country, namely the housing that he rents out and his UK based state and private pensions; (2) the fact that the majority of his assets are in the UK; (3) the fact that he transferred some damages from some Spanish litigation here in 2010 and also the proceeds of a property which he sold in Spain in 2011; (4) that he pays taxes as if he is domiciled in the UK; (5) that he has continued to use an address here for significant legal documents such as his will and tenancy agreement; and (6) that he has not renewed his residence certificate which expired in Spain in 2009.

10. Judge Newton carefully evaluated all the factors that were before and against habitual residence in this country. The factors on which counsel relies in her argument were all featured on the judge's list. She added to that list that at times the husband had evinced an intention to return to the United Kingdom, however she concluded that the factors against habitual residence here outweighed the factors for it. Those included the length of time that the husband had lived in Spain; the fact that he has no home here, no car, no personal items; the fact that the matrimonial home was always in Spain; the small number of the husband's visits to this country; the fact that the husband got residency in Spain in 2009 (I say as an aside that it may be that which explains why he has not renewed his residence certificate); the fact that he dealt with his pension, tax and business affairs in Spain using his Spanish address; the e-mail correspondence which the judge felt showed that the husband had come here to work on his yacht thus accounting for his increased number of visits recently, with the objective of taking that back to Spain; and the e-mail correspondence that she took the view also showed that he had in fact no plans to live in this country.

11. I am conscious that there is no Court of Appeal authority as yet concerning the question of habitual residence in the Brussels Regulation, but I am not persuaded that this is a case in which permission to appeal should be given so that this court can consider that matter.

It is not a case which, as is clear from the submissions made by Mrs Kumar, turns on any legal arguments.

12. It is clear to me that all the relevant factors which should have been taken into account in this case were in fact taken into account by Judge Newton, and it is not suggested that she took into account any factors which were irrelevant. The most that could be said by way of an appeal is that she gave the wrong weight to the factors, that she took them into account or viewed them in some way from the wrong end of the telescope looking at residence rather than centre of interests. It does not seem to me that this is a case in which there is any real prospect of persuading this court that the judge was wrong in the way she approached the factors and considered them and therefore it does not seem to me appropriate that permission to appeal should be granted in relation to the judge's granting of the order setting aside the decree.

13. Today, counsel added two further points to her proposed grounds of appeal which do not feature in the document as drafted or in the skeleton argument in support of it. Those grounds concern the costs of the proceedings. They fall into two parts. The judge ordered the wife to pay the husband's costs of the petition, and as far as I understand it made no order as to the costs of the ancillary relief proceedings. It is argued that there should not have been an order for the husband to have the costs of the divorce proceedings because he was late in opposing the jurisdiction of the court.

14. However, the fact is that there was no jurisdiction, that the husband succeeded in his application to have the decree nisi set aside. It would have been better to raise the matter sooner, but equally it can be said that the wife did not plead the matter properly in the petition. In those circumstances it seems to me entirely within the discretion of the judge to take the view that she did with regard to the costs of the petition, and there is no prospect of a successful appeal against that.

15. As to the argument that the wife should have got her costs of the ancillary relief proceedings, that proceeds on a similar sort of basis, that is to say that the husband actually participated in those proceedings without complaining that there was no jurisdiction for the matter to be before the court in the first place. What the judge did in that respect amounted, in essence, to each party ending up with the payment of their own costs rather than recovering anything from the other party, and it seems to me that that is an order which could not be criticised successfully on appeal. I would not therefore give permission to appeal in relation to either of those matters.

LORD JUSTICE RYDER:

16. I agree.

LORD JUSTICE SULLIVAN:

17. I also agree.

Order: Application refused