

UK Supreme Court Rules on Inherent Jurisdiction to Order Return of Children

On 4 December 2013, the UK Supreme Court delivered its judgment in *In the matter of KL (A Child)*.

The Court issued the following press summary.

BACKGROUND TO THE APPEAL

This appeal arises from proceedings under the Hague Convention on the Civil Aspects of International Child Abduction ('the Convention'). The Convention establishes procedures to ensure the prompt return of children to the state of their habitual residence. The question arising is the approach that the courts of this country should take when a child is brought here pursuant to an order made abroad in Convention proceedings which is later overturned on appeal.

The proceedings concern a child, K, who was born in 2006 in Texas and is a United States citizen. His father is also a US citizen; his mother came to the UK from Ghana as a very young child and she has indefinite leave to remain in the UK. They married in Texas in December 2005 and lived together there. The marriage broke up and in March 2008 the father issued divorce proceedings in the Texas state court. That court made orders by consent providing for the mother to take care of K (in the former matrimonial home) while the father was posted abroad on military service. In July 2008 she took him to London. In March 2010 a welfare-based custody hearing took place in the Texas court in which both parents were represented. The judge in those proceedings decided that it was in K's best interests that he reside with his father and have contact with his mother. As a result K moved back to the US.

The mother applied to the US Federal District Court for an order under the Convention, alleging that K had been habitually resident in the UK in March 2010 and that K had been wrongfully retained in Texas by the father. This argument succeeded in the District Court in August 2011. The father complied with the order to return K and his passport to the mother, whereupon the mother returned

to the UK with K and they have lived here ever since. The father appealed against the order. On 31 July 2012 the US Court of Appeals for the Fifth Circuit overturned the decision of the District Court and on 29 August 2012 the District Court ordered K's return to the US. When the mother did not comply, the father issued applications under the Convention in the UK. He argued that the mother's retention of K in the UK was wrongful because K's habitual residence had remained in the US. He further argued that the UK court should exercise its inherent jurisdiction to return K to the US in the circumstances of his case, even if it was not required to do so under the Convention.

On 17 January 2013 the judge in the High Court dismissed the father's applications, and his decision was upheld on appeal to the Court of Appeal. The Supreme Court granted the father permission to appeal on the grounds that K had been wrongfully retained in the UK after 29 August 2012 under the Convention and/or that the court should order his return to the US under its inherent jurisdiction.

JUDGMENT

The Supreme Court unanimously allows the appeal by the father and orders the return of K to the US on the basis of the undertakings offered by the father to enable the mother to live in Texas, independently of the father and sharing the care of K between them, pending any application she might make to the Texas court to modify the order relating to K's residence. The sole judgment is given by Lady Hale.

REASONS FOR THE JUDGMENT

Convention proceedings

The father's application could only succeed if K was habitually resident in the US when the US Court of Appeals overturned the earlier order of the District Court in the mother's favour. [17]. The Convention does not define habitual residence but the UK applies the concept of habitual residence adopted by most member states of the European Union, namely that it is a question of fact and corresponds to the place which reflects some degree of integration by the child in a social and family environment [20]. Parental intention plays a part in establishing or changing a child's residence and this has to be factored in with all the other relevant factors in deciding whether a move from one country to another has a sufficient degree of

stability to amount to a change of habitual residence [23].

In this case, the move of the mother with K to the UK in August 2011 was intended by her to be permanent and neither she nor K will have perceived it as temporary, notwithstanding the appeal. K became integrated into a social and family environment in the UK during the year before the appeal succeeded [26]. The judge was entitled to hold that K had become habitually resident in the UK by 29 August 2012 [27]. Thus the father was not entitled to an order for K's return under the Convention.

Inherent jurisdiction

Under the Family Law Act 1986 the High Court has power to exercise its inherent jurisdiction in relation to children by virtue of the child's habitual residence and presence here. Before the Convention was adopted this jurisdiction was used to secure the prompt return of children who had been wrongfully removed from their home country. The existence of an order made by a competent foreign court is a relevant factor in deciding whether to exercise it [28].

The judge did not ask himself the correct question, which is whether it is in K's best interests to remain in the UK, so that the dispute between his parents is decided here, or to return to Texas so that the dispute can be decided there. The Supreme Court is in as good a position as the judge was to answer this as he heard no oral evidence [32]. The approach and procedure of the Texan and English courts are very similar and the father's evidence is that an application by the mother in Texas would be decided in less than three months [30, 33]. In favour of K's remaining in the UK is the fact that he has been living here with his mother for over two years, is at school and apparently doing well [34]. In favour of return to the US is the fact that he was born in Texas, has a large extended family in the US, and has spent half his life living there, most recently in the sole care of his father, who has facilitated contact with his mother [35]. The crucial factor is that K is a Texan child who is currently being denied a proper opportunity to develop a relationship with his father and with his country of birth. While the conflicting orders remain in force he has effectively been denied access to the US. It is necessary to restore the synthesis between the two jurisdictions which the mother's actions have distorted [36]. Despite the passage of time there is no reason to consider that K would suffer any significant harm by returning to Texas on the basis proposed by the father and accordingly the Supreme Court

allows the appeal and orders K's return on these terms. This order is to stand even if the mother chooses not to avail herself of the opportunity to return with her son [38].