Child abduction—use of the 1996 Hague Convention as opposed to the inherent jurisdiction (Re I-L (children) (1996 Hague Child Protection Convention—inherent jurisdiction)

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Family analysis: In Re I-L (children) the Court of Appeal allowed the father's appeal and held that where the 1996 Hague Convention applies between two countries, if a 1980 Hague Convention application is made and is not successful, the applicable jurisdictional provisions are those of the 1996 Hague Convention, particularly Art 11, and the inherent jurisdiction is not available to use. Eleri Jones, barrister at 1GC Family Law, who represented the appellant father, considers the implications.

Re I-L (children) (1996 Hague Child Protection Convention: inherent jurisdiction) [2019] EWCA Civ 1956, [2019] All ER (D) 111 (Nov)

What are the practical implications of this case?

This case highlights the range of options open to parties in relation to children disputes across borders and the need for practitioners to be aware of the various international instruments which apply, both in terms of choosing from the routes available to them but also in relation to the limits on the court's powers.

The mother in this case chose to seek a summary return under the Hague Convention on the Civil Aspects of International Child Abduction (the 1980 Hague Convention) from the English court while also litigating in the Russian courts. The mother was unsuccessful here under the 1980 Hague Convention, but the judge found that at the relevant date, the children remained habitually resident in Russia and accordingly Russia retained substantive jurisdiction over the children. Therefore only the provisions of the Hague Convention on Jurisdiction Applicable Law, Recognition and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children 1996 (the 1996 Hague Convention) were available and the mother could not turn to the inherent jurisdiction.

The Court of Appeal was aware that the mother had obtained an order in Russia in the middle of the English proceedings for the return of the children to her care. The mother had already obtained orders in England for recognition and enforcement of the Russian order, but the father appealed against recognition and enforcement. The view of the Court of Appeal was that the appropriate course was for the appeal against recognition and enforcement to be determined next rather than the English court utilising its 'secondary jurisdiction' under the 1996 Hague Convention, Art 11 and risking inconsistent orders. The judgment is useful for its consideration as to the requirements for, and appropriateness of, return orders under Art 11 and highlights the differences in the issues engaged by applications under Art 11 compared with the process of recognition and enforcement of orders, to which different considerations apply.

The decision is a further caution in relation to the difficulty in mounting appeals against evaluative decisions such as habitual residence or repudiatory retention where the trial judge had correctly set out the law and gave sound reasoning for their decision based on the evidence.

What was the background?

The mother (Russian) and father (British) married in 2013 and initially lived in England. Their two children were born in Russia. The older child spent time living in England. After the second child was born, the children lived in Russia and spent time frequently with their father in England. When the parties separated in 2017, the arrangements were set out in a separation agreement between the parties. In late 2018, the mother told the father via lawyers that she wished to spend three months in the USA with the children. The father disagreed and so the mother went alone, leaving the children in Russia with nannies and refusing the father direct contact. Both parties commenced proceedings in Russia.

After the boys went on an agreed holiday with the mother to the USA in April 2019, they travelled to England to spend time with their father. The parties communicated extensively about their proposals for the future and it was agreed that the children would be in England until at least October 2019, spending time with both parents. The mother wished to relocate to the USA—the father disagreed. The mother relented but also stated that a return to Russia was 'out of scope'. Proceedings in Russia continued, but the father withdrew his claim in June 2019 (the mother's continued). The boys were due to be cared for by the mother in England in June 2019 but, fearful of the mother's intended relocation, the father commenced proceedings in England. The mother then issued her 1980 Hague application for summary return to Russia, arguing that the father had wrongfully retained them in England, his application to the English court amounting to 'repudiatory retention'. The father opposed this and argued that the boys had already become habitually resident in England.

Prior to the final hearing of the mother's 1980 Hague application, the mother obtained an order in Russia for the return of the boys to her care which the father appealed in Russia (ultimately unsuccessfully). The mother obtained orders in England for recognition and enforcement of the Russian order and the father appealed.

The judge at first instance found that there had been no repudiatory retention but that the boys remained habitually resident in Russia. He granted the mother's application to return the children to Russia pursuant to the inherent jurisdiction.

What did the court decide?

The Court of Appeal dismissed the father's appeal in relation to habitual residence and the mother's cross-appeal in relation to repudiatory retention but allowed the father's appeal in relation to the use of the court's inherent jurisdiction.

The Court of Appeal had invited additional submissions on the application of the 1996 Hague Convention. The parties accepted that this would apply in circumstances where the children remained habitually resident in Russia and so the Russian court retained substantive jurisdiction over the children. The parties also both accepted that therefore the court would only have been able to order return under the 1996 Hague Convention, Art 11 (*Re J (A Child) (1996 Hague Convention) (Morocco)* [2016] [2015] EWCA Civ 329, [2015] All ER (D) 53 (Apr)). The mother argued that the decision under the inherent jurisdiction could be exchanged for one under Art 11. The father argued that an order under Art 11 would not have been made and should not now be made.

The Court of Appeal considered the requirements of Art 11 as set out by Lady Hale in *Re J (A Child)*, namely 'urgency' and 'necessity' of orders. It is a 'secondary jurisdiction' which should only be used 'to support the home country' and not 'interfere'. Given the proceedings in Russia and the pending appeal here of the recognition and enforcement of that Russian order, the Court of Appeal considered that that appeal was the next appropriate step for determination rather than consideration of an Art 11 return order which may give rise to inconsistent judgments.

Eleri Jones is a barrister at 1GC Family Law. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysis@lexisnexis.co.uk.

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