Case No: B4/2009/1290
Neutral Citation Number: [2009] EWCA Civ 965

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION, PRINCIPAL REGISTRY
(HIS HONOUR JUDGE KEVIN BARNETT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 21st July 2009

Before:

LORD JUSTICE THORPE
LORD JUSTICE SCOTT BAKER
and
LORD JUSTICE SULLIVAN

IN THE MATTER OF I (A Child)

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Mr Jonathan Baker QC and Mr Edward Devereux (instructed by Messrs Bindmans) appeared on behalf of the Appellant mother.

Ms Alison Russell QC and Ms Divya Bhatia (instructed by Messrs Mulliger Banks) appeared on behalf of the 1st Respondent, the father.

Ms Judith Charlton (instructed by Messrs Edwards Duthie) appeared on behalf of the 2nd Respondent, the child, by his Guardian ad Litem.

Judgment (As Approved by the Court)

Lord Justice Thorpe:
1. This is an appeal from the judgment of HHJ Barnett sitting as a judge of the High Court here in London on 28 May 2009. The appeal is brought with the permission of the judge. The essential question which he considered and determined was whether the courts in in this country have jurisdiction to decide issues as to the mother's contact to the only child of the family, a boy, Q, who is nearly nine years of age.

2. The judge recorded the factual background in the first 19 paragraphs of his judgment. It would be superfluous for me either to summarise them or to record the history in different words, and accordingly I gratefully adopt HHJ Barnett's summary and findings:

"INTRODUCTION
[1] There are two main applications before the court. Both were issued by Y ('the Mother'), and both were issued when the Mother was acting as a litigant in person. The first application was issued on 31st October 2007 and the relief sought is defined in the Form C1A as '...an order to enforce the telephone contact and as much contact as possible'. The second was issued on 15th April 2008 and the Mother sought to 'enforce and vary' contact together with an assessment to be undertaking with the hope of moving to unsupervised contact. Mention is also made of the possibility of residence. The Respondent to both applications is I ('the Father'), and the child at the centre of these proceedings is Q I ('Q') who was born on 27th July 2000 and who is rapidly approaching his 9th birthday.

[2] The issues with which I am concerned are, firstly, whether the court has any jurisdiction to entertain the Mother's applications, and secondly, if I were to find such jurisdiction, whether I should decline to exercise it and stay the present proceedings on the basis that this Court is a forum non conveniens. The Mother asserts that there is jurisdiction, the Father and Q's Guardian ad litem assert there is not. If the court were to find it had jurisdiction, the Father submits that the Court should decline to exercise it as the courts in Pakistan are the appropriate forum. On the other hand the Mother and Guardian maintain that the jurisdiction should be exercised as this Court is the appropriate and convenient forum.

[3] For completeness it should be observed that the Father launched an application. That was dated 3rd March 2009 and issued by the Court the following day. The application was to set aside part of an Order made by Hedley J on 17th June 2008. If I find there was no jurisdiction to entertain the Mother's applications it would follow that the Order of Hedley J was made without jurisdiction and the Father's application becomes redundant.

BACKGROUND
[4] The background circumstances which give rise to the present applications have been described as extraordinary. Certainly they are unusual.

[5] The Mother was born in England. Her parents are from Gujerat in India. The Father was born and brought up in Pakistan, and it was whilst on a visit there that the Mother met the Father. Within a week of meeting they were married. That was in October 1999. The Mother quickly fell pregnant. About two months after the marriage the Mother returned to England and sponsored the Father's application for indefinite leave to remain in this country. It seems clear that, at that time, it was their intention to live in this country as a family. Q was born in England on 27th July 2000.

[6] In November 2001 Q was found to have sustained fractures to the shoulder, elbow and forearm. Q was removed into foster care and the London Borough of Newham ('the Local Authority') instituted care proceedings. On 29th May 2002 District Judge Brasse sitting at the Principal Registry commenced a fact finding hearing. On 29th May he delivered a long and detailed judgment, and concluded:

'I find, therefore, that, whilst the father himself inflicted the injuries and has failed to further protect his child by making sure that he was brought to the attention of medical authorities in time, sadly the mother, quite out of character, has also failed to protect her child by seeking medical advice, and she did this in order to protect her own interests, and in this instance she has put her own interests before those of her child in a very serious way. She has sought to protect herself, possibly her marriage, possibly her job and possibly her position as mother of the child who she does not want to lose. All of those are understandable motives, but in covering up and, frankly, lying in order to protect herself, she has not helped her child from whom she has been separated for many months.'

[7] The final, or 'welfare', part of the care proceedings was listed for 17th December 2002. Somewhat unusually DJ Brasse decided to revisit his original findings in the light of the evidence which had emerged since the May hearing. The conclusion was a complete volte face. DJ Brasse exonerated the Father and found the injuries were caused by the Mother.

[8] Within the care proceedings Dr Bashir, a Consultant Psychiatrist, was instructed and prepared two reports. For the purposes of this judgment it is only necessary to give brief consideration to the second dated 29th April 2003. The focus of that report was upon the ability of the father and his family in Pakistan to care for Q. Indeed as part of his investigation Dr Bashir visited the paternal family in Pakistan. He recommended that Q should either live with his Father or the paternal family in Pakistan.

[9] On 22nd May 2003 final orders were made in the care proceedings. A residence order was made in favour of the Father. A regime of supervised contact with the Mother was defined and a 12 months Supervision Order to the Local Authority was made. Annexed to the Order were (a) a 'Contact Agreement' between the Local Authority and the Mother, designed to help implement and regulate the contact arrangements between Q and the Mother; and (b) an 'Agreement' between the Local Authority and the Father. I need not consider the terms of that Agreement in any detail, it is sufficient to record that paragraph 13 provided:

'The Local Authority will assist in facilitating any move to Pakistan by the Father with Q.'

Thus it was in the contemplation of all concerned that the Father and Q could move to Pakistan.

[10] The Order of 22nd May 2003 effectively concluded the public law proceedings. It is right to observe that the Mother felt aggrieved and has never accepted the findings made against her. In May 2003 she sought to persuade DJ Brasse to reopen the issue of causation. That failed. The Mother launched an appeal which was eventually dismissed by Hogg J on 15th June 2004. An appeal to the Court of Appeal failed at the permission stage.

[11] The Father applied for leave to remove Q permanently from the jurisdiction, namely, to Pakistan. The Mother applied for increased contact. Pursuant to Rule 9.5 of the Family Proceedings Rules 1991 Q was joined as a party to both applications and a Guardian ad litem appointed for him. Those applications came on for hearing before Hedley J on 16th September 2004. Leave was granted to the Father to remove Q permanently from the jurisdiction and an undertaking by the Father to return Q when ordered to do so was given and recorded. In addition a contact order was made. The order provided for supervised visiting contact and weekly telephone contact, with 'the matter', by which I assume, is meant the issue of contact, to be listed before DJ Brasse in January 2005, unless by then and pursuant to the leave given, Q had left the jurisdiction. Although Mr Devereux argued strongly to the contrary, in my judgment, and read as a whole, the contact provisions were designed to regulate contact up until Q left the country. Mr Devereux submitted it would be extraordinary for there to have been no order dealing with contact post relocation. As a matter of practice I disagree. If there is no dispute about contact there may be no need to attempt to define it. In this case the Father has never sought to say there should not be contact between Q and the Mother, albeit that he has been concerned that it should be properly supervised given the findings against the Mother. At the end of the day the simple but clear conclusion I have come to is that the order of 16th September 2004 did not purport to define or regulate contact after Q had relocated to Pakistan. In December 2004 the Father and Q moved to Pakistan and hence there was no need for a further hearing before DJ Brasse.

[12] In April 2005 the Father returned to England leaving Q with his paternal grandparents and aunt in Pakistan. At first sight that may seem highly unusual. However, it is a situation which was, at least to some extent, foreshadowed in Dr Bashir's second report, where he wrote:

'It is not clear if' [the Father] 'would continue to offer long-term resident care to Q as he planned to travel abroad if he migrated back to' [Pakistan].

Accordingly from April 2005 to the present day Q has lived in Pakistan and has been brought up there by his paternal grandparents and aunt.

[13] Contact proceeded by agreement. There was telephone contact which took place, at least initially, on a weekly basis. In July/August 2005 and March/April 2006 the Mother stayed with the paternal family in Pakistan. In summer 2006 Q came to England for four weeks. He stayed with the Father and had daily contact with the Mother. In summer 2007 Q together with the paternal grandmother came to England on a 9 week visit. Q and his grandmother initially stayed with the Mother. That lasted for about 6 weeks but there was an argument as a result of which they went to live with the Father for the remainder of their stay.

[14] It appears that it was the events of the summer 2007 which led the Mother to issue her first application of 30th October 2007: see paragraph [1] above. That application proceeded to a conciliation hearing before Deputy District Judge Crowther on 12th December 2007. Both parties attended in person although the Father had the assistance of an interpreter. The parties managed to agree a way forward which (a) provided for weekly telephone contact when Q was in Pakistan, and daily telephone contact when in this country; and (b) defined arrangements for face-to-face contact when Q was in this country. The second part of the agreement was, of course, predicated upon Q visiting this country and that was provided for in the following (albeit badly phrased) way:

‘[The Father] to facilitate Q to visit UK if possible on an annual basis and his Mother during his school holidays.’

The telephone contact took place. However, because the Mother wanted the contact to progress to unsupervised contact and, possibly, to eventually care for Q herself, the application of 15th April 2008 (see paragraph [1] above) was launched.

[15] Eventually on 17th June 2008 the applications came on for hearing before Hedley J. Prior to that hearing Deputy District Judge Airey had given directions transferring the applications to the High Court and providing that each party should file a statement in relation to ‘the issues of jurisdiction and contact’. The Mother filed a statement the Father did not. In her statement the Mother said:

‘Q is habitually resident in both countries, and his centre of interest is in the UK where his parents are and where his father has residency and is habitually resident.’

The Mother, and indeed the Father were then acting in person.

[16] Hedley J dealt with the question of jurisdiction in the following way:

‘… the child is entirely lawfully in Pakistan, and indeed it is unusual that the Court should be retaining jurisdiction in this case because, of course, the child is habitually resident in Pakistan, and were this a European case the Court would be positively deprived of jurisdiction by the structure of European parenting law, but it is not and the Court undoubtedly does have jurisdiction because both parties have not only submitted to the jurisdiction but have actually invoked it on a number of occasions, and so the question of jurisdiction of itself does not present a problem in this case, though the question of enforcement of orders might.’

[17] I will analyse the approach taken by Hedley J at a later stage of this judgment, for the present purposes it is sufficient to observe that having satisfied himself that he had jurisdiction, he proceeded to make a number of orders. Thus, pursuant to rule 9.5 of the FPR 1991 Q was joined as a party and CAFCASS invited to appoint a Guardian. The Order also provided that the Mother was to have both telephone contact and visiting contact to Q in Pakistan (as I understand it the Father has never sought to prevent contact taking place in Pakistan). Further, paragraph 4 (as amended pursuant to the slip rule) of the Order provided:

‘The father to bring or cause the child to be brought into the jurisdiction of England and Wales on a date not later than 4th June 2009 and to remain in the jurisdiction until 30th July2009.’

That again was an uncontentious provision. The Father had re-married and the plan, at the time of Hedley J’s order, was for his new wife to come to this country and to bring Q with her.

[18] This matter was next before the Court on 2nd March 2009. All parties were legally represented for that hearing before Mr Stephen Bellamy Q.C. sitting as a Deputy High Court Judge. It appears that some consideration may have been to the question of jurisdiction as the Order he made recited ‘And upon the Court considering that it retains jurisdiction to make orders in respect of Q’. By that date it was clear that the Father was asserting that he was no

longer in a position to comply with paragraph 4 of the Order of 17th June 2008 (see paragraph [17] above). Put briefly the Father's position was that his relationship with his new wife was not good, she, therefore, no longer intended to come to this country, he was unemployed and therefore unable to finance the necessary travel arrangements. Accordingly the Father's solicitors gave an undertaking to issue an application to set aside paragraph 4 of the Order. Such an application was issued.

[19] The final hearing prior to this matter coming on before me on 5th May was on 12th March 2009 before Black J. It appears clear, notwithstanding the previous Orders of Hedley J and Mr Stephen Bellamy Q.C., that Black J was concerned and exercised by the question of jurisdiction. Although the Order she made does not expressly deal with this point, it appears to be the common understanding of all parties that it was her intention that the question of jurisdiction should be heard as, as it were, a preliminary issue at the hearing listed for 5th May 2009. On 5th May I heard detailed argument and it became apparent that even if I found the Court had jurisdiction the Father would, in all likelihood, invite the Court to decline jurisdiction on the basis that the courts in Pakistan, where Q lives, were the convenient forum. I managed to secure time the following afternoon to hear argument on that point and I am grateful to the parties' representatives for their industry and for preparing written arguments at such short notice."

3. On the essential issue of jurisdiction that HHJ Barnett was to decide as a preliminary issue, the mother, through her counsel, Mr Devereux, robustly asserted that the court had jurisdiction. There were obvious pointers in that direction. Mr Devereux relied on the habitual residence of both parents within the jurisdiction, the considerable history of litigation in the jurisdiction and to some extent on the nationality of the child.

4. The father and the Guardian ad Litem both took advantage of the doubts expressed by Black J and each submitted that there was no jurisdiction in this state. Perhaps that submission was more difficult for the father than the Guardian, since the Guardian had only entered the fray following the order of Hedley J of 17 June 2008. The father also had to present before HHJ Barnett a case that was at odds with the case that he had presented to the various judges before whom this contact dispute had previously been listed.

5. HHJ Barnett directed himself carefully as to the law, and in particular read into his judgment the relevant sections of the Family Law Act 1986. The Family Law Act 1986 is unhappily drafted and has attracted a good deal of criticism, both judicial and academic, in recent years. It has of necessity altered in shape and form as a consequence of European regulations that have invaded its territory and which prevail over the statute itself. However, the Act has not received the wholesale reconsideration that many are convinced it requires, the world having changed fundamentally since it was brought into legislative existence.

6. The judge was quite clear in his judgment that the relevant dates for the application of the statute were 31 October 2007, the date of the mother's first application, 15 April 2008, the date of the mother's second application, and 17 June 2008, when the applications were before Hedley J. The judge concluded that on none of those dates was Q habitually resident in this jurisdiction nor had he been present.

7. The judge went on to consider the further submission of Mr Devereux that the mother's applications were applications for the variation of existing Section 8 orders and thus fell within the exception provided by Section 1(1) of the 1986 Act. The judge rejected that

submission for reasons which it is unnecessary to recite. Essentially, he concluded that there were simply no extant contact orders which the mother by her applications had sought to vary. He held that on their construction the orders provided only for contact within this jurisdiction pending Q's removal to Pakistan.

8. In approaching the issue of jurisdiction as he did, the judge was following the course mapped for him by all counsel. Indeed, I note that in paragraph 24 of his judgment the judge remarked:

'This, of course, is not a case where the Council Regulation applies'

That was a reference to the European Regulation commonly known as Brussels II Revised.

9. The notice of appeal, filed pursuant to the judge's permission, was settled by Mr Edward Devereux and advanced criticism of the judge's conclusions on the issue of jurisdiction. The judge, despite the fact that he had held that there was no jurisdiction, invited submissions from counsel as to whether if, contrary to his findings, jurisdiction existed, it should be exercised on forum conveniens considerations. Here the mother had some support in that, perhaps surprisingly, the Guardian's submission was positive rather than negative. The judge, however, concluded that despite a number of pointers to Pakistan the forum conveniens balance fell in favour of this jurisdiction.

10. The advent of Mr Jonathan Baker QC into the case has radically altered the presentation of the appeal. Mr Jonathan Baker has candidly accepted that on the grounds surveyed by the judge the conclusions that he reached would be difficult to criticise. So in this court we have heard no argument in support of the appeal that HHJ Barnett himself created. All the argument has been directed to a fresh point that owes its origins to Mr Baker's ingenuity. We have permitted Mr Baker to run this novel argument despite the fact that it was never ventilated in the court below since on Mr Baker's appraisal there is really nothing else for us to consider. The novelty of Mr Baker's submission is that the Regulation Brussels II Revised is not international family law having effect only within Europe and amongst the Member States of the European Union, but has in limited circumstances a global application. The limited circumstances are, according to Mr Baker, in the provisions within the Regulation as to pro rogation, and all turns upon the meaning of the reference in Article 12(4) to 'a third state'.

11. This categorisation appears, we are told, only in Article 12(4) and Article 61 of the Regulation. I hazard that there has been a universal acceptance amongst international family lawyers in this jurisdiction that the Regulation Brussels II Revised is a regulation that has effect only within the Member States of Europe and Mr Baker's approach is certainly not one that I have seen suggested in any authoritative source. It is not specifically considered in the leading text book, International Movement of Children by Professor Lowe, HHJ Everall and Mr Nicholls QC, because that authority was concluded before the arrival of the Regulation. It is not specifically considered in the good practice guide settled by a committee of international experts and published by the European Commission with an updated version 1 June 2005.

12. Mr Baker has supported his submission by suggesting that his construction is the only natural construction, particularly when focussing on Article 12(4). To do justice to Mr Baker's submissions, I read into this judgment the whole of Articles 12 and 61;

“Article 12
1. The Courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised and is in the superior interests of the child.

2. The Jurisdiction conferred in paragraph 1 shall cease as soon as:

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;
(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a) a judgment in these proceedings has become final;
(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

(a) the child has a substantial connection with that member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

4. Where the child has his or her habitual residence in the territory of a third state which is not a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, jurisdiction under this Article shall be deemed to be in the child’s interest, in particular if it is found impossible to hold proceedings in the third state in question

Article 61
As concerns the relation with the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement, and cooperation in respect of parental responsibility and measures for the protection of children, this regulation shall apply;

(a) Where the child concerned has his or her habitual residence on the territory of a Member State

(b) As concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third state which is a contracting party to the said Convention"

13. It is to be noted in relation to Article 12(4) that the purpose of the paragraph is to create a deeming provision in the assessment of the best interests of the child for the purposes of Article 3(b), where the child is habitually resident "in the territory of the third state which is not a contracting party to the Hague Convention of 19 October 1996".

14. Whilst states that are not parties to the 1996 Convention are the large majority of the global population of states, there are now I think ten European states that have ratified or adhered to the 1996 Convention. So in differentiating between states party to the 1996 convention and states not party, it is possible to find each group within the Member States of Europe.

15. Article 61 falls within chapter 5 of the Regulation, which is headed "RELATIONS WITH OTHER INSTRUMENTS". Article 59 deals with Scandinavian instruments and Article 60 deals with a number of conventions, either Hague or European, other than the 1996 Convention. Within Article 61, dealing with the 1996 Convention, the emphasis is upon third states which are contracting parties to the Convention.

16. Within the good practice guide, illumination is only to be found in chapter XI, which is headed "Relationship between the Regulation and the 1996 Hague Convention". The authors consider Articles 61 and 62, and in concluding their review they say:

"The aim is to ensure the creation of a common judicial area which recognises that all decisions issued by competent courts within the European Union are recognised and enforced under a common set of rules."

In dealing with Article 12(4) the authors really do little more than to re express the effect of the Article without commentary.

17. It is therefore in my judgment impossible to find within the language of the Regulation itself any clear definition as to whether the provisions affecting third states are confined to European states or extend beyond. Every instinct suggests to me that the Regulation is intended simply for the solution of jurisdictional and other problems within the European Union to ensure a common judicial area within which decisions of competent courts are recognised and enforced under a common set of rules. It would be surprising indeed if this laudable aim had any impact at all on relationships between Member States and non-Member States through the wider world. It would be in my judgment to ignore the aims and objectives of the Regulation to afford it the construction that Mr Baker urges.

18. However, the point was not argued below. We have heard only the limited argument which is developed from the language of the Regulation itself, and given the absence of transparent conclusion, it would be preferable to avoid rejecting Mr Baker on that ground alone, however there are effectively three fences that he has to negotiate to arrive at his desired winning post. The extension of the Regulation to cover relationships between this jurisdiction and Pakistan can be said to be logically the first of those three fences. Mr Baker

presented it to us as the third, but unless a third state is to be construed to include Pakistan it is unnecessary to address the more important provisions of Article 12(3).

19. The second and third fences that Mr Baker has to clear are of course all presented by Article 12(3). He has to show in order to achieve pro-rogation that the jurisdiction of the courts has been accepted, expressly or otherwise, in an unequivocal manner by all of the parties to the proceedings at the time the court is seised. And the third fence he has to clear is to demonstrate that pro rogation is in the best interests of Q.

20. Most of Mr Baker's argument was directed to establishing unequivocal acceptance by the parties and particularly by the father. In advancing that submission Mr Baker asked us to find the father's unequivocal acceptance by, first, the consent order of 12 December 2007 entered by the deputy district judge. That seems to me a difficult argument taken individually, given that both parties appeared in person and arrived at an accommodation with the assistance of a CAFCASS officer.

21. Mr Baker's second reliance is upon the order of Hedley J of 17 June 2008, in which the judge incorporated a paragraph requiring the father to bring Q into this jurisdiction for a period terminating in this month of July 2009. Again, the father was a litigant in person appearing with the aid of an interpreter, he was not contesting contact in principle, and indeed he was telling the judge that his current wife would be in a position to implement such an order.

22. Thirdly, Mr Baker relies upon the concessions made by the father in his position statement for the purposes of a hearing before Mr Stephen Bellamy QC, by which stage the father was represented.

23. In his position statement it is true that at two points the father expressly accepted the jurisdiction of the court, that is, in paragraphs 4 and 28 of the position statement. However, it is necessary to read those paragraphs in their context, and both acceptances are advanced on the basis that a) the father has no objection to contact providing it is properly controlled, and b) that the child's residence in Pakistan makes any orders in this jurisdiction unenforceable and therefore almost academic.

24. Mr Baker endeavours to place reliance on the undertaking that the father gave to Mr Bellamy to apply for the release from the order of Hedley J, and finally to the application which he filed to give effect to the undertaking, supported as it was by a written statement.

25. Neither his fourth or fifth events strike me as individually of much significance. In the evidence in support the father made it perfectly plain that he was seeking release from the order of Hedley J on a variety of welfare grounds, including the fact that to bring Q to this country would upset the stability of his family life in Pakistan; further, that Q was resolutely opposed to coming; and thirdly, that any exposure of his son to contact in this jurisdiction would at the same time expose him to the risk of manipulation.

26. Whether judged individually or cumulatively, I am quite unpersuaded that anything that the father has done within this jurisdiction amounts to unequivocal acceptance. The moment the opportunity to challenge jurisdiction was flagged up by Black J he was quick to reverse his previous acceptances.

27. Another major difficulty for Mr Baker is that the unequivocal acceptance must be of all the parties to the proceedings. His only reliance on conduct on the part of the Guardian is to say that the Guardian participated fully in the hearing before Mr Bellamy. He has also flirted with the submission that because the Guardian was only joined at a comparatively late stage of the proceedings, unequivocal acceptance is unnecessary since the review is limited to "the time the court is seised".

28. That final submission seems to me to be quite unmeritorious. The court is seised throughout the continuance of the proceedings. The fact that the Guardian is not joined until a comparatively late stage is not to deprive the Guardian of the opportunity to obstruct pro rogation, particularly since the Guardian above all is charged with the responsibility of safeguarding the best interests of the child.

29. For all those reasons it seems to me plain that the attempt to demonstrate pro rogation by unequivocal acceptance by all the parties to the proceedings is hopeless. This jurisdiction by pro rogation is essentially exceptional. The whole thrust and construction of the Regulation is upon the basis that the primary jurisdiction, shall be the jurisdiction of the child's habitual residence. I draw attention to Article 19(2) which states:

"Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established"

30. So there is no doubt at all that the emphasis of the Regulation, supported to the full by the recital, is to this effect. That is precisely the point made by Lawrence Collins LJ in his judgment in the case of *Bush v Bush* [2008] EWCA 865, where he said:

"53. It is plain that Article 12(1) (b) of the Brussels II bis Regulation (Council Regulation (EC) 2201/2003), when it speaks of the jurisdiction being 'accepted expressly or otherwise in an unequivocal manner … at the time the court is seised,' is not simply referring to a mere submission in matrimonial proceedings equivalent to what would be an entry of appearance under the Brussels I Regulation (Council Regulation (EC) 44/2001), Article 24. First, it is clear that it does not refer to acceptance of the jurisdiction in relation to matrimonial proceedings alone. It must refer to jurisdiction in matters of parental responsibility. Second, the emphasis is on the acceptance of jurisdiction 'expressly' or 'in an unequivocal manner.' This must mean that acceptance of jurisdiction of a court other than that of the child's habitual residence is not lightly to be inferred, and that the paradigm case will be actual agreement by the parents at the time the matrimonial proceedings are instituted."

Although the Lord Justice was addressing specifically Article 12(1)(b) of the Regulation, all that he says is of equal application to Article 12(3).

31. So it is at this second fence that Mr Baker most plainly fails. In relation to the best interests of the child, it would be difficult to argue pro rogation on that ground either. The reality is that Q has been a child in a Pakistani environment for more than half his life, and any decisions as to his welfare are at first blush, and as a matter of ordinary assumption, better dealt with by the courts of that region.

32. So for all those reasons I am in no doubt at all that this challenge to the careful judgment of HHJ Barnett fails. It is difficult to see how Mr Baker could have crafted success to the advantage of his client, even had I a different view of the merits of his argument. None of the ground was laid for this submission below. There has been no evidence filed on any quarter as to unequivocal acceptance. There has been no evidence filed as to the best interests of the child. Obviously if a jurisdictional pro rogation is to be claimed, it must be claimed in the court of trial and it must be supported by essential evidence.

33. My last word is to emphasise that pro rogation is a dangerous road to go. In the huge majority of cases, the future evolution of any global accordance of international family law depends upon the readiness of states to recognise that, save in exceptional circumstances, the habitual residence of the child dictates which state holds the primary jurisdiction. Nationality, domicile or passing presence should not ordinarily divert from that clearly principled approach.

34. In our very considerable dealings with Pakistan, we are highly dependent upon the upholding of the protocol which was signed by the senior judiciary of the two jurisdictions in January 2003. We have approximately a million British nationals of Pakistani origin in this jurisdiction. Conflicted cases between this jurisdiction and Pakistan pass through my office at the rate of approximately one a fortnight. In the vast majority of cases we are appealing to the judges of Pakistan to recognise that welfare decisions belong to and are the responsibility of the courts of the child's habitual residence. I stress that although the protocol is largely directed to cases of wrongful removal or retention, the principle stated in the first paragraph is of general application:

"In normal circumstances the welfare of a child is best determined by the courts of the country of the child's habitual/ordinary residence."

We can hardly expect the judges of Pakistan to honour the protocol beyond the immediate territory of abduction if we lay exorbitant claims to jurisdiction in relation to children who are essentially Pakistani.

35. In any consideration of general policy, it is obvious to me that HHJ Barnett reached the right conclusion in determining the jurisdiction as he did, and I would have been dismayed had it been necessary to set aside his very sensible conclusion.

36. I would dismiss this appeal.

Lord Justice Scott Baker:
37. I agree

Lord Justice Sullivan:
38. I also agree

Order: Appeal dismissed