



THE BOARD ORDERED that no one shall publish or reveal the name or address of the child who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the child or any member of his family in connection with these proceedings.

PRESS SUMMARY

5 March 2018

A (Appellant) v R (Respondent) [2018] UKPC 4

On appeal from the Court of Appeal of Guernsey

JUSTICES: Lady Hale, Lord Mance, Lord Wilson, Lord Hodge, Lady Black

BACKGROUND TO THE APPEAL

The Appellant and Respondent are German nationals and are the parents of a minor child ("C"). They have never been married to one another. They lived together in Sark at the time of C's birth in 2009. In February 2012, the Respondent moved with C from Sark. In May 2012, the relationship between the Appellant and the Respondent broke down. The Appellant tried but failed to reach an agreement with the Respondent as to joint care, custody and maintenance of C. In January 2013, the Respondent returned to Sark with C and issued an application against the Appellant in the Court of the Seneschal of Sark for a maintenance order and a sole care and control order in respect of C.

An interim award was made by the Court of the Seneschal of Sark on 14 August 2013 against the Appellant to pay maintenance for C to the Respondent. Orders for payment of arrears of maintenance and a maintenance order were made by the Court on 9 February, 5 March and 9 July 2015. The Appellant appealed those orders to the Royal Court of Guernsey and the Court of Appeal of Guernsey. The Court of Appeal refused him leave to appeal to the Judicial Committee of the Privy Council on 13 July 2017. He now seeks special leave to appeal from the Board.

The application raises an important question as to the circumstances in which an applicant needs permission to appeal to the Board from a judgment of the Court of Appeal of Guernsey. It also raises questions about (a) the extent of the jurisdiction of the Seneschal of Sark and (b) the scope for judicial development of the common law or customary law in Sark.

JUDGMENT

The Board refuses special leave to appeal the issue of applicable law. Otherwise the Board gives the Appellant special leave to appeal and will humbly recommend to Her Majesty that his appeal should be dismissed. Lord Hodge gives the advice of the Board.

REASONS FOR THE JUDGMENT

Section 16 of the Court of Appeal (Guernsey) Law 1961 excludes the need for special leave of Her Majesty in Council or leave of the Court of Appeal when the monetary value of the claim is or exceeds £500. The Court of Appeal of Guernsey has sought to reform this out-dated provision by refusing to grant permission unless the appeal raises an arguable point of law of general public importance [4]. However, the Board considers that section 16 of the 1961 Law provides for an appeal as of right when the monetary value of the claim is or exceeds £500. It is beyond the power of the courts to contradict that legislation [6-7]. The Appellant's appeal as of right does not mean that the Court of Appeal has no control over the appeal [8-9]. The Board agrees that the Court of Appeal has the power to refuse an appeal where the applicant has an appeal as of right but the appeal is an abuse of process [10]. Moreover, the Board has a limited discretion to refuse special leave in a case where there is an appeal

as of right if that appeal is devoid of merit and has no prospect of success and/or if the appeal is an abuse of process [11-13].

An Order in Council dated 24 April 1583 gave the Jurats of Sark jurisdiction over all civil causes (excluding ecclesiastical causes) [17]. In 1676, the Court of the Seneschal inherited the jurisdiction of the former judges and jurats [19]. The modern statement of the jurisdiction of the Seneschal of Sark comes from a 1922 Order in Council and an ordinance of the Royal Court of Guernsey dated 5 October 1931. Later, the Reform (Sark) Law 1951 and the Reform (Sark) Law 2008 preserved the pre-existing jurisdiction of the Court and stated that it shall be the sole court of justice in Sark. The Court has the right to hear and adjudicate every action, whether in moveables or in immoveables. But legislation may give exclusive jurisdiction over a specified matter to the Royal Court of Guernsey [19-22]. The Board confirms that the Court of the Seneschal of Sark has unlimited jurisdiction in civil matters. Its jurisdiction is not limited, as suggested by the Appellant, to ordering the payment of liquidated sums due as debts and making orders in relation to immoveable property [23-24].

The Board observes that each of the Channel Islands has two principal sources of domestic law: legislation and their customary law (sometimes described as their common law) [26]. The Channel Islands gained their customary laws initially from the unwritten customs of the Duchy of Normandy. Local customs also developed within the islands [27]. On 27 July 1579, a Royal Commission was appointed to ascertain the extent to which the laws and customs of Normandy applied in Guernsey. A statement of the law of the Bailiwick of Guernsey known as “L’Approbation” was ratified by an Order in Council on 27 October 1583 [29]. However, L’Approbation was not a complete statement of the customary laws of the bailiwick, which continued to develop [30]. In the Board’s view, L’Approbation has not prevented the judicial development of the common law of Guernsey. While the status of L’Approbation as legislation prevents direct abrogation of its provisions by judicial decision, the scope for judicial development of the law around and in addition to its provisions should not suffer the constraints which more modern statutory provisions would impose. There is no reason to believe that L’Approbation was intended to prevent the further development of the common law of Guernsey [32-33]. The position is no different in Sark. The Order in Council of 24 April 1583 re-established the laws of Guernsey as Sark’s customary law [34-35].

L’Approbation stated that a father had a duty to maintain his children until they were married or had reached the age of 20 years. The Children (Sark) Law 2016 created, for the first time, a statutory regime for parental responsibility. The Affiliation Proceedings (Sark) Law 2017 created a statutory right of an unmarried woman to obtain a court order against the putative father to pay towards the maintenance of his child [36]. However, the absence of a statutory regime in this area did not mean that the common law had not developed since 1583, nor does it mean that L’Approbation encompassed the whole law on the maintenance of children [37-38]. The Court of Appeal was correct to hold that there has long existed an action in maintenance at common law in Sark [39-43]. The Board is satisfied that Sark has an action for enforcement of the obligation to maintain a child, which the parent caring for the child can raise when the child is not of an age at which he or she can assert the right to maintenance himself or herself [44].

The Board dismisses the Appellant’s argument that the enforcement of a maintenance obligation did not comply with Article 1 of Protocol 1 to the European Convention on Human Rights [45]. It also dismisses his contention that the Court has no power to make an interim order [46]. The common law of Sark empowered the Court of the Seneschal to make the orders challenged in this appeal [47]. The Appellant’s final argument was that the Court of Appeal erred in declining to address the relevant conflicts of law rules in order to identify the law applicable to the maintenance claim. The Board considered that the subject of applicable law is not a proper subject of an appeal where the question was not raised in the pleadings of either party or adjudicated upon by the fact-finding court. In the circumstances, an appeal on this ground is to be viewed as an abuse of process [48].

NOTE

References in square brackets are to paragraphs in the judgment. This summary is provided to assist in understanding the Committee’s decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html.