[2017] EWCA Civ 2695

IN THE COURT OF APPEAL
CIVIL DIVISION

Case No: B4/2017/0322

Room E307
Royal Courts of Justice
Strand
London
WC2A 2LL

4.01pm – 4.38pm
Thursday, 31st August 2017

Before:
THE RIGHT HONOURABLE LADY JUSTICE KING
THE RIGHT HONOURABLE LADY JUSTICE GLOSTER

IN THE MATTER OF:

S (A CHILD)

MR B ROCHE appeared on behalf of the Appellant
MR M KINGERLEY appeared on behalf of the Respondent

JUDGMENT
(Approved)

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person

Lady Justice King:

1. This is an appeal against an order made by His Honour Judge Handley on 20 January 2017, whereby he ordered Leicestershire County Council ("the County Council") to be the designated local authority in care proceedings in relation to a baby (LL) who was born on 19 December 2016.

2. The County Council now appeal that order submitting that its neighbouring local authority, Leicester City Council ("the City Council"), should properly be the designated local authority.

3. The issue before this court turns on the interpretation of s.31(8) of the Children Act 1989 s.31(8) CA1989, and, in particular, whether, in order for a baby to be deemed to be ordinarily a resident at the same place as his primary carer (usually his mother), it is necessary for him, or her, to have been physically present at that place.

Background

4. The City Council has a long history of involvement with the mother (EL), and the father (CS). The mother was herself in the care of the City Council, and a previous child of the parents, (born in May 2015) was the subject of care proceedings initiated by the City Council. As part of the current proceedings, a pre-birth assessment was completed by the City Council.

5. On 28 August 2016, the City Council held a pre-birth child protection conference. In October 2016, the mother and father moved from their address in Leicester to another address in Leicestershire, an area forming part of the County Council. Accordingly, on 21 November 2016, the County Council, in a spirit of co-operation between the two adjoining local authorities, attended a review in respect of the, then, unborn child.

6. On 25 November 2016, the City Council informed the County Council of their decision to issue proceedings and requested that they, namely the County Council, be the designated authority for the purposes of the anticipated interim care orders. The County Council did not agree that they should properly be the designated local authority and, on that basis, the City Council took the pragmatic decision, given the impending birth of LL, to issue care proceedings, and thereafter to seek an order of designation to the County Council.

7. On 18 December 2016, LL was born at the Leicester City Infirmary, a hospital which falls within the designated area of the City Council. LL remained there for a day before being made the subject of an interim care order on 20 December 2016. Since that time, he has lived in foster care in an area within the geographical location of the City Council. It follows, therefore, that not only has LL never lived with either of his parents, but he has never lived in the County Council area.

8. The dispute as to which of the local authorities was to be the designated local authority came before the judge on 20 January 2017. The judge discharged the City Council as a party to the proceedings, and the County Council was named as the designated local authority. Since then, LL has remained within the same foster placement funded by the County Council, who have also conducted the day-to-day assessments and acted within the care proceedings.

9. In reality therefore, the City Council have had no financial or social care involvement with LL since the day the designation order was made.

The Law

10. S.31(1)(a) of the Children Act 1989 permits the court to make an order "placing the child with respect to whom the application is made in the care of the designated local authority". S.31(8) of the Children Act 1989 defines "designated local authority" as follows:

> "The local authority designated in a care order must be-
>
> (a) the authority within whose area the child is ordinarily resident; or
>
> (b) where the child does not reside in the area of the local authority, the authority within whose area any circumstances arose in consequence of which the order is being made."

11. It follows, therefore, that there are two possible means by which designation is determined, namely:

> a) by reference to ordinary residence; or
>
> b) by reference to the precipitating circumstances giving rise to the order being made.

12. Further assistance is given in s.105(6) of the Children Act 1989 which states:

> "In determining the 'ordinary residence' of a child for any purpose of this Act, there shall be disregarded any period in which he lives in any place-
>
> (a) which is a school or other institution;
>
> (b) in accordance with the requirements of a supervision order under this Act;
>
> (ba) in accordance with the requirements of a youth rehabilitation order under Part 1 of the Criminal Justice and Immigration Act 2008; or
>
> (c) while he is being provided with accommodation by or on behalf of a local authority."

13. The fact that LL has been living in foster care within the City Council catchment area does not, therefore, "count" towards the acquisition of ordinary residence.

14. It is common ground that, where pursuant to s.31(8)(b), the child does not ordinarily reside in the area of a local authority, and the designated authority (by virtue of s.31(8)(a)) is therefore "that authority within whose area any circumstances arose in consequence of which the order is being made" (s.31(8)(b)). It is the primary circumstances that carry the case over

the s.31 threshold which determine the designation (see Thorpe LJ in *Northamptonshire County Council v Islington London Borough Council* [1999] 2 FLR 881).

15. The Judge held, and it is not disputed by either party, that if it is the case that LL was not ordinarily resident in the area of a local authority under s.31(8)(a) (ordinary residence), any proper application of s.31(8)(b) would have result in the City Council being the designated local authority given their long involvement with the family (the only connection with the County Council being that the parents chose to move to that area a matter of weeks prior to the birth of LL).

16. The only question, therefore, is whether or not LL himself was ordinarily resident in the County Council by virtue of the fact that his mother was ordinarily resident there.

17. For the purposes of designation, the time to consider a child's ordinary residence is the time the matter is being considered by the court and not, for example, at the date of the commencement of proceedings (see *London Borough of Redbridge v Newport City Council* [2004] 2 FLR 226). At the date of the hearing, LL was living with the foster carers; a residence which, as has already been noted, is, pursuant to s.105(6), disregarded for the purposes of s.31(8). It follows, therefore, that consideration of LL's ordinary residence is as a new-born infant in hospital, in circumstances where he has not only never lived at the mother's current address, but has never lived with the mother.

18. Guidance as to how a decision in relation to designation should be made was given by Thorpe LJ in *Northamptonshire County Council v Islington Borough Council and Others* [2001] Fam 364; [1999] 2 FLR 881. Thorpe LJ set out the proper approach to such disputes, which can be summarised as:

    i) The Judge's function is to carry out a rapid and not over-sophisticated review of the history to make a purely factual determination, it is a question of fact not discretion;

    ii) The subsection should be given the construction that achieves the result for which it is designed, namely a simple mechanism to determine the question of administration;

    iii) The subsection has to be read as a straight forward test to be operated by the court in what should be, in the unlikely event of a dispute, to determine which local authority is to be responsible for the care plan and its implementation.

19. The result has been that following the *Northamptonshire* case, such disputes between local authorities are usually resolved by agreement, and, in the event that the court is obliged to make a determination, it has been done (as it was in this case) by way of a "rapid and not over-sophisticated review of the history".

20. That this is the proper approach was confirmed in *C* (*A Child) v Plymouth County Council* [2000] 1 FLR 875 where Swinton Thomas LJ said at [29]:

> "The underlying purpose of the decision of this court in *Northamptonshire County Council and Islington Borough Council*, as I see it, was to bring an end to disputes as to the statutory responsibility for a child between local

> authorities, let alone disputes between a parent and a local authority. Following that decision, those issues should no longer be litigated."

21. In *C (A Child) v Plymouth County Council*, whilst an interim care order was made in respect of the child in question immediately following her birth, that baby lived with her mother at various addresses in Liverpool and in Plymouth. The dispute centred around which of the two local authorities should be the designated local authority. It was in this context that, on the facts of that case, Thorpe LJ upheld the judge's view that a new-born baby was incapable of having an ordinary residence apart from the mother, and that, therefore, the ordinary residence would be dependent upon the residence of the mother.

22. This theme was picked up more recently by Ryder LJ in *Medway v Kent* [2016] EWCA Civ 366 at [21]:

> "In *C (A Child) v Plymouth County Council [2000] 1 FLR 875* Thorpe LJ re-emphasised the basis of the Northampton decision which, he said, was to put an end to litigation of this kind between local authorities (see, for example at 878 and per Swinton Thomas LJ at 880). Thorpe LJ agreed with the first instance court that it was a reasonable inference of fact in the circumstances of that case that a new born baby would be unlikely to have an ordinary residence apart from her primary career and that for a child of such a tender age, the child's ordinary residence would usually follow that of her carer."

23. The observation of Ryder LJ was in the context of his summary of the current law, and not directly relevant to the decision that court had to make (which was in relation to the movements of the mother and child together after the discharge of the baby from hospital). It would seem that it was, as a consequence of these observations made by Ryder LJ and relating to a mother with primary care of her child, that the judge in the present case concluded that LL was ordinarily resident in the area of the County Council, notwithstanding that he had never having been present in the area.

24. Mr Roche, on behalf of the appellant, submits that the judge was wrong in reaching that conclusion and the presence of the child in the area in which the mother lives is a necessary, but not an exclusive ingredient, of ordinary residence. He submits that a new-born baby, taken immediately into foster care, will have no ordinary residence and therefore, he says, the designation of the appropriate local authority will be by reference to s.38(a)(b) and would inexorably have led to the designation of the City Council as the appropriate local authority.

25. That there are circumstances when a child will not have an ordinary residence is beyond dispute. Not only can that be taken from a straightforward reading of the section but, in the *Northamptonshire* case, Thorpe LJ said at [24]:

> "Where the child has connections with more than one area ordinary residence determines on the basis that almost every child will have an ordinary residence, if not a presence, in some local authority area. In the rare case where

> a child lacks an ordinary residence in a local authority area the court designates the area in which occurred the events that carried the application over the section 31 threshold".

26. The question, therefore, arises as to whether, as is argued by Mr Kingerley on behalf of the respondent, a new-born child's residence is derived solely from the mother's place of residence, notwithstanding that the child has never been present at the place of the mother's ordinary residence, and that there has been (and is) no intention that the child will ever be in the care of his mother.

Habitual Residence and Ordinary Residence

27. Ordinary residence is not defined by statute, however the concepts of "ordinary residence" and "habitual residence" are, as recently described by Cobb J in *Re M (A Child) (Foreign Care Proceedings Transfer)* [2013] EWHC 646 Fam; [2013] 2 WLR 146, "close relatives". He said at paragraph [61]:

> "61. There is no doubt that "ordinary residence" and "habitual residence" are close relatives. The phrases have been treated as equated one with the other, indeed they have been described as synonymous; see *V v B* [1991] 1 FLR 266, *Gateshead Metropolitan Council v L* [1996] 2 FLR 179, and *Re V (A Minor) Abduction: Habitual Residence* [1995] 2 FLR 992. In *Nessa v Chief Adjudicating Officer* [1999] 2 FLR 1116, Lord Slynn described an "overlap" between the meaning of "ordinary" and "habitual" residence, recognising that one is sometimes defined in terms of the other. In *Nessa* the House of Lords recognised that there is "a common core of meaning" between the two phrases (see also, for completeness, *Barnet London Borough Council v Shah* [1983] 2 AC 309 at 342, [1983] 1 All ER 226 at 234).
>
> 62. That 'ordinary residence' and 'habitual residence' are broadly synonymous was a proposition accepted by all parties in these proceedings."

28. Neither Mr Roche nor Mr Kingerley have suggested that Cobb J was wrong in reaching that conclusion.

29. Mr Roche submits that, in the light of the close connection between ordinary residence and habitual residence, assistance can appropriately be found in the case of *A and Another (Children) (Habitual Residence)*, a decision in respect of habitual residence decided at both the Court of Appeal and Supreme Court level.

30. In the Court of Appeal (*[2012] EWCA Civ 1369, [2013] EWCA Civ 232)* the question of whether presence was an essential ingredient before habitual residence could be established, lay at the heart of the case. Patten LJ said at [60]:

> "It is clearly artificial as a matter of ordinary language to say that a child is habitually resident at birth in a country to which it has never been. As the cases recognise, residence denotes and involves a physical presence. Where the

> parents or parent have established a place of habitual residence in a particular country it will usually require no more than a moment's presence in that jurisdiction for a newly born child to acquire the same status. The child's integration into the family and social life of his parents already centered in that location will be completed by his physical presence there.…"

And at [61]:

> "One could construct a rule by which a newly born child was presumed to take on birth the habitual residence of its parents or custodial parent. But the rule would be a legal construct divorced from actual fact which is what the court in *B.v H. [(Habitual Residence: Wardship) [2002] 1 FLR 388]* said that it was anxious to avoid and which has been rejected in all the earlier decisions of this court."

31. Rimer LJ agreed with the observations of Patten LJ. Thorpe LJ, however, dissented.

32. The matter was thereafter heard by the Supreme Court- *A v A and Another (Children: Habitual Residence) [2013] UKSC 60, [2014] AC1*. Although there were extensive arguments before the court in relation to the requirement of presence before habitual residence can be established, the Supreme Court in fact decided the case, not on the issue of habitual residence, but upon nationality. The observations of the court in relation to presence were, therefore, strictly speaking, obiter, but, as Mr Roche rightly submits, of powerful influence upon this court. Mr Roche, therefore, relies on certain observations made in particular by Baroness Hale in her majority judgment (Lord Wilson, Lord Reed and Lord Toulson agreeing and Lord Hughes dissenting).

33. Mr Roche highlights Baroness Hale's reference to earlier cases where physical presence was assumed to be an integral ingredient of habitual residence and relies on Baroness Hale's observations at paragraph [55]:

> "So which approach accords most closely with the factual situation of the child – an approach which holds that presence is a necessary pre-cursor to residence and thus to habitual residence or an approach which focusses on the relationship between the child and his primary carer? In my view, it is the former. It is one thing to say that a child's integration in the place where he is at present depends upon the degree of integration of his primary carer. It is another thing to say that he can be integrated in a place to which his primary carer has never taken him. It is one thing to say that a person can remain habitually resident in a country from which he is temporarily absent. It is another thing to say that a person can acquire a habitual residence without ever setting foot in a country. It is one thing to say that a child is integrated in the family environment of his primary carer and siblings. It is another thing to say that he is also integrated into the social environment of a country where he has never been"

34. Mr Kingerley, for his part, also properly draws the court's attention to the dissenting judgment of Lord Hughes in *A v A*, and, in particular, his observation at paragraph [90]:

> "The decision of the Court of Appeal in this case involves a rule or general proposition because it necessarily excludes habitual residence without some past physical presence. The contrary approach, which to my mind is correct, involves no rule or generality at all, save for the advice to look, in the case of an infant, at the position of the family unit of which he is part. This does not involve a rule for dependent habitual residence. It merely asserts the possibility that habitual residence may exist in a State which is the home of the family unit of which the infant is part, and is where he would be but for force majeure."

And at [92]:

> "If current physical presence is not essential, then so also can habitual residence exist without any physical presence yet having occurred, at least if it has only been prevented by some kind of unexpected force majeure."

35. Mr Kingerley goes on to submit that to adopt the approach in *A v A* would undermine the concept of "rapid and not over-sophisticated review", such as is required in a designation case since the days of the *Northamptonshire* case. *A v A* would lead, he says, to the introduction of a more complex and sophisticated test which is both unnecessary and goes against the approach of the *Northamptonshire* case, as confirmed by the *Plymouth* case.

36. I accept Mr Kingerley's submission to the extent that it would undoubtedly undermine the well-established approach to the determination of which local authority is to be designated for the purposes of a care order, if the court was expected to engage with detailed questions of fact of the type which might have been anticipated by the Supreme Court in order to determine habitual residence. It would, in my view, be both inappropriate and unnecessary to treat an application of this type in the same way, and with the same level of detail and sophistication as is sometimes found in disputes in relation to a child's habitual residence in international cases.

37. However, it is not that aspect of the judgment upon which Mr Roche relies. Rather, he relies on the fact that four of the five Supreme Court justices doubted that a child could acquire habitual residence in a country in which he had never been present.

38. Since the decision in the Supreme Court, the CJEU has considered the issue of physical presence in the context of habitual residence.

39. In *W and V v X (Case C-499/15)* the court held, at [61]:

> "Thus, the determination of a child's habitual residence in a given Member State requires at least that the child has been physically present in that Member State."

40. A few months later in *OL v OP Case C-111/17 PPU,* in the opinion of the Advocate General, the question was posed at paragraph [29] as was:

> "… is physical presence a necessary and self-evident prerequisite, in all circumstances, for establishing the habitual residence of a person, and in particular a new-born child?"

41. The Advocate General had the benefit of oral argument presented to him by, amongst others, Mr Edward Devereux QC on behalf of the United Kingdom. The Advocate General's opinion in relation to this aspect of the matter is found at paragraphs [81-83]:

> "81.…it is not inconceivable that there may be wholly exceptional circumstances in which it might be appropriate to disregard the criterion of physical presence. However, the present case, dealt with under the urgent procedure, does not lend itself to an in-depth examination of that question of principle. Given the circumstances of this case, an answer to such a question is not needed in order to provide a helpful answer to the question submitted by the referring court.
>
> 82. However, it seems timely to observe that, in such circumstances, and taking into consideration, in particular, that habitual residence is a question of fact, it is necessary that a tangible connection be established with a country other than that where the child is in fact living.
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> 83. Such a connection would have to be based, in the best interests of the child, on concrete and substantial evidence that could thus take precedence over the physical presence of the child. Plainly, there would not be a sufficient connection if there were some prospect that a particular Member State might become, on an indefinite future date, the place where the child would be habitually resident, unless that prospect were reinforced by other tangible links of such a kind that the prerequisite of the child's physical presence could be set aside."

42. When the matter came before the full court, the question previously put before the Advocate General was slightly rephrased to reflect the fact that the child in question had been born by agreement between the parties in a specific country and had thereafter remained in the care of the mother for a period of months. The full court, therefore, dealt with the matter only briefly saying at paragraph [42-43]:

> "According to that case law, the habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and

> family environment. That place must be established by the national courts taking into account all the circumstances of facts specific to each individual case… To that end, in addition to the physical presence of a child in a member state, other factors must also make it clear that presence is in not any way temporary or intermittent and that the child's residence corresponds to the place which reflects such integration in a social and family environment."

43. What is clear from *A v A*, at both the Court of Appeal and Supreme Court level and in the European jurisprudence, is that, in order to establish habitual residence, there will be an expectation that the child will have been present in the area where it is suggested that he, or she, is habitually resident.

44. In my judgement, the requirement of physical presence must equally apply to a determination of ordinary residence. The majority of the Court of Appeal in *A v A* was robust in suggesting that presence may be an absolute requirement. The Supreme Court do not specifically deal with the issue, but favour "presence". The Advocate General in *OL v OP* addressed the matter head-on, as already quoted at paragraph [81], although the Advocate General regarded it as "not inconceivable that there may be wholly exceptional circumstances in which physical presence will not be necessary".

45. In my judgment, it is not necessary for this court to express an opinion as to whether there may be, as the Advocate General suggests, exceptional circumstances which will mean that physical presence is not required, or whether physical presence is an absolute, essential ingredient of ordinary residence. In my judgment, whichever approach is applied, LL was not ordinarily resident in the County Council area. On the more draconian (Court of Appeal) interpretation, it brooks no argument as LL has never been present in the County Council area. If there is scope for an exception to that requirement then, in my judgment, there are no exceptional circumstances which would render physical presence unnecessary on the facts of the present case. LL was not only never present at the place of the mother's ordinary residence but he had never lived with her mother; he was the subject of an interim care order with a care plan, the effect of which was that they would never actually live together.

46. Mr Roche submits that nothing in the words of Ryder LJ, in *Medway v Kent*, justifies a departure from the approach of both the Court of Appeal and Supreme Court in *A v A*. It follows, Mr Roche submits, that, whilst usually a baby will be deemed to be ordinarily resident in the same place as its mother (as its primary carer), that is on the basis that the baby will have been physically present in that area by virtue of fact that he or she will have been in the care of his or her mother. If the baby has not been present, he or she cannot be deemed to have taken the ordinary residence of his or her absent mother.

Discussion and Conclusion

47. The Judge rightly attached no weight to LL's current care in the foster home within the City Council. The Judge did refer to Mr Roche's submission in relation to *A v A*, although at that stage the European cases had not been decided and were not available for the judge's consideration. The Judge, however, said at paragraph [12]:

> "Whilst I note the observations put forward on behalf of Leicestershire County Council with regards to the point arising out of *A v A*, I find the case of *A v A*, which is persuasive only, does not of itself exclude that finding, indeed it recognises that whilst not an absolute fixed position, it will be a frequent if not unusual position. I am driven to conclude that on that basis, and with my own judgment in the context of circumstances of this case, S's ordinary residence sits with his mother and sits with Leicestershire County Council who are on that basis the designated local authority. It would seem from the Judge's judgment he had at the front of his mind the observation of Ryder LJ set out above, namely that 'it would be unlikely to have an ordinary residence apart from the primary carer, and that for a child at such a tender age, the child's ordinary residence will look usually to follow that of her carer."

48. With respect to the judge who was endeavouring to approach the decision-making process in the spirit of *Northamptonshire*, he was, in my judgment, in error in concluding that LL was ordinarily resident in the County Council area and that that local authority was accordingly the designated local authority. Not only had this child not been present in the relevant local authority area, but critically the mother had never been LL's "carer" whether primary or otherwise.

49. In my judgment, this is one of those rare cases where a child has no ordinary residence. In the light of the majority view of the Supreme Court in *A v A* and confirmed by the European Court, presence, in my view, is a requisite before the child can acquire ordinary residence in a specified area. If I am wrong and presence is not an essential ingredient in order for ordinary residence to be established, I am nevertheless of the view that where circumstances arise where there has not only been no presence, but also that the baby in question has never lived with the parent through whom ordinary residence is asserted, that cannot be a basis upon which to make a finding that that baby's ordinary residence follows that of his or her mother's.

50. It follows that, in my view, the judge was wrong to conclude that the County Council should be the designated local authority. This case is one of those rare cases where the child in question, having been removed from his parents at birth, has no ordinary residence either in his or her own right, or by way of deemed ordinary residence by reference to his or her primary carer. The court must, therefore, determine the designated local authority by reference to s.31(8)(b). It was accepted by all parties that, in those circumstances, the designated local authority would be the City Council.

51. For those reasons, I would allow the appeal and discharge the order designating the County Council as the designated local authority and make a fresh order that the City Council be the designated local authority in these care proceedings.

LADY JUSTICE GLOSTER:

52. I agree. In my judgment it is impossible to say that in the particular circumstances of this case, LL was to be regarded as having ordinarily resided in either the area of the County

Council or in the area of the City Council for the purposes of s.31(8)(a) at the relevant time. For that reason, s.31(8)(b) applies and as My Lady has already said, there is no dispute that for the purposes of limb (b), the designated local authority is the City Council.

53. Accordingly, this appeal will be dismissed.

End of Judgment

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This transcript has been approved by the judge.