Case number DE21C00094

IN THE FAMILY COURT

AND IN THE MATTER OF THE CHILDREN ACT 1989

AND IN THE MATTER OF X

A LOCAL AUTHORITY

APPLICANT

AND

A (THE MOTHER)

1ST RESPONDENT

AND

R (THE FATHER)

2ND RESPONDENT

AND

X

(THROUGH HER CHILDREN'S GUARDIAN)

3RD RESPONDENT

Judgment on Jurisdiction and Habitual Residence Issue

For the Local Authority – James Cleary

The Mother did not attend and was not represented

For the Father – Anne Williams

For X – Melanie Brigden

1. Background

On 12.5.2021 the LA issued an application for a care order in respect of X, aged 13. The parents, A and R are both British nationals. A remains living in the UK but father, R, emigrated to Australia in 2009 and acquired permanent residence in Australia, where he remains. He and X arrived in the UK for a visit to see PGM in January 2020. X had been voluntarily placed in care pursuant to s.20CA 1989 prior to the issue of proceedings in May. The case was listed before me on 2.6.2021 and an ICO was made. The father was represented at that hearing by Miss Millership, an accredited Children Panel Solicitor. The father did not oppose the making of a care order or dispute jurisdiction at the first hearing. It was noted on the order, *"AND UPON the court taking a provisional view that it has jurisdiction, but that the issue of habitual residence and jurisdiction will be addressed at the next hearing; and in any event it was necessary for the court to take provisional protective measures today".* The father was directed to address jurisdiction specifically in his response to the local authority threshold document but he failed to do so.

At the next hearing on 16.7.2021, before a different Judge, when the father was represented by Miss Hodges of counsel, it was recorded, '*UPON the parties agreeing that the Court has jurisdiction to deal with X's case today, based on habitual residence, and that all parties are aware that if any*

application is made pursuant to Article 8 of The Hague Convention on the Protection of Children 1996, it must be made to the Family Division of the High Court as early in proceedings as possible.

AND UPON the Father confirming that he is content for the Court to exercise its powers in respect of X at this stage, given the urgency of the matter and the need for protective measures to be taken". When the matter came back before me on 15.10.2021 the case was timetabled through to an IRH. Dr Judith Freedman had prepared a psychiatric assessment of X. A paediatric assessment was awaited from Dr Diana Birch. However, I remained concerned that the issue of habitual residence (HR) had not been fully addressed. Consequently, I directed the service of skeleton arguments addressing the issue. On 22nd November I heard brief supplementary submissions from the LA, R, and the Guardian. A has not been involved in these proceedings and is not represented. I indicated I would give a judgment on this discrete issue on 3.12.2021.

2. <u>Position of the parties</u>

The LA, represented by Mr Cleary, were clear that X was habitually resident in the England and Wales.

R, represented by Ms Williams, submitted that X, although a British citizen, had permanent residence in Australia and that on the relevant date X continued to be habitually resident in Australia.

The Guardian, Dawn Eason, is represented by Ms Bridgen. Ultimately, she came to a similar position to that of the LA, namely that X was habitually resident and present in this jurisdiction thus giving the court power to exercise jurisdiction.

3. Preliminary issues

There were two preliminary points raised in the submissions on 22nd November. First, should the case be allocated to the Family Division of the High Court? I raised this matter with the DFJ as sometimes cases of this nature are heard in the High Court. She was of the view the matter could remain at Circuit Judge level at this time. The issue is a little academic as I do also sit as a s.9 Judge and so the case would more than likely have stayed with me. Second, was whether I needed to hear any evidence particularly on the issue of R's intention when he came to the UK in January 2020. As set out above R and X came here to visit PGM. It is R's case, as set out in his evidence and in Ms Williams skeleton argument, that this was during the Australian six-week summer holidays. R works at a school and was able to take the time to travel. X's stepmother did not have that advantage and so could not travel. The intention was to return to Australia after a few weeks. It is clearly described as a visit. The LA however describe this, in their application, as X moving to the UK. This is not accepted by father. During the course of their time in the UK, X made it clear that she wished to extend her visit and stay with PGM longer. After some trepidation R states he agreed and returned to Australia after two weeks. The expressed intention was for X to stay

for 10 weeks until March. R intended to collect X in the Easter holidays. She had been enrolled in school and was due to start at the end of January (commencement of the autumn term). The school was contacted and informed of the plan for X to stay a little longer in the UK and the start date was extended to Easter 2020, in line with R's plans. In the early Spring of 2020 COVID 19 struck and all flights to and from Australia were grounded. R applied for exemption to travel but this was refused. The PGM enrolled X in a local school in the UK in the summer of 2020 and registered her with a local GP. As I reflected on the case, I concluded that hearing evidence on R's intentions and the effects of the pandemic would not make a significant difference to my conclusion and determining that issue, at least for the purposes of HR would not be a proportionate use of court time. I was willing for the purposes of this issue to accept R's intentions.

4. The Law

4.1 The 'Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children' ('the Convention') is the starting point, as both the UK and Australia are signatories. Article 5 (1) of the Convention states: *"The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property"*. The court must determine whether B was habitually resident in England and Wales. If she is then

this court has jurisdiction. Even if the court is not persuaded that she had HR in England and Wales there are circumstances in which this court may still have jurisdiction to determine these proceedings.

The Convention has uniform rules that determine which authorities are competent to take the necessary measures of protection. These rules, which avoid the possibility of conflicting decisions, give the primary responsibility to the authorities of the country where the child has their HR (Arts 5 and 7). However, the Convention recognises certain situations where another authority will be competent. For example, the Convention allows the authority of any Contracting Party where the child is present to take necessary urgent or provisional measures of protection (Arts 11 and 12).

In determining the issue of HR, it is necessary not only to consider the relevant provisions of the Regulation but also the guidance given in the authorities concerning the interpretation and application of the Regulation. Two decisions of the Supreme Court are of particular relevance.

In *A v A (Children: Habitual Residence)* [2013] UKSC 60; [2014] AC 1 the issue for determination was whether the High Court of England and Wales had jurisdiction to order the "return" to this country of a very young child who had never lived in or even been to England, on the basis either that he was habitually resident here or that he had British nationality. In her judgment, Baroness Hale was very clear about the approach that should be taken when considering the issue of HR. After analysing the Regulation (at that stage Brussels II) and the relevant authorities, she said [§54]

‘Drawing the threads together, therefore:

i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.

ii) It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.

iii) The test adopted by the European Court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.

iv) It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.

v) In my view, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from R v Barnet London Borough Council, ex p Shah should be abandoned when deciding the habitual residence of a child.

vi) The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the

integration of that person or persons in the social and family environment of the country concerned.

vii) The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.

viii) As the Advocate General pointed out in para AG45 and the court confirmed in para 43 of Proceedings brought by A, it is possible that a child may have no country of habitual residence at a particular point in time.'

4.2 Further guidance was given by the Supreme Court in *Re B (Habitual Residence: Inherent Jurisdiction* [2016] UKSC 4, [2016] 1 FLR 561. Whereas in *A v A (Children: Habitual Residence)* the court was concerned with the circumstances in which HR may be acquired, *Re B (Habitual Residence: Inherent Jurisdiction)* concerned the circumstances in which HR might be lost. Lord Wilson approached that issue as follows:

'*45. I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state*

to the point at which he achieves the requisite de-integration (or, better, disengagement) from it.

46. One of the well-judged submissions of Mr Tyler QC on behalf of the respondent is that, were it minded to remove any gloss from the domestic concept of habitual residence (such as, I interpolate, Lord Brandon's third preliminary point in the J case), the court should strive not to introduce others. A gloss is a purported sub-rule which distorts application of the rule. The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him:

(a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;

(b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and

(c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it.'

4.3 One of the issues it seemed to me was the point at which HR was to be determined. Was it on 12th May 2021, when the LA initiated these proceedings? Whereas Brussels IIa specifies the date the court is seized (known as "perpetuatio fori"), Article 5 does not specify the point at which HR is to be determined for the purpose of establishing jurisdiction. In Warrington BC v T,R,W and K [2021]EWFC 68 MacDonald J concurred with Cobb J's obiter remarks in Re NH (1996 Child Protection Convention: Habitual Residence) [2016] 1 FCR 16 that the appropriate date in a Convention case was the date of trial. This may well be of significance in this case considering the effluxion of time since B first came to this jurisdiction. Proceedings were instituted on 12.5.2021 and a further 6 months have passed since then. Much has happened in the life of B in that time.

4.4 In Re K [2015]EWCA Civ 352 the Court of Appeal laid out the structure for determining the question of jurisdiction in respect of a child. The first step is to decide whether or not it has jurisdiction, and if so may go on to decide whether the other jurisdiction should nonetheless determine the matter. Although not specifically raised by R it seems to me that in the event that I decide B is HR in this jurisdiction I need to go on and address the issue whether nevertheless Australia is better placed to determine the issues and the case transferred under Article 8 of the Convention. In doing so I must consider, as set out by McDonald J in Warrington BC above, the principles set out in Spiliada Maritime Corporation v Consulex [1997] AC 460 namely :

i) It is upon the party seeking a stay of the English proceedings to establish that it is appropriate;

ii) A stay will only be granted where the court is satisfied that there is some other forum available where the case may be more suitably tried for the interests of all parties and the ends of justice. Thus the party seeking a stay must show not only that England is not the natural and appropriate forum but that there is another available forum that is clearly and distinctly more appropriate;

iii) The court must first consider what is the 'natural forum', namely that place with which the case has the most real and substantial connection. Connecting factors will include not only matters of convenience and expense but also factors such as the relevant law governing the proceedings and the places where the parties reside;

iv) If the court concludes having regard to the foregoing matters that another forum is more suitable than England it should normally grant a stay unless the other party can show that there are circumstances by reason of which justice requires that a stay should nevertheless be refused. In determining this, the court will consider all the circumstances of the case, including those which go beyond those taken into account when considering connecting factors.

McDonald J went on to say in Warrington BC *"In determining the appropriate forum in cases concerning children using the principles in Spiliada Maritime Corporation v Consulex, the child's best interests would not appear to be paramount, but rather an important consideration (whilst in H v H (Minors)(Forum Conveniens)(Nos 1 and 2) [1993] 1 FLR 958 at 972 Waite J (as he then was) held that the child's interests were*

paramount, subsequent decisions have treated those interests as an important consideration: Re S (Residence Order: Forum Conveniens) [1995] 1 FLR 314 at 325, Re V (Forum Conveniens) [2005] 1 FLR 718 and Re K [2015] EWCA Civ 352)".

4.5 The LA suggest in their skeleton argument that R does not dispute that this court should retain jurisdiction. In so doing they partly rely upon R's statement of 13th August to be found at C134 in the bundle where he says, *" My position in respect of jurisdiction is that although I am content for the UK Courts to deal with the case it is my intention to remain in Australia and X has expressed a wish to return to our care in Australia. I therefore seek to be assessed in Australia and in any case I am currently unable to leave the country due to the current lockdown. As such if the matter is listed for a Finding of Fact Hearing then I will unfortunately need to attend remotely from Australia. I have already spoken with my employer and have been advised that I will be able to take leave in order to attend the hearing. It has always been my intention to return to the UK and collect X but to date this has not been possible due to the ongoing pandemic".* At best this is ambiguous as to R's position on the issue of HR. It can be seen how the LA came to their, albeit mistaken, conclusion as to R's approach. Nevertheless, R's stance is now clear in the document submitted on his behalf on 5th November, namely that he says X's HR remains in Australia. In any event R's HR is a matter for the court and not the parties. This was why I had some concerns when the case first came before me in June.

5.Competing arguments on Habitual Residence

5.1 It is agreed that when X came to England in January 2020, she had lived in Australia for 9 years. She was HR in that country, even if a British citizen. It was also clear that it was R's intention that they were visiting PGM. Initially the visit was for the summer holidays. It is further agreed X wished to extend her stay and R returned to Australia as he had to go back to the school where he worked for the new term, with a view to coming back to collect X. R negotiated X's absence from her, as I understand it, new school for the 10-week term. Then the worldwide pandemic intervened and such a return, as R had envisaged when he left for Australia, became impossible. PGM then registered R in school and also with a GP in England. R's intention, namely that this was a visit, is a factor but is not determinative of the issue of HR. Undoubtedly X had strong roots in Australia, evidenced by R and her stepmother and half siblings living there with her and also the lengthy duration of her time in that country. Thus, it would take some time, with such a high degree of integration in Australia for HR to be lost. However, as time went on roots began to be put down in England. She was living with family and, as just identified, commenced school, and was registered with a GP. The issue of language is not significant as both countries are English speaking.

5.2 By the time of the commencement of the proceedings in this court in my view the issue of her HR was finely balanced. The younger the child the more likely her HR is shared with that of parents. However, X is 13 years of age, of a mind of her own to make it clear to R she wished to stay

for longer in the UK. She had been living in this jurisdiction for 16 months at the time of proceedings commencing. Prior to commencement she was accommodated under s.20 CA 1989 and is now settled in a residential placement. She is receiving education there, albeit not at the school where she was previously registered. She has been in the placement since May 2021. Even further time has now passed, and X appears relatively stable in this accommodation. Dr Freedman wrote that X is, *"thriving in the care of the Beacon House staff"*.

6. Conclusion

6.1 In *Re B (Habitual Residence: Inherent Jurisdiction)* (above) Lord Wilson used the analogy of the see saw. In May 2021 this issue of HR was finely balanced. Being a Convention case, it is now that HR is to be determined, and not as at 12.5.2021. Back then it is possible a different conclusion may have been reached. That is partly why this issue should have been addressed earlier. Now R's initial intention (namely a visit to the PGM) and X's significant integration in Australia have diminished in significance as the issues of effluxion of time, X's age and her ever deepening roots in England have increased in significance. Furthermore, this integration has accelerated over the last few months. The test is not whether X is fully integrated in this jurisdiction. It does need to be substantial or significant. It is *"some degree of integration"*. I thus come to the conclusion that by November 2021 X has HR in this jurisdiction.

6.2 That does not conclude the matter. Even though it is not raised by R I must address the issue under the Convention as to whether Australia is best placed to determine the issues in this case. The threshold includes allegations made by X that have taken place during her upbringing in Australia. However the threshold also includes more recent developments in this jurisdiction. The disclosures by X and the subsequent investigations have been in this jurisdiction. The witnesses, save for R, are based in this jurisdiction. I thus conclude that this court is best placed to determine the issues, reflecting that while X's interests are not paramount, they are nevertheless an important consideration. Further delay would not be in X's interests and a transfer to Australia at this stage would inevitably lead to considerable delay.

HHJ Jonathan Bennett

30th November 2021