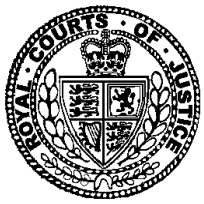

Neutral Citation Number: [2024] EWHC 2473 (Fam)
Case No: FD24P00174

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Before :

HHJ MORADIFAR
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

In the matter of;

Re A and B (Children: Return order: Article 13(a) defence: 1980 Hague Convention)

- -

- -

Miss Mehvish Chaudhry Best Solicitors appeared on behalf of the mother
Miss Amanda Meusz (instructed by Blackfords Solicitors) appeared on behalf of the father

Hearing dates: 18 and 19 September 2024

- -

Judgment

(Handed down on 30 September 2024)

HHJ MORADIFAR:

Introduction

1. A is a seven year old boy who together with his two year old sister B, are the subjects of an application by their mother for their summary return to Hungary pursuant to Article 12 of *the Hague Convention on the Civil Aspects of International Child Abduction* (the '1980 Hague Convention'). The application is resisted by the father on two grounds;
    a. The children were and are habitually resident in the UK.
    b. The mother consented to the children remaining in the UK.

The law

2. The Convention operates in the premise of respect and comity between the Authorities of its Contracting States and aims to protect children from the harmful impact of wrongful removal and retention. Where a child has been wrongfully removed or retained, its provisions aim for a prompt return of the child to the Contracting State that the child was removed from (see Baroness Hale at paragraph 48 *Re D (a child) (abduction: rights of custody)*[2006] UKHL 51). The scheme of the Convention provides for a limited number of defences to an application for summary return that include consent or acquiescence by the party seeking the return of the child.
3. The applicant must first establish where the children were habitually resident at the time of the alleged wrongful removal or retention. This is a factual determination by the court. The determination of habitual residence has been the subject of guidance that can be found in a series of authorities. In *Re B (A child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174, Hayden J provided most helpful guidance in the following terms:

> "*i) 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 (A v A, adopting the European test).*
> *ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, Re KL).*

iii) In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity.' Proximity in this context means 'the practical connection between the child and the country concerned': A v A (para 80(ii)); Re B (para 42) applying Mercredi v Chaffe at para 46).

iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (Re R);

v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (Re LC). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.

vi) Parental intention is relevant to the assessment, but not determinative (Re KL, Re R and Re B);

vii) It will be highly unusual for a child to have no habitual residence. Usually a child loses a pre-existing habitual residence at the same time as gaining a new one (Re B); (emphasis added);

viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (Re B – see in particular the guidance at para 46);

ix) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (Re R and earlier in Re KL and Mercredi);

x) The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (Re R) (emphasis added);

xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (A v A; Re B). In the latter case Lord Wilson referred (para 45) to those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move;

xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (Re R).

xiii) The structure of Brussels IIa, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, "if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former" (Re B supra);

If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child. The approach must always be child driven…"

4. In <u>*Re B (A child) (Reunite International Child Abduction Centre and others Intervening)*</u> [2016] AC 606, Moylan LJ stated that:

"*In conclusion on this issue, while Lord Wilson's see-saw analogy can assist the court when deciding the question of habitual residence, it does not replace the core guidance given in A v A and other cases to the approach which should be taken to the determination of the habitual residence. This requires an analysis of the child's situation in and connections with the state or states in which he or she is said to be habitually resident for the purpose of determining in which state he or she has the requisite degree of integration to mean that their residence there is habitual.*

Further, the analogy needs to be used with caution because if it is applied as though it is the test for habitual residence it can, as in my view is demonstrated by the present case, result in the court's focus being disproportionately on the extent of a child's continuing roots or connections with and/or on an historical analysis of their previous roots or connections rather than focusing, as is required, on the child's current situation (at the relevant date). This is not to say continuing or historical connections are not relevant but they are part of, not the primary focus of, the court's analysis when deciding the critical question which is where is the child habitually resident and not, simply, when was a previous habitual residence lost."

5. In light of the above, later in <u>*Re M (children) (Habitual Residence: 1980 Hague Child Abduction Convention)*</u> [2020] EWCA Civ 1105, Moylan LJ approved Hayden J's approach and his helpful list of considerations, save that he considered the terms of paragraph (viii) should be omitted so as to not divert the court *"from applying a keen focus on the child's situation at the relevant date"*.
6. In assessing a child's habitual residence, McFarlane LJ in <u>*Re R (a child)*</u> [2015] EWCA Civ 674 most helpfully observed that:

> *"When determining habitual residence there is no requirement that, to be sufficient to support a finding, the individual needs to be happy, well cared for or free from abuse. The 'social and family environment' into which a child might be integrated may include both positive and negative factors. These will not be irrelevant."*

7. It is possible, but vanishingly rare that a child may be found not to have a habitual residence. This may arise in circumstances where the child frequently moves between jurisdictions or has lost habitual residence in one jurisdiction but the evidence of acquiring it in the new jurisdiction does not reach the requisite threshold to make a finding of habitual residence.
8. If habitual residence is established to be in a Contracting State from which the child is said to have been wrongfully removed, the court will order a summary return unless one of the 1980 Hague Convention defences have been stablished. Article 13(a) sets out a defence of consent and/or acquiescence of the applicant to removal or retention of the child to the new jurisdiction. This is a further factual determination that the court is tasked with. Jackson LJ in *Re G (Abduction: Consent/Discretion)* [2021] EWCA Civ 139 summarised the applicable principles in this respect (by reference to the dicta of Wall LJ in *Re P-J (Children) (Abduction: Consent)* [2009] EWCA Civ 588) as follows:

" *25. ...*

> *(1) The removing parent must prove consent to the civil standard. The inquiry is fact-specific and the ultimate question is: had the remaining parent clearly and unequivocally consented to the removal?*
>
> *(2) The presence or absence of consent must be viewed in the context of the common sense realities of family life and family breakdown, and not in the context of the law of contract. The court will focus on the reality of the family's situation and consider all the circumstances in making its assessment. A primary focus is likely to be on the words and actions of the remaining parent. The words and actions of the removing parent may also be a significant indicator of whether that parent genuinely believed that consent had been given, and consequently an indicator of whether consent had in fact been given.*

(3) Consent must be clear and unequivocal but it does not have to be given in writing or in any particular terms. It may be manifested by words and/or inferred from conduct.

(4) A person may consent with the gravest reservations, but that does not render the consent invalid if the evidence is otherwise sufficient to establish it.

(5) Consent must be real in the sense that it relates to a removal in circumstances that are broadly within the contemplation of both parties.

(6) Consent that would not have been given but for some material deception or misrepresentation on the part of the removing parent will not be valid.

(7) Consent must be given before removal. Advance consent may be given to removal at some future but unspecified time or upon the happening of an event that can be objectively verified by both parties. To be valid, such consent must still be operative at the time of the removal.

(8) Consent can be withdrawn at any time before the actual removal. The question will be whether, in the light of the words and/or conduct of the remaining parent, the previous consent remained operative or not.

(9) The giving or withdrawing of consent by a remaining parent must have been made known by words and/or conduct to the removing parent. A consent or withdrawal of consent of which a removing parent is unaware cannot be effective.

26. *All of these matters are well-established, with the exception of the last point, which did not arise for consideration in the reported cases. As to that, there are compelling reasons why the removing parent must be aware of whether or not consent exists. The first is that as a matter of ordinary language the word 'consent' denotes the giving of permission to another person to do something. For the permission to be meaningful, it must be made known. This natural reading is reinforced by the fact that consent appears in the Convention as a verb ("avait consenti/had consented"): what is required is an act or actions and not just an internal state of mind. But it is at the practical level that the need for*

communication is most obvious. Parties make important decisions based on the understanding that they have a consent to relocate on which they can safely rely. It would make a mockery of the Convention if the permission on which the removing parent had depended could be subsequently invalidated by an undisclosed change of heart on the part of the other parent, particularly as the result for the children would then be a mandatory return. Such an arbitrary consequence would be flatly contrary to the Convention's purpose of protecting children from the harmful effects of wrongful removal, and it would also be manifestly unfair to the removing parent and the children."

9. Finally, consent given in the face of *"a calculated fraud or deliberate fraud on the part of the absconding parent"* is unlikely to be regarded as valid consent (per Waite LJ *Re B (A Minor) (Abduction)* [1994] 2 FLR 249) and examples include consent given in the belief that this may lead to a reconciliation between the parents where the parent removing the child is already in another relationship that was not known to the consenting parent (see *T v T (Abduction: Consent)*[1999] 2 FLR 912).
10. In all the circumstances the court has a discretion to return the child to the originating jurisdiction of a Contracting State which is to found in the wording of article 13 and by applying the overriding objective of the Convention (*Re M and another (Children) (Abduction: Rights of Custody)* [2007] UKHL 55).

Background

11. The Father is of Nigerian decent and a British national. His parents live between the UK and Nigeria. The mother was born in Hungary and a Hungarian national. The parties have been in a relationship since 2011 and married in 2014. Both children were born in the UK and hold dual British and Hungarian nationalities.
12. During their relationship, the parties lived and moved between the UK and Hungary. The mother has been studying a part time medical degree in Budapest for some years and this is now nearing its conclusion. The father is an English teacher. The family came to the UK on 26 January 2024. The mother asserts that this was pursuant to arrangements for a temporary relocation so that she could concentrate on concluding her degree. The father asserts that this was intended to be a permanent move with a plan that the mother will accept a medical post in the UK where she will be better

remunerated. Thus giving rise to the first material dispute as to the children's habitual residence.

13. It is clear that the parents' relationship was becoming increasingly difficult and by March 2024 the mother was clear that she wished the children to be returned to Hungary and she did not consent to their residence in the UK.
14. The parties' relationship is complex and unusual. The father has been openly in a relationship with another woman who also lives in Hungary. He states that the mother was supportive of this and it was within their permissible religious boundaries. He also states that he was used to receiving explicit images and videos from his wife. Shortly before departure to the UK in January, he discovered that the mother had been sharing explicit videos and images with other men. The mother strongly denies this.

Evidence

15. I have read the evidence that is within the bundle that includes statements from the parties that exhibit several pages of documents and images. I have also had the benefit of listening to a recording of a conversation between the parents in which it is asserted by the mother that the father was placing undue pressure on her to agree to the children residing with him and to limit her contact. Although it is unusual to hear evidence in such cases, I have heard the evidence of each of the parents limited to the issues of agreement and consent. I will summarise the relevant parts of the evidence below.

Analysis

16. This case calls for a cultural understanding and sensitivity of the highest order. The arrangements concerning the parties' marriage and what has followed since do not fit within the traditional British cultural norms. It is crucial that the assessment of the evidence is undertaken though a culturally sensitive lens which will enable the court to better understand and assess the evidence before it.
17. The first issue to be determined is the children's habitual residence. This is connected to the second issue, consent and its withdrawal. Turning to the first issue, I note that both children were born in the UK and hold dual nationalities. The parties have enjoyed an international life mainly traveling within Europe. The paternal grandparents live between the UK and Nigeria. The maternal grandparents live in Sweden. The parties have been very reliant on the support from the extended family

with the grandparents offering several types of support to the parties and the children. In the main the parents and the children have lived between the UK and Hungary.

18. The advocates' agreed chronology of the family's movements between the UK and Hungary demonstrates a broad pattern that the parties lived mainly in the UK during 2017 and mainly in Hungary in 2018. In 2019, 2020 and 2021 the family continued to spend time in the UK but lived for the significant part of their time in Hungary. The pattern was then reversed with the family living mainly in the UK in 2022 before returning to Hungary in July 2023 where the mother and the children resided continuously until their recent trip to the UK on 26 January 2023.
19. The evening before their departure, the parties had a serious argument which was caused by what the father had observed on the mother's mobile telephone. The father asserts that he discovered that the mother had been sending intimate images of herself to other males. The mother denies this and states that the father was jealous about her conversation with fellow male students. She strongly denies sending any sexualised messages or intimate images. She states that the father had behaved like this some years ago when she sent a picture of herself and A to a male friend.
20. The difference in the parties' respective accounts continue to pervade the remaining relevant aspects of the case. The mother asserts that the father has spent some time away from the family and when he returned in December, they discussed the options which were designed to facilitate the mother completing her medical qualifications. They agreed that the children and the father would stay in the UK on a temporary basis and rejoin her in May 2024 after she had completed her examination and to attend her graduation in June. Thereafter, they would remain living in Hungary. The father asserts that the move to the UK was intended to be a permanent relocation.
21. On arrival in the UK, the father's behaviour became increasingly abusive and controlling. The mother returned to Hungary on 4 February, the father's behaviour continued on the same abusive and controlling trajectory. He demanded to have control the mother's social media accounts, restricted her contact with the children, pressured her to send him intimate images of herself and cutting off any financial support that he was giving her. The father then presented the mother with a written document that he wished for her to sign. The document was drafted in terms that gave the father 'sole custody' of the children and the mother to have supervised contact with the children. Notwithstanding the pressures from the father to sign the document, she did not do so and withdrew her consent to the children remaining in the UK. She

demanded their return to her care in Hungary and issued these proceedings in April 2024.

22. The mother explained that she had previously been aware of the father's extramarital relationship in Hungary with another woman ('X'). He had raised this with her and she had registered her objections to the same. However, she felt unable to stand in the father's way as their marriage contract did not specify that she could object to the father taking other wives. From her perspective, he had acted unilaterally by pursing and maintaining a relationship with X for years which at times meant that he was away from the family several nights each week. She believed that they had been married. The relationship appears to have ended. However, she discovered the email dated 14 February 2024 from the father to X in which he declared his everlasting love for her, his joy at being 'rid' of the mother and that how X could now be a mother to his children. Until this email, the lady concerned did not know that the father had a daughter. Subsequently X rejected the father's advances. At about the same time the father was continuing with his demands of the mother to send him intimate images that she felt obliged to do as otherwise she would not be able to see her children.
23. The father was clear that the mother had encouraged his relationship with X. When taken to his email of 14 February 2024, he was unbale to explain its detailed contents or why he was seeking to have X become a mother to his children. More generally the father struggled to stay on point and answer the questions that were asked of him. It was clear that he was and continues to be enraged at the mother. His attitude towards the mother during his oral testimony reflected his previous conduct towards the mother. He was disparaging and belittling of the mother, offering no sympathy or appreciation of the impact that his actions may have on the mother.
24. The remit of this hearing is very narrow and it would be entirely inappropriate for me to determine any issues that go beyond the habitual residence of the children and the agreement between the parties. Within this context, I found the father's evidence to be evasive, contradictory and unreliable. By contrast the mother, whom I found to be an intelligent and measured lady gave consistent reliable and balanced evidence. It was clear to me that she has done her utmost to meet the cultural expectations of her that included treating the father as he dominant figure of their household and respecting his decisions even where this has been unpalatable to her. She has also worked hard to near the end of her medical studies in the face of challenging circumstances.

25. Although, the family have moved frequently, the evidence before me is clear that both children were fully integrated in the Hungarian society. The mother's evidence about the choice of schools for A and what was achievable was entirely consistent with the children's lives being well established in Hungary before coming to the UK. This was clearly understood by all of the family and the paternal grandparents who were assisting with the school fees. The exhibits to the mother's statements fully support and corroborate her oral testimony. The father's evidence did not mount any serious challenge to the children being habitually resident in Hungary up to January 2024. Therefore, without hesitation, I find that as of January 2024, both children were habitually resident in Hungary.
26. Turning to the issue of the parents' discussions and agreement to travel to the UK, I found the father to be inaccurate, inconsistent and unreliable in his evidence. He was very much focused on the mother's conduct and how he might address this. If there was any agreement that the children were permanently relocating to the UK, I would expected there to be some mention of the agreement that the father had acted upon in good faith. There is no reliable evidence that would support the father's assertion that the move to the UK was intended to be a permanent move. The evidence clearly demonstrates the desperate and abusive attempts by the father to pressure the mother to agree to the children remining in his care. It is also clear that in the mother's absence the day to day care of the children is undertaken by the paternal grandmother and not the father. In my judgment the children's daily circumstances far more closely resemble a temporary arrangement that further corroborates the mother's account.
27. I particularly note that the mother's immigration status and ability to travel to and from the UK is limited. There is no evidence of her having a work visa or having applied for one. Her evidence about her prospects of working in the UK illustrated that not only this is not immediately achievable but that she has done little to investigate this or to take steps towards making the necessary applications. The contents of her text exchanges with the paternal grandmother lend further support to her assertions regarding the agreement between the parties. The mother also gave unambiguous evidence about her future work commitments in Hungary and how unlike the expectations of working within the NHS, it would allow her to care for her children. There is little evidence of the children's integration in the UK since their arrival. Whilst I am confident that there is a degree of integration by mere fact of their

presence here, I note that until May 2024 A had not attended school and has been home schooled due to the father' asserted fears of abduction.

28. I found the mother to be an intelligent and articulate lady. Her evidence was cogent, reliable and balanced. Her focus has steadfastly been the children notwithstanding the tremendous pressure that she has been placed under that in no small part include her separation from her children. By contrast, I found the father's evidence to be focused on the mother's alleged conduct and punishing the mother for the same. He was highly evasive on the principal issues and self-serving. He has clearly mislead the court in his previous ex parte applications to his local court seeking to secure the children's residence in the UK. His explanation by blaming his legal representatives lacked any credibility. I am entirely confident that the agreement for the children's to come to the UK was an exceptionally difficult one for the mother and that the parties were clear that this was only a temporary solution to allow her to complete her studies by May 2024 at which time the children would return to Hungary. I am also entirely confident that in the face of the father's behaviour and the limitations on the time that she could spend with her children, on 31 March 2024 she withdrew her consent to the children remaining in the UK. Therefore it follows that since that date the children have been wrongfully retained in the UK.

Conclusion

29. In summary I find that:
    a. At all material times the children have been habitually resident in Hungary.
    b. In December 2024, the parents agreed that the children may temporarily relocate to the UK with a plan that they would return to Hungary in May 2024.
    c. Based on the aforesaid agreement, the parents and the children came to the UK on 26 January 2024.
    d. On 31 March 2024, the mother withdrew her consent to the children remaining in the UK.
    e. The children have been wrongfully retained in the UK since 31 March 2024.
30. Given my finding, in my judgment the children's interests demands that they are returned to Hungary where they are habitually resident. Such an order would be entirely consistent with the exercise of any discretion about the children's welfare. Therefore, it is not necessary for me to consider if the mother gave informed consent

or whether it is invalidated in the circumstances that I have set out earlier. Accordingly I order that the children are returned to Hungary forthwith.