OUTER HOUSE, COURT OF SESSION

[2021] CSOH 50

P114/21

OPINION OF LADY WISE

In the petition

ML

Petitioner

against

JH

Respondent

Petitioner: McAlpine; Morton Fraser LLP
Respondent: Cheyne; Gibson Kerr Law & Property

7 May 2021

Introduction

[1] This case involves the application of ML, the mother of a young child, for an order that he be returned to Canada. For the purposes of these proceedings I will call that child Fraser. He was born in September 2019 to his Canadian mother and a British (born in England, lives in Scotland) father, the respondent JH. The couple were neither married nor co-habiting at the date of Fraser's birth although they had been in a relationship since late 2016. Fraser was born in Canada and is a Canadian national. He lived there throughout the first year of his life other than during a visit to Scotland in December 2019/January 2020. He was in the sole care of his mother ML during that first year, albeit that his father visited

and spent time with him, particularly from the end of June 2020. In the circumstances detailed below the parties agreed on 11 September 2020 that Fraser's father could take him to Scotland for a period but that he would be returned to Canada no later than 15 December 2020. The child was not returned to Canada on that date. The petitioner came to Scotland to collect him, which the respondent refused. These proceedings were raised in early February 2021. There were procedural delays caused partly by the late lodging of documentation that required to be considered by the petitioner and also because of the late focus on the legal significance of the mother's move from one province of Canada (Ontario) to another (Quebec) shortly before Fraser's departure for Scotland in September 2020. The final hearing took place before me on 23 April 2021.

[2] There is no dispute that Fraser came to Scotland with the petitioner's full agreement. The main issue is whether he was wrongly retained here as at 15 December 2020. The matters that were focused as comprising the dispute by the date of the hearing were as follows:

- Where was Fraser habitually resident as at 15 December 2020 when the respondent was due to return him to Canada?
- If Fraser remained habitually resident in a Canadian province, was that in Quebec or Ontario?
- If Fraser had lost his habitual residence in Quebec, which failing Ontario, by 15 December 2020 had he by then acquired a Scottish habitual residence?
- If Fraser was habitually resident in Quebec on 15 December 2020 and wrongfully retained in Scotland on that date, has the respondent established an article 13(b) defence and should the court refuse to return him to Canada?

- If Fraser was habitually resident in Ontario on 15 December 2020 and if the respondent does not establish an article 13(b) defence can the court return him to Quebec rather than Ontario, those two provinces being separate territorial jurisdictions within Canada?

Undisputed facts

[3] Some of the essential facts about Fraser's departure from Canada in September 2020 were not in dispute. The petitioner has always lived in Canada, having been born in Quebec but has resided in Ontario for much of her life. Her parents divorced when she was young and her father (RL) remains resident with his partner and their 13 year old daughter in Quebec. The petitioner lived with her mother (VB) in Ontario for the first year of Fraser's life. The respondent JH was living in Scotland during the petitioner's pregnancy with Fraser and subsequently. The parties' relationship was not a stable one but the respondent flew to Canada to attend Fraser's birth. He returned to Scotland about a week after the baby was born. During the first year of his life Fraser and the petitioner shared a room in the home of the petitioner's mother, VB, who has young children of her own from a new relationship. She and the petitioner have had a difficult relationship at times.

[4] The petitioner has suffered from mental health difficulties from time to time. She has a history of depression and suffered a major depressive episode during her pregnancy but reported feeling well before Fraser's birth (see number 6/8 of process, a report of the petitioner and Fraser's family doctor in Ontario). That report confirms that from Fraser's birth in September 2019 to September 2020 the petitioner attended a number of medical appointments including all those connected with the care of a young child. Fraser was taken for regular checks and for vaccinations. There were two brief hospital visits to the

emergency department in April and June 2020 which were reported as being for minor falls from a bed and from a couch respectively.

[5] At the end of June 2020 the respondent arrived in Canada. There were discussions about the petitioner moving from her mother's home which she and JH had agreed was not the best place for the child to be cared for. There were discussions about the petitioner and Fraser moving to live with the petitioner's father in Quebec. In that context there were also discussions about the respondent taking Fraser to Scotland. The petitioner was again struggling with mental health issues. There were also discussions about the respondent staying in Canada and about a possible move by the petitioner to Scotland. The petitioner wanted to stay in Canada. While the parties did not take legal advice, the petitioner had concerns about the vulnerability of her situation if there was no agreement that Fraser would be returned to Canada and to her within a specified period. An agreement was drafted, (number 6/3 of process) and signed by the parties. In the agreement, the petitioner gave formal consent for Fraser to travel temporarily with JH who would provide care for him in Scotland until "no later than 15 December 2020". There followed what were described as "strict circumstances" in the agreement, namely that the respondent would require to confirm with the petitioner before leaving Fraser under the care of anyone other than himself and also that the respondent acknowledged that the move to Scotland was simply temporary on the basis that the petitioner had "some health concerns". Two further strict circumstances were stated to be:

> "3. [JH] must, above all, agree to return [Fraser] to ML on or before the agreed upon date.
>
> 4. [JH] understands this is not a permanent custody agreement."

Both parties signed and dated the agreement on 11 September 2020.

[6] The respondent is 29 years old. He is a student at Aberdeen University. He has embarked on a five year degree course of which he has completed at least one year. His stated address is in the centre of Aberdeen. His parents live in a small village about 12 miles from the city. When he arrived in Scotland with Fraser in September 2020 the respondent was living in student accommodation with others. He secured his current Aberdeen address in December 2020. By 15 December 2020 he had not registered Fraser with a general medical practitioner. The child had not attended a nursery or other infant playgroup. The respondent's mother was involved in supporting the respondent with child care. When the petitioner came to Scotland to collect Fraser in December 2020 in accordance with the agreement, the respondent indicated that she could have only limited contact with the child. She contacted the Canadian Consulate in Edinburgh and was directed to the Canadian central authority and in turn the Scottish central authority. She raised this action before she returned to Canada in February 2021 and has continued to pursue this application from there.

The applicable law

[7] The Hague Convention on the Civil Aspects of International Child Abduction is incorporated into domestic law in this jurisdiction by the Child Abduction and Custody Act 1985. Article 3 provides as follows:

> "The removal or the retention of a child is to be considered wrongful where -
>
> > a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

Article 12 provides that where a child has been wrongfully removed or retained in terms of Article 3 and less than one year has elapsed from the date of the wrongful removal or retention the authority concerned shall order the return of the child forthwith. There are certain limited defences to a return where wrongful removal or retention is established, one of which is relied on in this case as detailed below. It is not disputed in this case that the petitioner has relevant rights of custody over Fraser (in terms of Articles 599 and 600 of the Quebec Civil Code, confirmed by the Affidavit number 22 of process, of Mrs SA, a practising Quebec lawyer) and that she would have been exercising those but for his retention in Scotland. Initially the respondent disputed that the petitioner herself was domiciled in Quebec but by the time of the final hearings that was not insisted in. The central issue for determination relates to Fraser's habitual residence as at 15 December 2020. There was no dispute between the parties on how the law in relation to habitual residence in the context of international child abduction has evolved in recent years.

[8] In *A* v *A and Another (Children): Habitual Residence (Reunite International Child Abduction Centre and Others Intervening)* [2013] AC 1 the UK Supreme Court examined the traditional view of habitual residence as that had been interpreted in England and Wales. Baroness Hale of Richmond, citing various relevant authorities, drew together all of the threads of the previous case law, and made eight relevant points (at paragraph 54). These included that habitual residence is a question of fact and not a legal concept such as domicile (and so there is no legal rule akin to that whereby a child automatically takes the domicile of his parents); that the test adopted by the European court for habitual residence was "the place which reflects some degree of integration by the child in a social and family

environment" in the country concerned; and that it is unlikely that such a test produces different results from that previously adopted in the English courts. Baroness Hale specifically expressed the view that the test adopted by the CJEU in *Proceedings brought by A [2010] Fam 42* was preferable to that earlier adopted by the English courts insofar as they had focused on the purposes and intentions of the parents rather than the situation of the child. Accordingly, any test that preferred the purposes and intentions of the parents should be abandoned in deciding the habitual residence of a child. Further, the social and family environment of an infant or young child is shared with those (whether parents or others) on whom he is dependent. In any case in which habitual residence is at issue it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned. The essentially factual and individual nature of the enquiry should not be glossed with legal concepts which would produce a different result from that which the factual enquiry would produce. Finally the court noted that it was possible that a child may have no country of habitual residence at a particular point in time. The possibility of a child having no habitual residence at all during a transitional period was said to be "conceivable in exceptional cases".

[9] In the subsequent case of *In re B (A child)* [2016] AC 606 Lord Wilson in the UK Supreme Court expressed the following view on the way in which the loss of one habitual residence and the acquisition of another operates:

> "45 … 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 ……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."

An example of a Scottish case heard by the UK Supreme Court on this issue since the focus changed following the case of *A v A supra*, can be found in *In re R (Children)* [2016] AC 76. There Lord Reed emphasised that it was the stability of the residence that was important, not whether it is of a permanent character. There is 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 (paragraph 16).

[10] The most recent exposition of the law of habitual residence in so far as it relates to child abduction under the Hague Convention is provided by Moylan LJ in the case of *B (A child) (Abduction: Habitual Residence)* [2020] EWCA Civ 1187. In that case a young child was born in Australia but moved to France with her parents, with the parents' intention being that the move would be permanent. The mother subsequently retained the child in England and Wales. An issue arose about where the child was habitually resident. The Court of Appeal overturned the first instance judge's decision that the child had remained habitually resident in Australia. Detailed reference is made in the judgment of Lord Justice Moylan to the authorities referred to above on habitual residence, including his own recent decision in *M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention) [2020] EWCA Civ 1105*, where his Lordship had reiterated that the core guidance remained that set out in *A v*

A and that the " see-saw" analogy could not replace the analysis of the child's situation in, and connections with, the state or states in which he is said to be habitually resident. Importantly, Lady Hale's reference in *A v A* (at paragraph 44) to it not being impossible for habitual residence to change in a single day depending on the circumstances was again relied on.

[11] There is also discussion in *B (A child) (Abduction: Habitual Residence)* about whether a return order can be made to a third state. Although it was unnecessary in the circumstances of the case to make an order for the return to a third state, Moylan LJ considered it to be competent if to do so was appropriate in all the circumstances. He cautioned that if such a power was to be exercised it must be used with considerable care so that it does not "procure an effective relocation without any concomitant welfare inquiry" (para 117). It ought to be used only when it was in effect procuring a child's return, the obvious case being where it is being used when a child is being returned to his or her primary carer. A list of factors relevant to a possible return to a third party state had been provided to the court in that case and these were approved by Moylan LJ at paragraph 118.

[12] Article 31 of the Hague Convention applies to this particular case. It provides that in relation to a state which in matters of custody of children has two or more systems of law applicable in different territorial units, any reference to habitual residence in that state shall be construed as referring to habitual residence in a territorial unit of that state. Similarly, references to the law of the state of habitual residence are to be construed as referring to the law of the territorial unit in the state where the child habitually resides. Canada, as a sovereign state, is a signatory to the Hague Convention and the provinces of Ontario and Quebec constitute territorial units of that state, each with its own system of family law. Importantly, however, the contracting state for the purposes of the Convention is Canada.

[13] Turning to the respondent's defence should wrongful retention be established, Article 13 of the convention provides, *inter alia*, as follows:

> "Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

[14] The most authoritative guidance on a defence under article 13b remains that of the UK Supreme Court in the case of *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144. Baroness Hale and Lord Wilson, at paragraph 34 of that judgment reiterated that the burden of proof in an Article 13 defence lies with the person opposing the child's return. In relation to the specifics of this type of defence they stated:

> "…the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real". It must have reached a level of seriousness as to be characterised as "grave"……
> ….the words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative 'or *otherwise*' placed 'in an intolerable situation' (emphasis supplied). As was said in *Re D* [2007] 1 AC 619, para 52, 'intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate.' Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent…if there is such a risk, the source of it is irrelevant: e.g., where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child. "

[15] While the case of *In re E* might have impacted on what things might create a grave risk for a child, the strength of the test that must be satisfied to succeed under article 13b remains as exacting as ever. Clear and compelling evidence of a grave risk of substantial harm is required, something much more than the risk inherent in any unwelcome return to the country of habitual residence. It has also long been established that in the absence of compelling evidence to establish that the courts in the requesting country do not have the power to protect the child, the courts of the requested county should assume that they will be able to do so – *C v C [1989] 1 WLR 654.*

[16] Finally, it is useful to bear in mind the whole purpose of decision making in this area, neatly summarised by Lady Hale in the case of *In re E* cited above. She noted (at para 9) that ;-

> "…The first object of the Hague Convention is to deter either parent (or indeed anyone else) from taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any dispute can be determined there. The left-behind parent should not be put to the trouble and expense of coming to the Requested State in order for factual disputes to be resolved there. The abducting parent should not gain an unfair advantage by having that dispute determined in the place to which [he or] she has come".

The disputed issues in this case

Habitual residence

[17] There is no dispute that Fraser had only ever lived in Canada by mid-September 2020. The first issue is whether he was habitually resident in Ontario or in Quebec being the relevant territorial jurisdictions for the purposes of the Convention applicable to this case. Once his habitual residence as at September 2020 is established, the

issues become whether he had lost that habitual residence by 15 December 2020 and if so whether he had acquired a Scottish habitual residence by that date. The petitioner's contention is that the move from Ontario to Quebec in September 2020 was intended to be permanent. Her position is that a return to her province of domicile, standing the age of the child and her role as his primary carer until September 2020, resulted in the uprooting of the child from Ontario and his settling in Quebec taking place with almost immediate effect. The respondent's position on the other hand is that Fraser had effectively been "in transit" from Ontario to Scotland having spent only a few days in Quebec. The respondent's position is that he had arrived in Canada with the intention of taking the child to Scotland, his own country, and that Fraser had subsequently become settled here by 15 December. The supporting evidence for these two opposing positions requires examination.

[18] In her third supplementary affidavit the petitioner states that she and her father started discussing a possible move by her with Fraser to Quebec in about July 2020. Her father was aware of the problems she had at her mother's house and she told him that she did not consider she had sufficient support in Ontario and wanted to take up an offer that he had made previously about her and Fraser moving in with him. Her intention was to settle in Quebec and in the longer term to secure her own accommodation but meantime to accept her father's offer. The move to Quebec took place on 6 September 2020, a later date than initially anticipated because of the petitioner's father's commitments in the Canadian military. A trailer was rented into which the petitioner and her father packed the vast majority of her belongings and Fraser's crib and toys. The respondent, who had been staying with the petitioner at VB's home in Ontario, accompanied the petitioner, her father and Fraser to Quebec. When the petitioner had been in Ontario there had been some involvement with a local Children's Aid Society after a volatile incident in which the

petitioner's mother's partner was arrested and charged with assault. In the summer of 2020 the petitioner kept the Children's Aid Society informed of her planned move. She notified them that her departure was not for a holiday and that she would be settling in Quebec with Fraser. The petitioner confirms that by the time the agreement (number 6/3 of process) was signed she and Fraser, together with the respondent, were already in Quebec. She notes that she mistakenly used her Ontario address in the agreement, explaining that she was distraught at the time and felt under huge pressure. The address in the agreement is to that extent erroneous.

[19] It was only five or six days after the arrival in Quebec that the respondent and Fraser left for Scotland. The petitioner had advised her doctor that she was leaving Ontario although there is a necessary transition period of three months when one moves from one province to the next in Canada before a change of medical professional can be confirmed. The petitioner's relationship with her mother has been under huge strain, particularly because VB has provided an affidavit supportive of the respondent's article 13(b) defence which will be discussed in that section. The petitioner asserts that having moved to Quebec with a settled intention, the situation had not changed by December 2020. The pertinent facts on which she relies include ;-

(1) The petitioner is from Quebec having been born there and was domiciled there in mid-September 2020 and on the date of wrongful retention on 15 December 2020.

(2) Her father lives permanently in Quebec and she has a relationship with him and lives in his home.

(3) The departure from Ontario was not intended to be temporary. The clear intention was that the petitioner would not return to live there and would

have a future in Quebec. The move to Quebec was well planned and considered and not spontaneous. It was communicated to third parties both before and after it happened. The respondent was part of that plan.

(4) The only accommodation available to the petitioner in Ontario had been with her mother VB. That accommodation was no longer suitable and available by the time Fraser left for Scotland, nor was it available on 15 December 2020. The child had no home in Ontario by that date.

(5) The move to Quebec involved the physical transportation of the petitioner and Fraser's possessions to Quebec.

[20] The respondent's position is that as Fraser had spent very few days in Quebec and the intention was that he would be removed to Scotland no habitual residence had been acquired there. He contends that as the petitioner has lived the greater part of her life in Ontario and the child had lived there for almost all of his short life any habitual residence in Canada in September 2020 was in Ontario. The case was not analogous with the situation Moylan LJ was dealing with in *B (A child) (Abduction: Habitual Residence)* as there was nothing of the certainty about the move to Quebec that the move from Australia to France had in that case. The petitioner's father had been assisting his daughter who was in extremis. The available material did not indicate that the move was permanent, the petitioner's home with her father was simply one of temporary refuge. The respondent's evidence was to the effect that, while he accepted that he had signed an agreement that the child would be returned to Canada no later than 15 December 2020, he had also imposed a condition that the petitioner required to seek medical assistance for her mental health issues and to show him that she had addressed those issues before he would agree to return Fraser to her. His position is that when the petitioner arrived in Scotland to collect the child he was

not convinced that she had addressed her mental health issues and so made a decision that the child should remain with him. On 4 December 2020 he moved from the student accommodation he had been sharing to a property in Aberdeen with the child. His position is that he has continued to reside there.

[21] It was said that registering with a GP was not at the top of his list but he had done so at some point after 15 December 2020. A report from a health visitor based at a practice in the locality of the village where his parents live was lodged (number 7/2/1 of process). That letter indicates that the health visitor made a "home visit" to the child at the respondent's parents' home. Following questions about why the child had been registered at a practice in the vicinity of his parents' home rather than his property in Aberdeen, the respondent's position was that he had registered with a GP in Aberdeen (in late December) but did not like the practice and so retained registration for himself and Fraser with his family GP in Aberdeenshire. He had taken the child to his parents' home for the purpose of the health visitor's visit. In that letter, the health visitor states "[Fraser] needs to catch up on the immunisation programme and [JH] is unsure exactly what [Fraser] has had …".

[22] There is support in the available material for the petitioner's contention that the move to Quebec was intended to be permanent. Her father, RL, has provided two affidavits. In his supplementary affidavit dated 22 April 2021 he addresses the move to Quebec from Ontario. His recollection is that the first discussion about a move to Quebec was in June 2020 and that the final decision was taken in the August. His recollection is that the move took place on 7 September 2020 and not the 6th but, with that minor exception (and the inconsistency is easily reconciled when the duration of the trip is considered) he confirms the petitioner's account of him travelling to Ontario to collect the petitioner and Fraser and the majority of their belongings. Mr L confirms that his understanding was that after Fraser

went to stay temporarily in Scotland he would be returned to his home in Quebec where there was suitable accommodation for the petitioner and her son. None of the other witnesses are able to give direct evidence in relation to the nature of the move to Quebec. The petitioner's mother VB states in her first Affidavit (number 14 of process) that when the respondent took Fraser to Scotland the petitioner went to stay with her father and that Fraser was to be returned (to her) before Christmas. Conversely, in her supplementary affidavit (number 25 of process) VB states that she did not know if the petitioner intended the move to Quebec to be permanent. However, there is certainly no suggestion on VB's part that she was expecting the petitioner and Fraser to return to live in her home. The only other witness who was involved with the family directly at the time of the move was the petitioner's mother's partner MD. Mr D has provided an affidavit in relation to the article 13(b) defence (number 26 of process). At paragraph 11 thereof he states that in September 2020 VB asked the petitioner to leave the home and that the petitioner moved to Quebec into her dad's house. The witness then alleges that Mr L threw the petitioner out of his house but that is in contradiction to the direct evidence of the petitioner and Mr L. It is clear that MD had the impression that the petitioner had moved.

[23] While it was stated on the respondent's behalf in submissions that the petitioner and the child were "in transit" when he left for Scotland, this had not been addressed in his affidavits. In his first affidavit,(number 15 of process), at paragraph 7 he stated that the conversations in September 2020 had been to the effect that it was better that Fraser came with him to Scotland and that "even her dad was trying to convince her". The petitioner's father had been in Ontario only for the purposes of collecting the petitioner and Fraser for a move to Quebec, which tends to support that if there was any convincing about a trip to Scotland it was in the context of the move to Quebec having taken place. Importantly the

respondent's supplementary affidavit (number 24 of process) tends to support the account given by the petitioner and her father when he states (at para 20 "…*It was in June 2020 that her mum asked her to move out. It was not in fact until September that we did move out.*" This confirms both the respondent's involvement in the move to Quebec and its nature being one of a pre- planned departure from VB's home and from Ontario. Importantly, the agreement that Fraser would travel to Scotland for a temporary stay was not finalised until 11 September, by which time the parties and Fraser had moved to Quebec.

[24] Having regard to the various factors relied on by the petitioner and listed at paragraph 13 above and such support as there is from the extraneous material, I have concluded that Fraser's habitual residence in Ontario was lost on 6 or 7 September 2020 and he had acquired a new habitual residence in Quebec by 11 September 2020. He was a young infant who had been in the care of his mother throughout the first year of his life. Until he was brought to Scotland in terms of the agreement (number 6/3 of process) for an agreed limited period there was no question but that he would live wherever his mother lived. Her return to Quebec was a natural one in the difficult circumstances in which she found herself and with the support of her father who was able to offer stability in terms of accommodation and family life. There is a considerable amount of material, some of which is more relevant to the article 13(b) defence, indicating that the situation at the petitioner's mother's home had been unstable and volatile for some time. Where a very young child is moving with his primary carer, the change of habitual residence may take place effectively immediately. In the particular circumstances of this case it did not involve any change of country but was a move from habitual residence in one province of a country to another province within that state. It would be entirely artificial to regard Fraser as having retained a habitual residence in Ontario when he, his mother and their joint belongings had moved to Quebec with a plan

to remain there, other than for the subsequent agreement to a limited period in Scotland. Quebec was the place in which there was some degree of integration by Fraser in a family and social environment in the circumstances I have found established. The issue then becomes whether Fraser lost his habitual residence in Quebec by the date of the retention in Scotland on 15 December 2020.

[25] On the basis of the applicable law to which I have referred, the issue of habitual residence is now considered to be a fact sensitive one where the degree of integration by the child in a social and family environment requires scrutiny. As Fraser had been resident in Quebec for only a short period it might have been easier for him to lose that habitual residence and gain a new habitual residence in Scotland if the circumstances here were illustrative of stability. The starting point in this case is that the parties signed an agreement confirming the intended nature of Fraser's stay in Scotland. They agreed that it would not be of a permanent character but that it was to give the petitioner space to address her health issues. While indisputably parental intention can never now be the determinative factor in these cases, it is an important factor in this particular case, given the contrast between the level of preplanning for the move to Quebec and that for the stay in Scotland. The firm agreement that the trip was characterised as a temporary stay influenced what happened to Fraser once he arrived in Scotland. I observe that neither of the parties in this case has been living a particularly permanent or even stable existence over the last 18 months. However the petitioner's move to Quebec was, as I have found, intended to be permanent and involved the move of almost all of her belongings and those of the child to her father's home. In contrast, when the respondent arrived in Aberdeen in mid-September 2020 he seems to have taken the child into his shared student accommodation. Fraser also spent time with his paternal grandparents in the village 12 miles from the city, as he had done

during the visit to that home when he was a tiny baby. The trip had all the hallmarks of an extended trip rather than a change of residence for the child. By 15 December 2020 Fraser had not been registered with a doctor and did not attend nursery or play group. That is what one would expect if the period in Scotland was in the nature of a visit or short stay rather than the acquisition of a stable residence. The petitioner arrived in Scotland in early December 2020 and required to quarantine for a period due to Covid 19 restrictions. On his own evidence, the respondent indicates that it was in early December that he decided to move to more suitable accommodation with the child. He did not provide the respondent with his new Aberdeen address. Further, the respondent's position on whether he ever intended to have Fraser returned to Canada is unsatisfactory. He contends that there were conditions, not stated in the agreement, that in his mind were determinative of whether or not Fraser would be returned. The claim in his Supplementary Affidavit (at paragraph 21) that his understanding was that the return was dependent on the petitioner securing accommodation (other than her father's house) seems particularly implausible standing the clear terms of the agreement. Similarly, his assertion (paragraph 9 of his Supplementary Affidavit) that it was his solicitor who advised him to give his mother's address to the petitioner when she arrived in Scotland is unsupported, as is his claim not to have known that the petitioner was coming to Scotland in December 2020 to collect Fraser. I am left with some uncertainty as to what was happening to Fraser and where during the period leading up to 15 December 2020, which adds to the perception of a lack of stability in this jurisdiction at that time.

[26] It is not surprising in some ways that, with a very young infant like Fraser there is very little extraneous material to rely on in support of the different positions of the parties. The absence of attendance at nursery/play group would be more significant with an older

child, but the lack of registration with a GP for a young infant is revealing. It is of particular note that even by February 2021 the respondent appeared not to know what vaccinations Fraser had been given, again suggestive of his time in Scotland being of a temporary and unsettled nature prior to the respondent's refusal to return him in December 2020. The respondent claims to have registered Fraser with a dentist but there is no independent evidence to confirm that. In any event, in his Supplementary Affidavit the respondent dates the registration with both a doctor and a dentist for Fraser at the end of December 2020, which again is after the date at which habitual residence must be determined to ascertain whether the retention was wrongful. Indisputably, the absence of such features of settled life are not determinative on their own. Taken together, however, with the nature of Fraser's removal from his primary carer for what was agreed to be a relatively short time limited period, this absence of any indication that the child was putting down new roots in Scotland, insofar as a very young child can, leads to a conclusion that he had not lost his habitual residence in Canada, and particularly in Quebec, by 15 December 2020. His time in Scotland was not of such a settled character that he had acquired a new habitual residence in this jurisdiction. While it is just conceivable that a child can be in limbo with no habitual residence, neither party suggests that this could be the outcome in this case. I conclude that Fraser had not lost his habitual residence in Quebec by 15 December 2020 as he had not acquired a new habitual residence in Scotland. Accordingly, the respondent's retention in Scotland on 15 December 2020 was wrongful in terms of Article 3 of the Convention.

[27] I have considered the petitioner's alternative position that, even if Fraser was not habitually resident in Quebec he was habitually resident in Ontario (and not Scotland) on 15 December 2020. I record that there was no dispute about the petitioner having rights of custody under the relevant law of Ontario (Children's Law Reform Act 1990, section 20).

However, in my view the petitioner's alternative position does not sit well with the evidence. For the reasons given, I am satisfied that there was a pre-planned move from Ontario to Quebec that was intended to be permanent and where roots could be put down immediately because it was a return to the petitioner's province of domicile and to her father's home with her infant son, all within her contracting state of permanent residence. If habitual residence did not require to be interpreted in accordance with Article 31 but by reference to a sovereign state then I would have found that Fraser was habitually resident in Canada at all material times up to and including 15 December 2020. However, the terms of Article 31 demand that I identify in which territorial jurisdiction the child was habitually resident. I have determined that he was so resident in Quebec. He had no other settled home and the environment in Ontario had become unsuitable. Had I decided that Fraser remained habitually resident in Ontario, then it seems on the basis of Moylan LJ's decision in *Re B (A Child) (Abduction : Habitual Residence), cited supra*, that I could competently order Fraser's return to Quebec as a third state. Any lingering doubts I may have about whether a return to a state other than that of the child's habitual residence is appropriate given the terms and purpose of the Convention are tempered by and subject to the persuasive authority of *Re B*. In any event, on the facts of this particular case, a return to Quebec would be a return to the contracting state of Canada even if the child's habitual residence in Ontario was deemed to have continued. In the particular circumstances of this case I do not consider any competency issue would have arisen, although it is not necessary to discuss the third state issue standing the decision I have made. It is noteworthy that in cases involving Contracting States with Federal systems, such as Canada, the order for return is normally articulated as being to the country rather than the province. That is reflected in the prayer of the petition in this case. While I am satisfied that Fraser had lost his habitual residence in

Ontario, the fact of the move being merely from one province to another in the country of his birth, home and nationality were relevant factors supportive of the ease with which the change could take place.

Article 13(b) defence

[28] Having determined that Fraser had retained his habitual residence in Quebec, Canada, until his retention in Scotland on 15 December 2020 and there being no dispute that the petitioner would have been exercising rights of custody but for that retention, the onus switches to the respondent to establish the defence to a return. As indicated the stated defence is that there is a grave risk of the child suffering serious physical or psychological harm in the event of a return to Canada. I have indicated that in terms of the applicable law the risk must be a grave one and if it is contended that the child would be placed in an intolerable situation that must be one that a child in the particular circumstances of the case should not be expected to tolerate. I will consider the competing allegations in the affidavits and extraneous material lodged in this case before concluding how the law should be applied to the particular circumstances of this case.

[29] The respondent gives detail of the petitioner suffering from mental health difficulties for some years and that she has required involuntary hospitalisation for that on two occasions. None of that is disputed by the petitioner, who has also given such detail. There was no suggestion when Fraser was born that the petitioner should not care for him and at no time has there been state intervention with a view to changing her role as primary carer. The contentious aspect of the allegations relates to the petitioner's care of Fraser during 2020. The respondent was not present in Canada until the end of June 2020. However some support for his allegations is available in the affidavits of the petitioner's

mother VB and her partner MD who speak of a difficult period at the end of June 2020 when the petitioner was struggling with the care of Fraser and the local Children's Aid Society visited the home. An agreement was reached that Fraser would go and stay with VB's second husband AM who is effectively the stepfather of the petitioner. It was agreed that Fraser would stay with Mr M for three nights; he did so and was then returned to VB's home and to the care of the petitioner. There were also two occasions in 2020 on which emergency medical attention was required for Fraser. The first was on 10 April 2020 when there was an incident during which Fraser banged his forehead and the police and an ambulance were called. VB's position in her affidavit (at paragraph 4) is that the petitioner had dropped Fraser wilfully onto his head although she told the police that he had fallen. The second occasion was in June 2020 when Fraser had apparently fallen on his head when it is alleged that the petitioner had left him alone in VB's home. VB was not present during the incident but she states at paragraph 5 of her affidavit that another of her adult children found him head down and he was taken to the emergency department of a local hospital. The picture painted by VB and her partner is of neglectful parenting of a type that would put a small child at risk. The respondent in his affidavit evidence alleges that the petitioner regularly smoked marijuana and that she was generally unwell and often suicidal.

[30] The petitioner addressed the respondent's allegations in her supplementary affidavit (number 12 of process) and second supplementary affidavit (number 31 of process). In the first of these, which runs to some 22 pages, the petitioner confirms that the respondent was made fully aware of her diagnosis since the beginning of their relationship. In essence, she has suffered PTSD due to being a victim of sexual abuse by a relative as a child. Her depressive illness had developed thereafter. She describes an unsympathetic response on the part of her mother to her difficulties. The petitioner denies the specific allegations made

in relation to her treatment of Fraser. At paragraphs 44-54 of her supplementary affidavit she responds to the allegations made. She provides some detail in relation to the incident of 10 April 2020 which she states arose when VB's partner MD was shouting and threatening those in the house. The petitioner's position is that she put Fraser on the floor to go to search for her phone to call the police as MD was on probation and was breaching a condition of that. MD fled the house and the petitioner states that she only discovered that it was said Fraser had fallen off a bed when the police and emergency services arrived. He had no bruising and there was a short trip to hospital during which it was confirmed that Fraser was not concussed. She has produced Fraser's medical records (number 6/13 of process) which provide some support for her account. So far as the June 2020 incident is concerned the petitioner's position is that Fraser was sitting on a couch and she stood up for a minute to assist her sister in looking for an item. As she walked away she heard a noise and realised that Fraser had fallen off the couch. She ran to him and noticed a large bruise and bump and another of her sisters agreed to drive them to the hospital. The respondent was notified. Again there was a short trip to hospital and a discharge after it was confirmed that any concussion would likely be mild and there would be no immediate treatment. Again this incident is narrated in Fraser's medical records (number 6/13 of process).

[31] The petitioner disputes the terms of the respondent and VB's affidavits in relation to the other incident in June 2020. The respondent was still in Scotland. The petitioner's account is that it was her mother's support worker who was attending the home and to whom VB alleged that the petitioner was struggling and minimising her problems. The petitioner acknowledges that she had a minor breakdown and called her own support worker asking her to remove Fraser. She stated that she did not want to give him up but she was incapable of dealing with the mounting pressures being thrown her way. The outcome

was that the petitioner's childhood stepfather took Fraser. The petitioner has responded to the respondent's claim that she regularly smokes marijuana including in the presence of the child by lodging a video recording (number 6/33 of process) which shows the respondent standing at patio doors in the Ontario home smoking from a pinkish red filtration device used for smoking cannabis. He appears to be standing within a couple of feet of Fraser who is in a highchair. The petitioner's voice can be heard in the background. The petitioner has also lodged her report (number 6/8 of process) from the family doctor attending her and Fraser in Ontario confirming that there were no child protection concerns. There is other information in relation to breast feeding, a health visitor family assessment and the child's medical records already referred to (number 6/9, 6/11 and 6/13 of process) which provide some support for the petitioner's position. The petitioner has also lodged a group of text messages (number 6/23 of process) between her and the respondent in which there appear to have been regular communication about minor health issues Fraser was having in June 2020. There are also messages between the parties in which the respondent refers to having weed (number 6/35 and 6/31(4) of process).

[32] Mr McAlpine submitted that from the material lodged, it could be seen that the respondent was well aware of the chaotic atmosphere in VB's home in which he also stayed in July and August 2020. There are messages lodged illustrating that the respondent would criticise VB in his exchanges with the petitioner. He has now shifted his allegiance from the petitioner to her mother and partner and successfully enlisted their assistance with his article 13(b) defence. In some of the messages between the parties the respondent had referred to the petitioner's mother's house as being "So f-ing toxic" and to that house as "aids for the head". He told the petitioner that she would do "far better out of there" (see 6/31(1), (2), (4), (6), (7) and (9) of process). It was submitted that the respondent's

allegations had not been made out and that conclusion could be drawn that the respondent lacked credibility. For example he states in his supplementary affidavit that he does not smoke marijuana yet makes allegations of the petitioner using cannabis as part of his case. It was clear that the respondent had smoked cannabis in very close proximity to the child himself. There was also inconsistency between VB's first affidavit when she states that the petitioner's intention was to move to live with her father and her supplementary affidavit when she states that she did not know what the petitioner's intentions were. There were concerns about the credibility of VB. She was not present at two of the incidents she gives evidence about. It was noteworthy too that VB's partner MD did not live with VB between March and October 2020 and could not be speaking from direct knowledge in relation to any June 2020 allegations. The petitioner had explained the position about his being in the house in April 2020.

[33] For the respondent it was contended that there was abundant evidence about the petitioner's lack of ability to look after her child. For his part the respondent had also lodged two short videos one of which showed the petitioner in bed, apparently during the day, with the child trying to crawl on top of her (number 7/3/1 of process). The petitioner is seen swearing at the child and telling him to go and play. It was submitted that this demonstrated something of an *animus* from the petitioner to her own child. She had videoed the event and sent it to the respondent. The second video (number 7/3/2 of process) showed Fraser in clear distress the petitioner not responding and videoing the event. It was also said that as no affidavit had been provided by the petitioner's father's partner, she was a shadowy figure and it was unknown who would help the petitioner with Fraser while her father who is in the military would be working. The father's home is in an isolated situation something that was important given the risk of physical harm based on the incidents where

the child suffered bruising and had suffered from neglectful behaviour on the part of the petitioner. There was also a reference to psychological harm because of the capricious way in which the petitioner was said to parent the child. The petitioner had produced an affidavit from someone who appeared to be a new boyfriend or partner of sorts (JB) who spoke to her life in Quebec but there was no real independent evidence that the risks had diminished as a result of the petitioner settling in that province. The circumstances in which Fraser was brought to Scotland should be taken into account even if he was deemed to be habitually resident in Canada. Matters must have been quite desperate for the petitioner to consider that it was better for the child to be in student accommodation with his student father rather than with her. It was the respondent's position that the article 13(b) defence had been established.

[34] In considering the evidence in relation to this matter, I am mindful of the decision of the Inner House in *D* v *D* 2002 SC 33 (at paragraph 8) where it was confirmed that in a case of this sort no firm conclusion can be made in relation to allegations made only in contradictory affidavits if there is an absence of extraneous evidence to support a conclusion one way or another. While on the face of it the respondent has support from the petitioner's mother and her partner in relation to one or two of the more serious allegations, those witnesses are clearly not independent and the context was that after a difficult year in her mother's home the petitioner left to go and live with her father who does not enjoy any form of working relationship with VB. In fact RL describes his ex-wife as "an unstable person and a liar" stating that "she's been lying to me for so many years" (affidavit 21 of process, paras 9 and 10). The background of family acrimony has led to various changes in allegiance in this case. It is noteworthy that the only truly independent material, such as medical records, tend to support the petitioner's account of the April and June incidents on which the

respondent places such reliance. The petitioner has lodged videos and similar material illustrative of her being capable of routine care of Fraser and displaying appropriate affection to him. Further, I am sceptical about the suggestion that little is known about the petitioner's father's partner. It was not contended that RL's evidence that he has been with his partner for 21 years was incorrect. I am not satisfied that there is anything of particular concern in relation to the set up in the Quebec home. Taking all of the available material into account I simply am not in a position to reach any firm conclusions about whether Fraser would be at serious risk of harm if returned to the care of his mother. Accordingly, the respondent has not established the necessary grave risk of physical or psychological harm or that Fraser would be placed in an intolerable situation if returned to Canada.

[35] In any event, during the course of the hearing before me, Mr Cheyne confirmed that it was the respondent's position that if an order for return to Canada is made the respondent will travel with Fraser and will litigate the issue of care arrangements for Fraser in the courts there. It seems likely that as part of such litigation the respondent would seek to relocate the child to Scotland. That position having been stated, I do not require to examine too closely the sufficiency of any protective measures that could have been put in place had I been satisfied that a grave risk defence had been established. I am satisfied that it will be for the courts of Quebec to determine what care arrangements will best serve Fraser's interests in the longer term. Mrs SA has confirmed in her affidavit that only the best interests of the child will determine the outcome of such a dispute having regard to a number of listed factors. Mrs SA confirms also that legal aid may be available for proceedings of that sort in Quebec and that raising and concluding such proceedings should take between 12 and 15 weeks. There are currently no proceedings in this jurisdiction for the making of orders relating to Fraser's care.

[36] It would be inappropriate for me to state any conclusions in relation to matters of credibility and reliability in this section when I have indicated that I am not in a position to reach a firm view on the veracity of the allegations made in this case in so far as relevant to the article 13(b) defence. There are issues to try in any proceedings raised in relation to Fraser in Quebec and it will be for the decision-maker to assess the parties' respective credibility and reliability against a backdrop of all the other issues mentioned. The voluminous material lodged supports a tentative view that both parties appear to have acted immaturely at times, but both have also exhibited a caring attitude towards their son. A careful analysis of the petitioner's current mental health will be required. All I can say at this stage is that the respondent's proposal that he return to Canada with the child if that is the decision of the court seems sensible. If the parties cannot then agree on *interim* arrangements in terms of where the child should live and the contact he should have with the other parent, pending longer term decisions being made, that matter could be regulated within the court proceedings in Quebec. This approach is consistent with the view expressed by Lady Hale in *Re E* and referred to at paragraph [16] above.

[37] For all of the reasons given I intend in due course to grant the prayer of the petition, but will reflect the respondent's suggestion about how Fraser should be returned to Canada. To that end I will hear first from parties at the hearing already fixed in relation to the specific arrangements for Fraser's return to Quebec. I will reserve meantime all questions of expenses.