# RE R (ABDUCTION: HABITUAL RESIDENCE) [2003] EWHC 1968 (Fam)

Family Division

Munby J

24 July 2003

*Abduction – Habitual residence – Test applied – Application of domestic law*

The father was born in the UK and the mother was born in Australia. They married, lived in London and had one child, born in 2002. The father was posted via his employment to Germany. The parents rented accommodation in Germany and put their belongings, including personal items, in storage in London. The father's contract of employment was subject to English law. His salary was in pounds sterling and holidays included English bank holidays. The judge accepted the evidence that the mother believed the posting was essentially temporary and for a maximum of 6 months. The mother and child, with the father's consent, travelled to Australia. They were due to return on 6 March 2003 and the mother sought to stay until 17 March 2003 for an uncle's 80th birthday party. The father refused to agree to the extension and instructed lawyers in Germany to write to the mother for the child's return. The mother and child travelled from Australia to London on 22 March and the father applied, without notice to the High Court, for orders for the child's return to Germany. The mother was served, as she landed at Heathrow, with Hague Convention on the Civil Aspects of International Child Abduction 1980 proceedings.

**Held** – finding that the child was habitually resident in Germany and ordering the child's return –

(1) The test for habitual residence is whether their residence was for a settled purpose, which might be either a purpose of short duration or conditional upon future events (see para [49]). The test is not, 'that one does not lose one's habitual residence in a particular country absent a settled intention not to return there'. This comes perilously close to confusing the question of habitual residence with the question of domicile and is contrary to the authorities (see para [41]).

(2) The question of habitual residence is to be determined in accordance with English domestic law, by reference to the authorities, and cannot be affected by the evidence of German law. The decision would not be affected even by the decision of the German court to a different effect (see para [58]).

**Statutory provisions considered**

Financial Services Act 1986

Hague Convention on the Civil Aspects of International Child Abduction 1980, Art 3

**Cases referred to in judgment**

*A (Abduction: Habitual Residence), Re* [1996] 1 WLR 25, [1996] 1 FLR 1, [1996] 1 All ER 24, FD

*Akbarali v Brent London Borough Council; Abdullah v Shropshire County Council; Shabpar v Barnet London Borough Council; Jitendra Shah v Barnet London Borough Council; Barnet London Borough Council v Nilish Shah* [1983] 2 AC 309, [1983] 2 WLR 16, [1983] 1 All ER 226, HL

*Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951, CA

*F (A Minor) (Child Abduction), Re* [1992] 1 FLR 548, CA

*H (Abduction: Habitual Residence: Consent), Re* [2000] 2 FLR 294, FD

*N (Abduction: Habitual Residence), Re* [2000] 2 FLR 899, FD

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*Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937, [1999] 2 FLR 1116, [1999] 4 All ER 677, HL
*P (Abduction: Declaration), Re* [1995] 1 FLR 831, CA

*James Turner QC* for the claimant
*Debbie Taylor* for the defendant

*Cur adv vult*

**MUNBY J**:

**[1]** These are child abduction proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). A father alleges wrongful retention by the mother. It is common ground that the outcome of this case turns on the question of the child's habitual residence at the relevant date.

**[2]** The father was born in the UK. The mother was born in Australia. They met in London in 2000. They married in London on 23 March 2001. Their daughter, IS, who is the subject of the present proceedings, was born in London on 22 January 2002. At that time the family was living in a rented property in London. The father was employed pursuant to a contract dated 19 March 2001 with the London branch of a German company. He was employed as a debts capital markets junior, reporting to the head of the global debt origination department of the bank, Mr MB. The contract was expressed to be subject to English law. His salary was expressed in terms of pounds sterling. His 'current normal place of work' was said to be in the City of London. His holiday entitlement was expressed in part by reference to 'English bank holidays'. Amongst the conditions which he had to demonstrate that he was able to satisfy to take up the employment, he had to show that he was properly authorised by the relevant English regulators under the Financial Services Act 1986.

**[3]** In the course of 2002 his employer posted him to Germany. It is that posting which has generated the current litigation. The subsequent facts (by facts I mean for this purpose matters which are not in controversy) can be summarised follows.

**[4]** He commenced his posting in Germany on 5 August 2002. On 7 August 2002 he moved into temporary accommodation in a small furnished apartment in Germany, the mother and daughter remaining at that time in this country.

**[5]** On 18 August 2002 the mother's parents arrived in this country from Australia and they and she went on holiday initially to the Faroe Islands before meeting up with the rest of the family in France.

**[6]** On return from holiday the mother packed up the family's furniture and possessions in London and arranged for them to be put into storage. It is a matter of significance that the items which were put in storage were not merely very extensive but included, in addition to the family's furniture, a very substantial amount of the family's personal possessions – photographs, CDs and other matters of that sort.

**[7]** On 15 September 2002 the father, mother and IS went to Germany. They lived for the next couple of weeks or so in a small temporary apartment. On 29–30 September 2002 they moved into a larger apartment in Germany. That apartment was taken on a lease which ran until 31 January 2003 subject

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to automatic extension thereafter in the absence of notice to determine. The mother then returned briefly to this country to finish the clearing out of the London house, the lease of which, in the events which have happened, was duly determined on 13 October 2002. Thereafter the mother and father returned to Germany living together with IS in the furnished apartment which they had obtained.

**[8]** The father returned from time to time to this country at weekends. He came to this country for the weekends of 11/12 October 2002, 25/26 October 2002 and 21/22/23 November 2002. On those occasions, as is apparent from the evidence, he mixed business, personal and social activities. The mother on those occasions remained in Germany with IS.

**[9]** From 15 to 29 December 2002 the father travelled from Germany on business partly to this country but primarily to the US. For part of that time, from 21 to 29 December 2002, the mother and IS were in this country visiting friends and relatives. They all returned briefly to Germany for 30 and 31 December 2002 before leaving for a 4-day skiing holiday in Austria from 1 to 4 January 2003. The father returned again to this country for the weekend of 17/18 January 2003 and again from 31 January to 2 February 2003.

**[10]** On 5 February 2003 the mother, with the father's approval and consent, travelled to Australia with IS for a holiday in order inter alia to see her parents, who, as I have said, live there. The return ticket was booked for 6 March 2003.

**[11]** According to the mother's evidence, on about 15 February 2003 she telephoned the father to say that she wanted to stay in Australia with IS until 17 March 2003. That was because there was planned for 16 March 2003 a party for the 80th birthday of one of her uncles. She was understandably anxious to be present with IS at that party. She feared it would be the last time she would see that uncle. It was going to be a big family celebration and other members of the family would thereby have the opportunity of seeing IS. Moreover it would extend the holiday only for a comparatively short period.

**[12]** There is a dispute between the father and the mother as to whether the original plan was that the mother was to return on 6 March 2003, being the date of the return ticket, or whether, as the mother says, it was always planned that she would return on 12 March 2003, the tickets having been bought for an earlier date because, as she understood it, that was a means of obtaining a cheaper ticket. Be that as it may it does not seem to me that anything very much turns on it.

**[13]** When the mother and father spoke on the telephone, according to the mother that conversation being around about 15 February 2003, the father's response was that her proposal was unacceptable and according to her he launched into a tirade about how this was kidnapping.

**[14]** On the father's case the telephone conversation took place somewhat later. He dated it at 2 March 2003. The precise dates seem not to matter because, as he accepts, he made it clear (if only on 3 March 2003) that he did not consent to the extension of the holiday. Indeed he sent the mother a fax saying, amongst other things:

> 'I would not keep IS in another country away from her home in Frankfurt against your will. That would not be acceptable. Likewise I find your recent behaviour doing just that unacceptable … please … come home with IS.'

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Two days later on 5 March 2003 the father's German lawyers wrote to the mother saying, amongst other things:

> 'The delayed return to Germany is considered as an illegal retention of the child. Due to the international legal rules you are obliged to return as soon as possible to Germany.'

The letter went on to state:

> 'In case of any delay in your confirmation you should be aware that your husband will take all legal steps in order to return the child to Germany where all issues concerning the child have to be handled due to international law.'

It is a matter regrettably, so far as this court is concerned, only between the father and his conscience whether he believes that was an appropriate way of responding to what appears to have been the reasonable request of his wife and the mother of his daughter for a short extension of the holiday to enable his daughter to meet her wider family.

**[15]** Having put German lawyers into action with astonishing rapidity the father then made appropriate inquiries, as a result of which he discovered on 20 March 2003 that the mother had changed not merely the date of her return but her destination, her revised plans by then being that she was to fly from Australia to this country. Having approached the German Central Authority he obtained ex parte on 21 March 2003 from this court orders in the usual form, which had the consequence that when the mother arrived at Heathrow Airport on 22 March 2003 she was met by the tipstaff and served with the Hague Convention proceedings.

**[16]** The mother's evidence, which seemed to me to have the ring of truth about it, was that her plan had been to return to Germany, albeit via this country, her wish being to have an opportunity of seeing members of the wider family and, as it were, drawing breath before returning to what no doubt she correctly anticipated would be a very highly charged situation in Germany.

**[17]** The proceedings in this court have thereafter proceeded in the usual way and came on for hearing before me on 22 July 2003. The main issue, as I have said, is accepted as being where IS was habitually resident at the relevant date; that is to say in March 2003.

**[18]** The father's case very shortly is that his posting to Germany by his employer was for an indefinite period intended to extend into the foreseeable future and in any event for a minimum period of 6 months.

**[19]** The mother's case put very shortly is that the posting was essentially temporary and short term in its nature and for a maximum period of 6 months.

**[20]** A variety of written and oral evidence has been adduced on behalf of both the father and the mother. I, of course, have regard to the totality of the evidence and to the differing accounts given on that crucial issue not merely by the mother and the father but also by the various witnesses called on their respective behalfs, some of whom did, but some of whom did not, also give oral evidence in front of me. It seems to me that some witnesses are more helpful than others in pointing to a conclusion on this central and crucial issue.

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**[21]** The father's case is supported by his employer, and in particular by Mr MB, effectively his line manager, who swore an affidavit on 17 July 2003 in which he said:

> 'In August 2002 [the father] commenced work in Germany on a full-time basis. He was told the posting was for an indefinite period and there was no specific date on which his work in Germany was due to end. At the time of the posting he sought from me an assurance the posting would be at least 6 months. I would expect [the father] to continue for the foreseeable future to work in Germany as we agreed from July 2002.'

A letter written by Mr MB clarifies and confirms that not merely did the father seek that assurance but that he was given the assurance that his posting would be for at least 6 months. It is important perhaps to point out, as the mother asserted and the father accepted, that the mother has never had any dealings with or communication with Mr MB.

**[22]** The most illuminating evidence on this issue apart from the evidence of the mother and the father comes, as it seems to me, from three different sources, all of whom as it happens support the mother's case. The first of these witnesses is Miss L, who is the partner of the father's father. The mother and father, immediately before the father left for Germany in August 2002, went to stay with his father and Miss L on 3 and 4 August 2003. On 6 August 2002 Miss L wrote the following letter to the mother:

> 'Dear [–]
>
> Above is address and tel. no you asked for – don't lose it.
>
> So lovely to see you at the W/E. One of the few warm days so far this summer. What a wash out! We have been so looking forward to suppers in the garden on balmy summer evenings – ah well.
>
> IS a total delight as ever and does seem to be very easy at the moment. Even [B] seemed smitten.
>
> She is already a little person, no longer a tiny infant and, obviously, if you do go to Germany there will be huge changes in the next few months.
>
> Six months is a very long time in her little life although for us elderlies it will probably pass in a flash and you will be back in the UK before we have got used to you going away.
>
> Anyway we will see you at Xmas and if you do go P and I will take you up on your invitation to visit in the new year – this is of course assuming that you do stay the whole 6 months things being what they are in the job market. Fingers crossed.
>
> When you are back in Lond we do hope that you will make use of [L] whenever you can. [P] is already getting quite excited about the idea of a paddling pool for IS next summer – well, he says it's for her but I bet he will try it out too …!!
>
> Hope you have a good holiday and that packing up is not too awful.
>
> Lots of love to you all
>
> [J] xxx.'

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**[23]** When the father first became aware of the existence of that letter earlier this year, after the present proceedings had commenced, his immediate reaction was one of suspicion. It is a revealing commentary upon the father's approach to this matter that his reaction should be to suspect, and indeed on Miss L's evidence to put direct to her the allegation that the letter had been forged by Miss L's daughter. Even more revealing as an insight into the father's character is the fact that those suspicions about this letter persisted even after Miss L had on 1 May 2003 sworn an affidavit asserting in terms that she had written that letter on 6 August 2002 and that it was in her handwriting. In the teeth of that affidavit the father nonetheless caused the mother to be cross-examined as to the circumstances in which that letter had come into her possession with a view to attempting to cast some doubt upon its genuineness, in consequence of which, not surprisingly, Mrs Taylor, on behalf of the mother, felt obliged to call Miss L. Miss L was patently honest, reliable and wholly convincing. I have not the slightest doubt that the letter which I have just read was indeed written by Miss L on the date which it bears and that it set out accurately her understanding on that date of the family's plan.

**[24]** That letter refers in more than one place to an understanding on her part that the mother and father were going to Germany for 6 months. In the course of her cross-examination by father's counsel, Mr Turner QC, the text of the letter was subjected to close scrutiny and the basis of her understanding as set out in the letter subjected to particularly close scrutiny. She made clear, and I have not the slightest hesitation in accepting, that her understanding as faithfully reproduced in her letter was based on a number of conversations which she had had not merely with the mother but also with the father. She very frankly accepted that it may well be that nobody had said in so many words that the stay in Germany was for 6 months, but I have not the slightest doubt having heard her evidence that when in her letter she twice refers to the anticipated stay as being for 6 months that accurately reflected the clear impression she had been given both by the mother and by the father. She recognised in the letter and acknowledged in her evidence the possibility that the stay might be for a shorter period, might perhaps be for a longer period; but tellingly she referred in her evidence to the fact that there was, however tentatively (and it does not matter for present purposes) an understanding that *if* the mother and the father were still in Germany in January or February 2003 she and the father's father might go out to Germany to see them.

**[25]** The second important witness, although I have only the benefit of her written statement, is the health visitor who, on 25 March 2003 in her own handwriting, sent the following statement by fax to the mother's solicitor:

> 'I saw [the mother] and her daughter on seven occasions between May and September 2002. I was very concerned regarding the emotional and physical abuse that [the mother] was enduring in order to protect her daughter – I only became aware of the extent of this before the family went to Germany – [the mother] said she would seek help there but said they were going for a short time only. Apparently her husband had taken her and her daughter's passports and she was very frightened of what he would do if she refused to go. I feel this woman is in fear of her life and that of her child because of the violence of her husband and his need to control them. I know and believed [the mother] to be a

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good, caring protective mother, who is very sensitive to the needs of her child.'

**[26]** Apart from the illuminating insight which that fax gives us into the state of the matrimonial relationship between the mother and father and the mother's state of mind, matters which it is fair to say were not in the event canvassed before me, there are two matters of significance. First, and most obviously, is the record of the mother having told the health visitor that they were 'going for a short time only'. Important also, and a matter which it seems to me requires to be brought to the attention of any judge who may on some future occasion in whatever jurisdiction have to deal with this case, is the health visitor's concluding observation that the mother is 'a good, caring protective mother who is very sensitive to the needs of her child'. I should also place on record at this point Mr Turner's ready acceptance – and very proper and appropriate acceptance – that the father makes not the slightest allegation against the mother's capacity to care for and look after their baby daughter.

**[27]** The father's response to this document was again revealing. It was put on his behalf in cross-examination of the mother that the health visitor had, in effect, been persuaded by the mother to say in this statement what the mother wanted her to say. That allegation, seemingly unwarranted in the circumstances, was convincingly rebutted by the mother who pointed out on the basis of her own observation that the practice of the health visitor had been to make contemporaneous notes upon a computer, and that on the various occasions (seven in all) on which the mother had seen the health visitor the mother had observed the health visitor referring to her notes on the computer. In other words, as I understood the mother's evidence, this was a summary derived by the health visitor from her computerised notes of her meetings with the mother.

**[28]** The health visitor, as appears from the headed paper on which this fax was written, is professionally qualified. There is not the slightest reason to believe that she would do anything other than, within the inevitable confines of a fairly short statement, set out a fair, truthful and accurate summary of the matters which she was dealing with.

**[29]** Allowing for the fact that I have not heard her oral evidence (although that presumably is because the father did not seek to have her called for cross-examination) that is evidence which it seems to me I can and should accept.

**[30]** Thirdly, there is the evidence of Miss G. She swore an affidavit on 9 April 2003. She also gave oral evidence before me. She is qualified as a barrister and solicitor in the province of Ontario in Canada and has been so qualified since 1989. She is at present and has at all material times for present purposes been employed by the Frankfurt branch of a very well-known English firm of London City solicitors. It so happens that (albeit her perspective is a legal perspective whereas the father's perspective is the banker's perspective) her professional activities intersect with those of the father, so that she has, as it happens, a professional understanding of the nature of the father's professional activities. She met the father coincidentally at a business function when each was no doubt astonished to discover that they lived in the same house. Thereafter, after the mother had moved to

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Germany, Miss G and her husband met and dined on a number of occasions with both the father and the mother. In her affidavit she says:

> 'Sometime after I met him he told me his secondment in Germany was originally scheduled to terminate in April 2003 although it might be extended.'

Not surprisingly that crucial statement was closely scrutinised in cross-examination. Miss G's evidence was clear. Her understanding was based not on a recollection of a single conversation but on a composite recollection of a number of occasions, some more formal than others, when she had discussed with the father the purpose and duration of his stay in Germany. The very fact that her understanding arose from a number of conversations seems to me, if anything, to reinforce the accuracy of her recollection and the degree of weight one can attach to her evidence. Her understanding based on those conversations was that the father's posting to Germany had been, in essence, for the purpose of implementing and carrying through to completion a particular commercial project with a particular customer. That project had originally been anticipated as terminating around about Easter 2003, but in circumstances where it was possible either that the project might be completed sooner or that it might take longer. She confirmed explicitly in her oral evidence that the phrase 'it might be extended' in her affidavit was a reference to the possible extension of the period which it would take for that particular project to be completed. Indeed her understanding was (and as I understood his evidence this was in fact confirmed by the father) that the purpose of the father's visit to the US in December 2002 to which I have already referred was for the purpose of negotiating and discussing a critical phase of this particular business project.

**[31]** I have no hesitation whatever in accepting Miss G's evidence which was given with evident sincerity and frankness. She was a careful and cautious lawyer who was careful to distinguish between what she could remember and what she could not remember and who I am satisfied was scrupulous in giving what I am also satisfied was an accurate account of what she had been told and what she had understood.

**[32]** What then, in the light not merely of the evidence to which I have referred in particular but in the light of the totality of the evidence, is the proper conclusion which I should draw? I have no doubt in the light of all the evidence that, whatever may have been the private understanding of the father, whatever may have been the understanding or arrangement (if different) which the father came to with his employer, the plan and understanding of this family was that they were going to Germany for a particular project and for a short time. It is not necessarily the case that the plan was for them to go to Germany for 6 months – if by 6 months it is to be understood 6 months rather than 5½ months or 6½ months. But it seems to me in the light of all the evidence I have read and heard, that the plan as it was explained by the father to the mother, as it was understood by the wider family (see, for example, Miss L's evidence) and as it was understood at the time by the mother (see for example the health visitor's evidence) and indeed as it was being explained at the time by the father to professional colleagues in Germany (see the evidence of Miss G) was that the family was going to Germany for a short period – a period which, roughly speaking and in terms

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of an order of magnitude, was to be no longer than 6 months. The plan was a plan which contemplated that the period might be shorter. As Miss L's evidence suggested, the plan contemplated that the family might, on the other hand might not, still be in Germany in January and February 2003. It was not on the understanding of the mother, it was not on the understanding of the wider family, it was not on the basis of whatever discussions and plans there had been between the mother and the father, a departure for Germany for an unlimited period into the foreseeable future. In essence, therefore, I accept the mother's case as to the nature of the arrangement and the family's plan and as to the anticipated extent, duration and purpose of the move to Germany.

**[33]** I turn to the law. The question is one of 'habitual residence'. It is well recognised in the jurisprudence that there is for this purpose and in this context no difference between the legal concept expressed in the words 'habitual residence' and the legal concept expressed in the words 'ordinary residence'. The authorities on the two different phrases are for present purposes interchangeable.

**[34]** The leading modern authority is *Akbarali v Brent London Borough Council; Abdullah v Shropshire County Council; Shabpar v Barnet London Borough Council; Jitendra Shah v Barnet London Borough Council; Barnet London Borough Council v Nilish Shah* [1983] 2 AC 309 where, at 343G, Lord Scarman said:

> '… "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.'

**[35]** More recently in *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937, [1999] 2 FLR 1116 the House of Lords considered the topic again, the relevant speech being that of Lord Slynn of Hadley, with whom each of their Lordships agreed. At 1942 and 1121A respectively, Lord Slynn of Hadley said:

> '… as a matter of ordinary language a person is not habitually resident in any country unless he has taken up residence and lived there for a period.'

He continued:

> 'It is a question of fact to be decided on the date where the determination has to be made on the circumstances of each case whether and when that habitual residence had been established. Bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, "durable ties" with the country of residence or intended residence, and many other factors have to be taken into account.
>
> The requisite period is not a fixed period. It may be longer where there are doubts. It may be short (as the House accepted in *Re S* … and *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548, 555 where Butler-Sloss LJ said: "A month can be … an appreciable period of time").'

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Immediately after the passage in *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548 to which Lord Slynn of Hadley there referred, Butler-Sloss LJ continued:

> '… it is important for the successful operation of the Convention that a child should have, where possible, an habitual residence, otherwise he cannot be protected from abduction by a parent from the country where he was last residing. Paraphrasing [counsel's] argument, we should not strain to find a lack of habitual residence where, on a broad canvass, the child has settled in a particular country.'

**[36]** The most recent authoritative pronouncement on the subject is in the decision of the Court of Appeal in *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951 where (at para [37]) Thorpe LJ said:

> '… Mr Everall submits that the judge set the test too high when she concluded … "this family never settled". Mr Everall submits that the test is not whether the family was settled in Dubai but whether their residence was for a settled purpose, which might be either a purpose of short duration or conditional upon future events.'

He continued, having referred to certain reported cases:

> 'Those three examples do, in my opinion, make good his submission that habitual residence may be acquired despite the fact that the purpose of the move was intended to be fulfilled within a comparatively short duration or, as in the case of *Re B*, the move was only on a trial basis.
>
> Again Mr Swift responded to these submissions submitting that the judge's conclusion was well justified on her findings. However on this subsidiary point I again prefer the submissions of Mr Everall. I conclude that the judge's factual appraisal was insufficiently balanced and further that she misdirected herself in asking whether the family had settled in Dubai in the sense of putting down substantial roots. In my opinion the evidence as a whole demonstrated the acquisition of habitual residence in Dubai between the date of arrival in September and the breakdown of relationships between the families on or about 22 December 1999.'

I should add that, as appears elsewhere in the report of that case, the family had in fact arrived in Dubai on 5 September 1999, so on the particular facts of that case habitual residence was found to be established following a period of some 3½ months.

**[37]** So much for the leading and, as it seems to me, determining authorities.

**[38]** I was referred to a number of authorities at first instance, some more relevant and therefore helpful for present purposes than others. In *Re A (Abduction: Habitual Residence)* [1996] 1 WLR 25, [1996] 1 FLR 1 Cazalet J was concerned with a US serviceman who was posted in the course of his service duties to Iceland, and the question was whether or not on the

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particular facts of that case the relevant children were habitually resident in the US or in Iceland. At 32 and 7H respectively Cazalet J said:

> 'It should, I consider, be borne in mind that when the father elected to join the US forces he embraced the fact that he would, no doubt from time to time, be required to move to different countries following the Stars and Stripes. On any view this was a voluntary election, with, in my view, no material distinction from that of the business employee who knows when he joins a particular firm that he may well be required by his employer to work in different parts of the world. Of course it would be different in this case had the father been posted, for example, on active service, or to a bivouac in Bosnia; but that is not this case.'

That observation, of obvious relevance in the present context because of Cazalet J's reference to the business employee being posted abroad seems to me to be fully in accordance with the authorities which I have already mentioned.

**[39]** Properly in the course of his submissions Mr Turner referred me to two authorities which on one view were not helpful to his case and were in fact on that view contrary to his submissions. The first is the decision of Holman J in *Re H (Abduction: Habitual Residence: Consent)* [2000] 2 FLR 294, the second that of Black J in *Re N (Abduction: Habitual Residence)* [2000] 2 FLR 899. It may not be wholly irrelevant to observe that each of those two decisions was made before the decision of the Court of Appeal in *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951.

**[40]** In each of the judgments in those two cases there appear words which could be read as suggesting that one cannot acquire a habitual residence in a foreign country unless one has a settled intention not to return to the country from which one is departing. Holman J in *Re H (Abduction: Habitual Residence: Consent)* was concerned in part with the question of whether a mother who had embarked upon a peregrinate tour with a view to acquiring possible academic degrees in different countries, was or was not habitually resident in a particular country. At 300B he said:

> 'In my judgment and understanding, however, the element of intention to take up long-term residence in country B is not in fact an essential prerequisite of ceasing to be habitually resident in country A. Thus a person might leave country A with a settled intention not to return to it but with no particular intention about residence anywhere else. For example, somebody who sets out to travel the world.'

With that, if I may respectfully say so, I have not the slightest quarrel at all. It seems to me to be an entirely accurate statement of principle. Moreover the reference there to a person leaving country A with a settled intention not to return to it is not, as I read it, a reference to a principle of law which has to be established; it is merely a formulation of a particular state of affairs which may appropriately lead to the conclusion there suggested.

**[41]** More troubling, however, is the passage at 300C where Holman J, continuing by reference to the facts of the particular case he was concerned with, said:

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> 'I am quite satisfied, however, that there has never been a stage when the mother reached a settled intention, or indeed any intention, not to return to Sweden. …
>
> In my judgment she clearly retained and retains her habitual residence in Sweden.'

If, which I do not necessarily accept, that passage is to be read as containing the proposition of law that one does not lose one's habitual residence in a particular country absent a settled intention not to return there, then with very great respect to my brother I cannot agree with it. That comes perilously close, as it seems to me, to confusing the question of habitual residence with the question of domicile. If it is to be said that one cannot lose one's habitual residence in country A or, more significantly, that one cannot acquire a habitual residence in country B unless one has a settled intention not to return to country A, then that, as it seems to me as a proposition of law, is not merely unfounded – it is contrary to the authorities which I have already referred to.

**[42]** Similarly there are words used by Black J in *Re N (Abduction: Habitual Residence)* [2000] 2 FLR 899 which can perhaps be read in a similar fashion. At 906H she said:

> 'There are many features which indicate to me that the departure from England was not, at least on the part of the mother … with the settled intention not to return but to take up long-term residence in Spain instead.'

Having then referred to some of the particular facts of that case she continued at 907C:

> 'What then happened in Spain reinforces my view about the lack of a settled intention to leave England and take up residence there.'

**[43]** There may be cases where on a proper analysis of the applicable facts it will not be possible to demonstrate the acquisition of habitual residence in country B absent a finding in the particular circumstances of a settled intention not to return to country A; and it may well be that each of those two cases were cases of that kind. If so, I have not the slightest quarrel with anything said either by Holman J or by Black J. If and insofar, however, as either of those cases is to be read as endorsing a proposition of law, namely, that one cannot acquire habitual residence in country B absent a settled intention not to return to country A, then in my respectful judgment such observations are not merely unfounded in principle, they are contrary to the binding authorities which I have mentioned. So much for the law.

**[44]** How does Mrs Taylor put her case? She points to a number of matters indicative as she would have it of an overall picture inconsistent with the acquisition of habitual residence in Germany. She says, as is the case, that this was a short marriage which was already running into problems and that the mother on any view was deeply ambivalent about going to Germany at all. She asserts that England remained the father's centre of gravity. I do not accept that particular proposition although I do accept the factual matters upon which it was based, namely that, as I have indicated, he returned frequently to this country for weekends for a mixture of both business and

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social activities. There were in other words regular trips by the father to London. It is the fact that the father retained, albeit the lease on the London property had been surrendered, the London address as the address to which, for example, his bank sent his bank statements, documents of that sort being redirected to Germany by the post office. He did not until a very late stage, for example, open any German bank account. He kept his English bank accounts. The parents had discussed putting IS down for an English school. They had taken no steps according to Mrs Taylor (and I accept the fact although I have no means of knowing whether I should accept the implication which Mrs Taylor seeks to draw from the fact) to register themselves in Germany.

**[45]** It is the fact that the father while in Germany took the appropriate steps to obtain English child benefit for IS. The father's employment remained pursuant to the English contract which I have mentioned. There was no relocation package to Germany provided by his employers. The flat which the father and the mother obtained in Frankfurt was a furnished flat. They left the vast bulk of their possessions, both furniture and personal possessions, in storage in this country, for example as Mrs Taylor pointed out, leaving in this country not merely things like the photographs and CDs I have already mentioned but also the mother's summer clothes. It may be there is some slight exaggeration in this but I suspect it is not that far away from the truth when the mother says that effectively she was living out of no more than two or three suitcases in Germany.

**[46]** Those various matters put before me by Mrs Taylor I accept as matters of fact. I have some difficulty with Mrs Taylor's characterisation of the picture as being one in which the father maintained his centre of gravity in England. It may be, as Mrs Taylor also sought to persuade me on the basis of those matters and others, that this was not a family which had put down any established roots in Germany. But as the passage from *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951 which I have already referred to makes clear, that is not the determinative question. One of the very misdirections by the judge in that case which led the Court of Appeal to reverse the judge was that the judge had asked herself the inappropriate question: was the family settled in Dubai in the sense of putting down substantial roots?

**[47]** I have to assess against the background of the authorities to which I have referred, evaluating the principles one there finds in the light of the findings of fact I have made, whether or not in March 2003 this family, and more specifically this child, was habitually resident in Germany.

**[48]** I am driven to the conclusion with, I confess, considerable reluctance that the family and IS were habitually resident in Germany at the relevant date. It may very well be, indeed my assessment is that it was the case, that this was not a family which had put down substantial or established roots in Germany. It may very well be – and I am inclined to accept Mrs Taylor's submission – that this family was not settled in Germany. But that, unhappily for mother in the present case, is not as *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951 shows the relevant test.

**[49]** Was this family's residence in Germany for a settled purpose albeit a purpose of short duration? That is the test identified by Thorpe LJ in the passage I have referred to. The answer, in my judgment, is that this family was living in Germany for a settled purpose; that is to say for the settled purpose

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of enabling the father to fulfil that, albeit short-term, assignment by his employers.

**[50]** True it is that on the findings of fact I have come to the purpose of this family's move to Germany was a purpose intended, certainly so far as the mother was concerned and so far as their joint planning was concerned, to be fulfilled within a comparatively short duration; indeed, as I have found, within a period of something of the order of no more than 6 months. But that does not prevent there being habitual residence in Germany.

**[51]** Had this family taken up residence in Germany? The answer it seems to me can only be yes. Had they in fact lived there for an appreciable period? Again, the answer can only be yes. Indeed, not merely had they lived there for what in the present context, in my judgment, amounts to an appreciable period, it was their plan that they should do so, because in the circumstances of a case such as this and in the circumstances of this particular case the period of up to 6 months, which was the basis of their plan when they moved there, plainly qualifies as and amounts to an appreciable period. Moreover, the period which had in fact lapsed between the arrival in Germany of the mother and IS and the relevant date (being the date of the wrongful retention in March 2003) was in any event, I am satisfied, an appreciable period for this purpose. I take into account all the relevant circumstances. I appreciate that the period was short. But as the authorities show in this context a period as short as a month is capable in law of being an appreciable period. I take into account in particular the fact that not merely was the period short, but that on the mother's case, which on this aspect I accept, it was a period which contemplated a return to this jurisdiction within the very near future. I also take into account the fact that the vast bulk of their personal possessions remained in storage in this country, not in storage in this country with a view to future export to Germany but, as I find, in storage in this country with a view to being taken out of storage and used when they returned to this country. As against that there is the fact that when they left this country they surrendered the lease on the only property they had in this country. True it is that from time to time the father, and on one occasion the mother and IS, came back to this country either, in his case, for business purposes, or, in the case of both of them, for social purposes or to meet members of the wider family. But the fact is that subject to staying with friends and relatives this was a family which, throughout the relevant period from October 2002 to March 2003, had only one home. When I say only one home, they had only one property available to them for use as a home. They had only one home which they in fact used. That home was in Germany. This is not the definitive test, and the answer to this question is by no means conclusive; it is at best indicative. But if one asks the simple question: where were this family living in March 2003? where was IS living in March 2003? there can be only one answer – they were living in Germany. One can perhaps test the same point slightly differently. If it is to be said that they were not habitually resident in Germany, then where precisely in this country can it meaningfully be said that they were actually let alone habitually resident? The fact is there is no such place.

**[52]** I confess that it gives me little pleasure to find myself driven to this conclusion. But despite my findings of fact, which in overwhelming measure involve acceptance of the mother's case and rejection of the father's case, I am driven on the authorities to the conclusion that as a matter of ordinary language, applying the test and principles set out in the cases to which I have

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referred, this family had by the relevant date acquired habitual residence in Germany. That being so the father's application must succeed.

**[53]** The judgment which I have thus far delivered was the judgment, albeit not in written form, which I had arranged to deliver and intended to deliver at 9.00 this morning. At 9.00 without any prior warning Mrs Taylor, on behalf of the mother, sought an adjournment. The purpose of that adjournment was to enable her to obtain further and more formal advice from German lawyers as to the view which German law or a German court would take on the question of habitual residence. Mr Turner resisted that application and I indicated that I was refusing it for reasons which I would give as part of my judgment.

**[54]** Mr Turner's objection proceeded on two distinct grounds. First, that as a matter of substance, the application was misconceived because evidence of the kind contemplated was, if not irrelevant, unlikely to be of any meaningful assistance to the court; and secondly and independently, that in any event this application made literally as reserved judgment was about to be delivered and on 24 July 2003 was far far too late in the day when made in the context of Hague Convention proceedings which had been commenced some 4 months ago.

**[55]** It seems to me that the application, with all respect to Mrs Taylor, is misconceived. There is in fact lurking within the application an important point of law; namely, by reference to what system of domestic law does this court when acting as the court of the requested State have to determine questions of habitual residence? I put the point that way because if the relevant law which in these circumstances this court has to apply is the domestic law of Germany, the evidence would be highly relevant. If on the other hand the relevant domestic law applicable in these circumstances is the domestic law of this country, then evidence as to German law, although a matter of interest, can in truth be little more than that. As I understand it the thrust of the evidence which Mrs Taylor would anticipate being in a position to adduce were the application to be successful, is to the effect that in German law, at least as a rule of thumb, one would not normally anticipate – it may be the point goes higher than that, I know not – the acquisition of habitual residence within a period of less than 6 months. Let it be assumed for the purpose of present argument that the evidence were to prove to be to the effect that on the facts as I have found them but applying German domestic law, this family would not have acquired habitual residence. Even were that to be established I do not see how it could be relevant if the case is as a matter of English domestic law to be determined in accordance with English domestic law as opposed to German domestic law.

**[56]** The fact is, as it seems to me, that clear authority in the Court of Appeal demonstrates that the question of habitual residence is for this purpose to be determined by this court, as the court of the requested State, applying for this purpose English domestic law, in which expression I include the view which English domestic law takes as to the meaning of the Hague Convention. That this is so appears from the judgment of Millett LJ (as he then was) in *Re P (Abduction: Declaration)* [1995] 1 FLR 831 at 838C:

> 'In *Re F* (unreported) this court held that the construction of expressions in the Convention such as "rights of custody" and "breach" is a matter for the courts whose jurisdiction under the Convention has been invoked, that is to say, the courts of the requested State. The only

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> question which falls to be answered by reference to the domestic law of the requesting State is what rights, if any, in relation to his child, and in particular what rights to determine the child's place of residence, were possessed by the deprived parent under the domestic law of that State at the time of the child's removal.
>
> Similar considerations apply to the child's place of residence. The question whether the child was habitually resident in the requesting State within the meaning of Art 3 of the Convention immediately before removal is exclusively a matter for the requested State. If disputed it will have to be resolved by that court on the evidence available to it, and by applying its own understanding of the meaning of "habitual residence" in the Convention. In determining the question he was asked to decide, the judge in the present case had to decide whether the President's order was still in force. That was a pure question of English domestic law which did not depend on the meaning of any expression in the Convention. If and insofar as it may have required the judge to form a view whether the child was habitually resident in England immediately before her removal, that too was a pure question of English domestic law which did not depend on the Convention.'

He continued at 838H:

> 'I do not wish to suggest that the meaning of habitual residence in English domestic law differs in the least from the meaning which an English court would ascribe to that expression in the Convention, or that the courts of England and California would interpret the Convention differently. I am, however, concerned to make the point that when it comes to determining where the child was habitually resident in February 1994 the questions which the courts of England and California will have had to decide are technically different questions. The English court had to decide whether the child was habitually resident according to English domestic law (if that was relevant to the continued subsistence of the President's order) or according to the meaning which English law ascribes to that expression in the Convention if this was otherwise material to the application of Art 3. The California court will have to decide whether she was habitually resident in England according to the meaning which California law ascribes to that expression in the Convention. I can see no reason why the finding of the judge below should embarrass the California court or impede the mother in putting forward her case in that court.'

**[57]** Mrs Taylor accepted that there is no subsequent authority on the point. Those passages are determinative of what I have described as the underlying question of law for an English judge sitting on a Hague Convention case in a court of the requested State, which is the capacity in which I sit today, albeit that in *Re P (Abduction: Declaration)* [1995] 1 FLR 831 Millett LJ was sitting as an English judge in a court of the requesting State. The domestic system of law by reference to which for this purpose I have to determine the question of habitual residence, is the domestic law of England. It is the

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domestic law of England, the view which the law of England attaches to the meaning of the words 'habitual residence' when they appear in Art 3 of the Hague Convention. It is the law of England as set out in the authorities to which I have referred.

**[58]** Mrs Taylor is in this difficulty. On the facts as I have found them either the German court applying German law takes the same view or a different view. If it takes the same view then the evidence achieves nothing. If it takes a different view then the reality, however elegantly the point is put, is that I am being asked to come to a different view from that which the law of England would direct me to come to by being invited to be beguiled by the different view of German lawyers in relation to German law. My duty in these circumstances is to apply the domestic law of England by reference to the authorities I have mentioned, and in the light of those authorities, applying the relevant principles, the conclusion I have come to cannot be affected by evidence of German law. Equally it seems to me it would not be affected even by the decision of the German court to a different effect.

**[59]** For those reasons it seems to me that the unarticulated premise which underlies Mrs Taylor's application is in fact wholly misconceived and on that ground alone it would not be appropriate to have such evidence adduced. I add that I am not aware of any case, and perhaps more revealingly Mrs Taylor was unable to point me to any case, where the question has been a bare question of habitual residence (as contrasted for example with a case where the court has been concerned with the legal capacity of one parent to change habitual residence), in which evidence of the sort which Mrs Taylor would seek to adduce has in fact been adduced.

**[60]** Quite apart from all that there seems to me to be overwhelming force in Mr Turner's second submission. Hague Convention procedure is supposed to be summary and speedy. It is a fact that these particular Hague Convention proceedings have been on foot for almost exactly 4 months. Absent the most compelling circumstances – and such circumstances do not exist here – it is far far too late in the day for an application to be made, not merely for such evidence to be adduced but evidence on a wholly new point to be adduced, not least when, as Mrs Taylor very frankly told me, she anticipated it might take a month or perhaps something more than a month to obtain that evidence.

**[61]** Accordingly and for those reasons Mrs Taylor's application for an adjournment is refused, with the consequence which I have already indicated.

**[62]** I cannot part from the case without adding these observations. The law drives me on the facts as I find them to the conclusion I have come to. I have no discretion in the matter. The law requires me on the findings I have made to make the order the father seeks. If this was a jurisdiction in which I had any discretion I suspect very strongly indeed that I would exercise my discretion against the father. That is one point.

**[63]** The other point is this. This case is far removed from the kind of international child abduction case which the Hague Convention was originally designed to prevent. In this case an English father is seeking to compel the return to Germany of his English daughter, and his wife who, although not English, is not a German national, in circumstances where the marriage has now it would seem irretrievably broken down and in circumstances where he well knows that his wife has no wish to return to Germany, let alone to the family home. The child is almost exactly 18 months old and is his daughter. The mother, as I have already mentioned, is on his own acceptance and in the

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light of what the health visitor has told me, a more than adequate mother. Every impression I have is that as a parent this mother is unimpeachable. The father, however, works in a profession where, as the evidence shows, he works very long hours indeed. The idea that this busy professional father is himself going to take over the day-to-day parenting of an 18-month-old baby seems to me in the light of everything I have heard and read improbable in the extreme. It seems to me to be remote from reality.

**[64]** The consequence of the judgment I am driven to is that it will be for my colleague in Germany (if the father is determined to take the benefit of this judgment) to decide whether, as she wishes to, the mother should be able to return with this baby girl to this country. But without wishing to trespass in any way on a jurisdiction which is vested in another judge in a different court and operating a different legal system, this would appear to be a case where taking a common sense humane view of the merits it might be thought that this little girl's future, on any sensible basis in terms of residence, should be with the mother rather than the father. Of course, as Johnson J pointed out on an earlier occasion when he sought to bring home the reality of this litigation to these people, the father is entitled to and must have the most generous contact. That is not something which as I understand in her current plans and proposals the mother in any way seeks to reject.

**[65]** This is a most unfortunate and most unhappy case. This is a father who most unhappily for the mother has the letter of the law on his side. I have already made comment as to the circumstances in which and the astonishing rapidity with which the father sought to invoke his Hague Convention rights in the first place. I hope even at this late stage that with time for calm reflection the father may wish even yet to consider whether in the long run – and I will explain in a moment what I mean by that – either his interests or the interests of his baby girl are best served by his insisting upon what the law gives him. I say in the long run for this reason. Whatever the state of the relationship between the mother and father, and I assume it has irretrievably broken down, the mother will remain IS's mother for ever and the father will remain IS's father for ever. There may be a terrible legacy being stored up here for the future when IS becomes old enough to be told about and to understand what has happened. There may be a terrible legacy of future difficulties stored up here if the father, with the benefit of my judgment, insists on taking the mother and IS back to Germany. As the father is well aware Johnson J on a previous occasion in the course of this litigation expressed certain views. I have expressed further views today. There is time for reflection and I hope that time will be usefully spent.

**[66]** That said, and for the reasons I have given, I find myself compelled to find as I do, and accordingly in principle, the father is entitled to an order requiring the mother forthwith to return IS to Germany.

*Order accordingly.*

Solicitors: *Dawson Cornwell* for the claimant
*International Family Law Chambers* for the defendant.

FAY ELIZABETH BAKER
*Law Reporter*

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