Case No: B4/2014/0635 & 0636

Neutral Citation Number: [2014] EWCA Civ 1032

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PRINCIPAL REGISTRY OF THE FAMILY DIVISION
MRS JUSTICE PARKER
CB13P01283

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2014

Before :

LORD JUSTICE MOORE-BICK
LADY JUSTICE BLACK
and
LORD JUSTICE BRIGGS

- -

R (A CHILD: HABITUAL RESIDENCE)

- -
- -

Mr Henry Setright QC & Mr Edward Devereux (instructed by **Dawson Cornwell**) for the **Appellant**
Ms Jaqueline Renton (instructed by **Tees Law**) for the **Respondent**
Mr Mark Jarman (instructed by **Cafcass Legal**) for the **Childrens Guardian**

Hearing dates : 20th May 2014

- -

Judgment

Lady Justice Black :

1. This appeal concerns decisions taken by Parker J in relation to S who was born in June 2005 and is 9 years old. The appellant is her mother (M) and the respondent is her father (F). The principal issue is in relation to S's habitual residence.

2. On 23 September 2013, F commenced proceedings here, seeking a residence order in relation to S. By virtue of Council Regulation (EC) No 2201/2003 (Brussels IIR), jurisdiction in those proceedings depends upon S being habitually resident in England and Wales on that date. F contended that she was; M contended that she was habitually resident in Italy.

3. Parker J accepted F's case and found that S was habitually resident here at the relevant time. M appeals against her declaration to that effect made on 3 December 2013. She also appeals against the judge's order of 7 February 2014 that S must be returned to this jurisdiction on or before 14 February 2014 so that a CAFCASS officer could meet her as part of an assessment of the welfare issues in relation to her. If the appeal succeeds in relation to the question of habitual residence, it necessarily succeeds in relation to the order for the return of S.

4. Parker J began her judgment of 3 December 2013 with the observation that this is "a very difficult case". So, indeed, it is. The judge was not helped at all by the stance taken in the litigation by M in particular.

Outline history

5. F is Scottish by origin; M is Italian. They have lived in this country at times and have jointly owned a property here ("the property"), although that has now been repossessed because of mortgage arrears. They separated in 2009 and were divorced in March 2011.

6. M has been the primary carer for S since the separation. In August 2009, she was granted a residence order in relation to S and her considerably older sister C. She was also granted leave to remove both children from the jurisdiction to Kenya where she was working. M returned to this country in 2010 and, in July 2010, was granted leave to remove the children from the jurisdiction to Italy permanently. It is common ground that she and S became habitually resident there. F was to have contact but he says that by October 2010, M was in breach of this requirement. Contact seems to have ended completely eventually, as he last saw S in March 2013.

7. M was diagnosed in January 2011 with cancer and has been receiving chemotherapy, primarily in Italy. She and S remained living in Italy until 31 August 2013. On 31 August, they arrived in England with (according to Mother) two suitcases, travelling from Japan where M had been on a work trip. It seems that they moved into the property at some point thereafter. There is an issue between the parties as to the state in which M found it and whether or not she had to stay with a friend to begin with because, as she alleges, F had removed some of the contents and the services were not working.

8. There has been a long running dispute over the property. In 2012, an order was made which provided for it to be sold and the net proceeds divided as to 30% to F and 70%

to M, unless M returned to live there permanently by no later than 31 December 2012 ("the 2012 order"). If M did return to live there permanently, title would be transferred to her and there would be a charge in F's favour for a lump sum equal to 30% of the proceeds of sale, exercisable on what I would summarise as Mesher terms. M did not return to live in the property permanently by the prescribed date which was extended. Litigation about the property continued. For the purposes of this judgment, I can jump forward to what was a critical hearing about it before the district judge on 12 September 2013.

9. Unfortunately, although that hearing is important to the issue of habitual residence, we have neither a transcript of it nor a copy of any judgment the district judge gave that day. It is necessary to piece together what the parties' cases were from various sources and I will come back to this later.

10. Two days after the hearing, on 14 September 2013, M purchased a one-way ticket for herself and S to return to Italy on 24 October 2013. S in fact returned to Italy with her maternal grandfather on 12 October 2013 and M returned on 24 October. That is where they have been living since then.

Parker J's judgment of 3 December 2013

11. F's case before Parker J was that M and S were not just visiting when they came to England on 31 August 2013 but came here to live and rapidly became habitually resident. M's case was that they remained at all times habitually resident in Italy.

12. Having stated the law, the judge commenced her examination of the facts by looking to see "what the mother's intention is, or what was the reason for, her moving to this jurisdiction with S on 31 August" (§37). She considered four documents emanating from M herself.

13. The first was an email to F and others in December 2012 (presumably the email of 4 December 2012 at D14 of the bundle) from which the judge quoted the following passage:

> "Cambridge will be our main permanent home for the next eleven years."

14. The second was a communication to the English court on 12 September 2013 in the context of F's financial application (presumably C11 of the bundle) in which M said:

> "I am currently on Job Seekers' allowance and hopefully will receive child tax credit. I am seeking a job but clearly I have the full care and responsibilities of my daughters and I must continually take care of my precarious health." [*with my corrections to the version in the judgment, made by reference to the actual document*]

M went on to say that she had signed up at Addenbrookes hospital for her medical treatment and the judge found that documents from the hospital, in particular their letter of 10 October 2013 (E14 in the bundle), supported F's case that her treatment had been transferred there from the hospital in Italy.

15. The third was an email to F and others on 17 September 2013 (D19 in the bundle) in which M said:

> "For your information we are here permanently and there is an appeal in due course for the house. I am advised that I will win it. How stupid is it to keep stating the opposite when there is evidence everywhere and long term plan which will be produced in court?" [*sic, again corrected by me*]

16. The fourth was an email to the English court on 19 October 2013 (C9 in the bundle) from which the judge quoted the following passage:

> "We have lived in Italy for 2 years due to my cancer treatment. The UK would become so only and if we were able to live here permanently, and after a period of 6 months, as it was our intention when we arrived on 31 August 2013." [*again corrected by me; note that the context of this, not quoted by the judge, was the assertion M had just made in the email that the UK was "not our current jurisdiction with respect to children's matters"*]

The judge thought it "quite plain that M was saying that she was intending to live here permanently and her plan changed as a result of F's actions in respect of the property" (§41).

17. At §42 of her judgment, the judge noted a number of other features of the case as follows:

> "On 23 September the child was enrolled at a primary school in Cambridge where she was seen by the social worker. M was notified by HMRC on 15 October that she was entitled to meet conditions for full help with health costs. M has a UK bank account. She has never chosen to sell the former matrimonial home. F states that at the hearing on 12 September 2013 M made it clear that she had moved back to this jurisdiction on a permanent basis and at that stage informed the court that she was in receipt of Job Seekers' allowance and child benefit. At the hearing on 16 October M stated that she was commencing academic work at the Welcome Trust in this jurisdiction."

18. The judge then went on to recognise that M's case was that S is integrated in Italy, not England. Her reasoning in rejecting that is relatively short and as it is upon this that the determination of the appeal depends, I will set it out in full:

> "43. …..Of course, it is true that the child's integration was entirely Italian in terms of her day-to-day environment until 31 August 2013. However, I have to have regard to the whole factual nexus. The factual determination depends upon whether there is 'some' degree of integration and on her family environment. It is also significant, as Miss Renton [for F] points out, that after F obtained the possession order –

> admittedly M appealed unsuccessfully – M did not return S to Italy because she said she did not want to go, aged eight and a half. This did not, however, prevent her from having her father collect S in October. I do not accept that any precipitating feature arising from F's actions in the financial remedy proceedings led to the child's return to Italy. In my view it is connected with F's application for residence.
>
> 44. Against the background of the family's historical connection with this jurisdiction, which is significant, but also the fact that M retained her interest in this property and resisted, and still resists, its sale, that she expressed an intention to work here; to be medically treated here; for the child to be enrolled in school; and described herself as being here permanently, I conclude that this child is integrated into English society, as M is sufficiently integrated into English society, for her to have become habitually resident in this jurisdiction, if not immediately after arrival, although she may have done so in the light of the quotations to which I have referred, but as at the date of the issue of the proceedings, and at the date of the child's removal, even assuming it to be 12 rather 15 October. I am satisfied that this court has jurisdiction."

The basis of M's appeal in relation to habitual residence in summary

19. Mr Setright QC and Mr Devereux on behalf of M submitted that Parker J did not approach the documentary evidence relied upon by F correctly. It was accepted that M did at one time consider returning to live in England but the thought was embryonic. The trip to England on 31 August was primarily to resolve matters concerning the property, and S's stay here with her then did not amount to habitual residence. It is submitted that Parker J put too much emphasis on M's asserted or supposed intention, that she failed to put the documents upon which she relied into their proper context, and that she also failed to take into account the large body of evidence which weighed against S having become habitually resident here by 23 September 2013.

The law in relation to habitual residence

20. The Supreme Court has considered habitual residence on several occasions recently, in A v A (Children: Habitual Residence) [2013] UKSC 60, [2014] AC 1, Re KL (Abduction: Habitual Residence: Inherent Jurisdiction) [2013] UKSC 75, [2014] 1 All ER 999 and Re LC (Abduction: Habitual Residence: State of Mind) [2014] UKSC 1, [2013] 1 All ER 1181. It may not be surprising, in the circumstances, that I did not detect much dispute between the parties as to the law.

21. It would not be helpful for me to go over in detail here the ground that was covered in the Supreme Court decisions. A useful starting point is Baroness Hale's summary in §54 of her judgment in A v A. From that, it is clear that habitual residence is a question of fact and that the test adopted by the European court is to be applied in deciding whether it is established. Thus there has to be an assessment of whether the country concerned is a place which reflects some degree of integration by the child, or

in the case of an infant or young child, his parents, in a social and family environment. Or, putting it in the way in which it was put in §59 of Re LC, "has the residence of a particular person in a particular place acquired the necessary degree of stability….to become habitual?" All sorts of factors may be relevant, of which the purposes/ intentions of the parents are merely one.

22. Counsel for M particularly invited our attention to §63 of Re LC where Baroness Hale said:

> "The quality of a child's stay in a new environment, in which he has only recently arrived, cannot be assessed without reference to the past. Some habitual residences may be harder to lose than others and others may be harder to gain. If a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly. If a person leaves his home country for a temporary purpose or in ambiguous circumstances, he may not lose his habitual residence there for some time, if at all, and correspondingly he will not acquire a new habitual residence until then or even later. Of course there are many permutations in between, where a person may lose one habitual residence without gaining another."

23. They also invited our attention to §44 of A v A where Baroness Hale treated as a helpful generalisation of fact Lord Brandon's statement in In re J [1990] 2 AC 562 that an appreciable period of time will be necessary before someone becomes habitually resident somewhere, although (and Miss Renton, who represented F in the appeal proceedings, as below, was naturally at pains to emphasise this) she did not accept that it was impossible to become habitually resident in a single day, observing that "[i]t will all depend on the circumstances".

24. Mr Setright and Mr Devereux largely did not challenge the judge's statement in her judgment of the relevant legal principles. The one exception was that Parker J had not had the benefit of Re LC on the subject of the relevance of the child's own state of mind because it post-dated her decision. Whilst Mr Setright submitted that S's own state of mind could potentially have been relevant here, he did so almost in passing and agreed in argument that it was M's position that was relevant in the circumstances of this case.

The factual arguments in relation to habitual residence

25. Counsel for M submitted that the evidence of fact was complex and contradictory and the judge should have heard oral evidence. Directions had been given by Moylan J for M to attend the 3 December hearing to give oral evidence "if deemed necessary by the trial judge". The transcript shows that the subject came up during the hearing (see pages 8, 27/28 and 31 of the transcript) but it did not happen. I do not know the reason for this. However, I would observe that even a glance at the transcript shows that the hearing was difficult and we can see from page 60 that the judge eventually excluded M from court.

26. Miss Renton argued that the documents told the story and the judge was entitled to rely upon them to make her finding, not needing any oral evidence. Indeed, she submitted that questions of habitual residence can *often* be decided on the documents and oral evidence should only be heard where that is not possible, Re LC (where the case was remitted to the Family Division by the Supreme Court and oral evidence was heard) being unusual.

27. Each side emphasised before us factors which they said supported their contention as to habitual residence.

28. Counsel for M argued that the judge failed to give proper weight to the factors that pointed away from habitual residence in this country. Mr Setright conceded that a well-established temporary stay is capable of amounting to habitual residence but pointed out that the stay needs to have stability and submitted that it was starkly evident that this stay was not stable.

29. For F, Miss Renton supported the judge's evaluation. She conceded that Parker J had not referred in the judgment to the fact that M had retained her home in Milan where her belongings were but she submitted that it was not necessary for M to have shut up shop in Milan to be habitually resident here.

30. As a back-up, Miss Renton argued that there may be jurisdiction in the courts of England and Wales by virtue of S's presence (Article 13 of Brussels IIR), there being a real prospect that S had lost her habitual residence in Italy by 23 September even if she had not yet acquired a habitual residence here. Mr Setright responded that it was impossible to find the ties with Italy cut in this case and referred us to a passage in the transcript of the hearing before Parker J (page 3 of the transcript) where Miss Renton herself said to the judge that she did not think it would really be open to the court to say that S is not habitually resident anywhere.

31. If we were minded to allow the appeal against Parker J's habitual residence decision, Mr Setright invited us to remit the case to the Family Division for a rehearing of that issue. Miss Renton on behalf of F said she would find that difficult to oppose. Certainly she preferred us to do that if we were minded to allow the appeal, rather than to seek to substitute our own decision on habitual residence on the material before us.

Discussion

32. There was an abundance of evidence before the judge, although it was not complete, a notable omission being a transcript of the proceedings before the district judge on 12 September 2013. There were many emails, letters and other documents in the bundle, M having kept up a fairly continuous email commentary, leaving no doubt about her dissatisfaction with the course of events.

33. An important feature of the evidence is that following the 12 September hearing about the property, there appears to have been a notable reversal of the parties' positions.

34. F had initiated the round of litigation in relation to the property that led to the September hearing. His objective was to establish that M was not living "permanently" in the property and thus to obtain the sale of it. In his application

notice dated 29 May 2013 (C85) he sought the "[e]nforcement of the existing order [the 2012 order] and financial compensation". Amongst other things, he asserted that M's "refusal to move to the home, sell or let in accordance with court orders, or contribute to house running costs, has imposed substantial costs on" him.

35. He appears to have submitted for the 12 September hearing a case summary (C87) and a schedule of evidence (C89) together with supporting documentation. I do not know when the schedule of evidence was compiled but on it we find the following propositions advanced by F:

> "Correspondence and actions from M since 2010 demonstrate that she has no real intention of selling or living permanently in Cambridge"
>
> "M's emails of 4 and 14 December 2012 state her intention to use the house as a base but not to live there permanently or school S in the UK"
>
> "M will not move back to the UK because of the likelihood that she will lose residence of our younger child"
>
> "M's ill health will likely prevent her from moving back to the UK ….She has received care for two occurrences of cancer in Italy and all her medical and family support is in that country"
>
> "M and younger daughter are housed in a large 3 bedroom apartment in one of the wealthiest parts of Milan…..The property is owned by her mother, who also owns and lives in the property below."

36. M's objective in the September hearing appears to have been the reverse of F's. She sought to establish that she *was* returning to live permanently in the property and that it should not therefore be sold.

37. In her statement for the September hearing (C11), she says that she has now returned to the property "as per Court Orders" (§3), that she is "on job seeker allowance and hopefully will receive child tax credit" and is looking for a job (§4). She says that she is "now signed up at Addenbrookes Hospital" (§4). She seeks the transfer of ownership of the property to her within 7 days, together with various other relief, including the "restitution of all furniture that was in the house". She complains that she found the boiler broken and is without heating and water.

38. By the time of the hearing before Parker J in December 2013, each party was arguing for the position that the other had advanced in September before the district judge. It seems to me that it was incumbent on Parker J to have this very much in mind and to pay regard to what both had been saying prior to the 12 September hearing in evaluating the documentation upon which she placed reliance. A recognition that both parties had done a volte face would, no doubt, have provoked a consideration of *why* they had been saying what they had been saying at each point, which would have informed the judge as to the weight that should be placed on M's various statements. However, the judge seems to have taken what was found in the documents pretty

much at face value and, in at least one case, to have done so without regard to the full contents.

39. A consideration of M's email of 4 December 2012 will exemplify how this might have misled the judge. This email was the first of the documents upon which she relied as indicating M's intention. It needed to be considered as a whole and with account being had to the fact that it was written in the run up to 31 December 2012, a date with particular significance for the operation of the ancillary relief order. Before positions reversed, as we have seen, F had said of it that it stated an intention "to use the house as a base but not to live there permanently or school S in the UK". Reading on in the email from the passage quoted by Parker J, we can see the foundation for this comment in that M said, "[t]he order says we have to move permanently back, it does not say we have to stay put in the house, be imprisoned in Cambridge or that I cannot work abroad……I will finish off my treatment and then hopefully go abroad for work….". In my view, therefore, the judge's consideration of this communication was not complete without a recognition that it was at best equivocal and might even be open to an interpretation that weighed against M intending actually to live in Cambridge.

40. In addition, I accept the submission of counsel for M that the judge's evaluation of the habitual residence question was too narrowly focussed. Whilst the judge recognised that up to 31 August 2013 S had been entirely integrated in Italy, she did not proceed to review what, if any, links remained with Italy by 23 September 2013, only just over three weeks later.

41. For example, in the schedule for the 12 September 2013 hearing, F himself referred to M's accommodation in Milan (see above). It was obviously material to the habitual residence enquiry to take into account what the current position was in that respect. Arrangements with S's school in Italy were also material. There was an email in the papers (C104) from M to S's Italian school dated 4 September 2013 in which M informed the school that she was remaining in London with S for a period yet to be determined, that S would be absent at the beginning of the school year, and that she would let them know as soon as possible how long this would last. The school responded with a request that she let them know when she was planning to return. Also material were the circumstances of M's arrival in this country, as to which her case was that she arrived direct from a trip to Japan with only two suitcases, leaving her other belongings in Italy.

42. In evaluating the factors which were taken to indicate habitual residence in this country, it may perhaps also have been significant to note that in his Form C1A accompanying his application on 23 September 2013 for residence, F's own evaluation was as follows (B21):

> "M has no concrete or realistic plans for remaining in the UK and so is unable to provide S with satisfactory education or social opportunities which will harm her development. Her schooling will be disrupted."

43. The judge did examine the question of why S was returned to Italy in October 2013, concluding that it was connected with F's application for residence and so, I think, discarding it as material to the habitual residence question. I am not entirely clear

however what she thought the chronology following the 12 September hearing was. There is, in fact, a booking for return air tickets for M and S which appears to have been made on 14 September (C95), immediately after the order for sale of the property was made and before F's application for residence was launched. This may not fit well with the judge's reasoning although, as with much of this case, the picture is not straightforward because, no sooner had she booked the return tickets, than M wrote an email to F, on 17 September 2013, in which she informed him that "we are here permanently and there is an appeal in due course for the house" (D19).

44. I will not go further into the evidence because it would be undesirable to do so when I have reached the clear conclusion that the appeal should be allowed, the finding of habitual residence in this country overturned, and the case remitted for hearing in the Family Division before a different judge. I have reached this view because, as I hope the examples I have given demonstrate, it seems to me that the judge did not take all the factual evidence into account in arriving at her determination. In fairness to her, she was trying, commendably, to reach a speedy resolution for S and, it would appear, doing so in the face of difficulties during the hearing. But the result was that her finding about habitual residence is not reliable.

45. I do not wish anything that I have said in this judgment to be taken to indicate that I have formed a view one way or the other on habitual residence. It is not a simple question in this case. There are, of course, factors which point towards S being habitually resident here, as the judge identified, and there are other factors which point in the opposite direction and contribute to a sense that the child's stay here lacked stability. A reliable determination as to habitual residence can only be made if they are all weighed up. It will, of course, be a matter for the trial judge to determine the form of the hearing and, in particular, whether oral evidence is required, although I think I might be inclined, where the picture is as confused as it is here, towards at least some limited oral evidence, and I think even Miss Renton was inclined to that view, which was why she sought to dissuade us from determining the question ourselves if we were unable to support the judge's decision.

46. It follows from my decision about habitual residence that it is not necessary for me to go on to determine whether the judge was wrong to make the return order that she did in February 2014 because that order necessarily falls away in consequence.

47. As I have explained, I would allow the appeal and remit the matter for rehearing on the issue of habitual residence as soon as possible. The decision about habitual residence will determine whether jurisdiction is here or in Italy. I would urge the parties to think very carefully, however, about whether it would not in fact be better for S if her welfare were to be determined in the Italian courts. Italy is where S has lived for the majority of the last few years. M's mobility may be restricted by her illness and treatment and it is in Italy that she has somewhere to live and family support. As she is presently S's carer and as disruption to M may rebound upon S, there would be much to be said for the litigation taking place in Italy.

48. I have not mentioned in this judgment S's guardian and her counsel Mr Jarman. This is not through any lack of gratitude for their contribution but simply because the guardian took a relatively neutral stance in relation to the question of habitual residence, although Mr Jarman helpfully pointed out in his skeleton argument (see particularly §20) features of the case that would be material to the issue and

concluded with the suggestion that, in the light of the need for a proper welfare inquiry and for child-centric reasons, it may be that Italy is a better forum to consider the welfare issues.

Lord Justice Briggs:

49. I agree.

Lord Justice Moore-Bick

50. I also agree.