HABITUAL RESIDENCE IN WRONGFUL REMOVAL APPLICATIONS UNDER THE 1996 HAGUE CONVENTION – Re A

Last week the Court of Appeal handed down Judgment from a hearing in Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention) [2023] EWCA Civ 659, concerning the issue of *when* the relevant date for determining habitual residence should be.

The High Court Decision

The Father applied in the High Court initially for return of the child from Zambia to England. The brief facts are that the parents and the child had together travelled to Zambia on 8th March 2022 for what was intended to be a short trip. The Mother and the child remained there since, however the Father formally withdrew his consent to that arrangement on 23rd May 2022 and applied to the Court on 24th June 2022 for return of the child to the jurisdiction of England & Wales. His application was issued by the Court on 6th July 2022.

The Father's case was that the child had been wrongfully retained in Zambia by the Mother and that the English Courts had jurisdiction under either Article 5 or Article 7 of the 1996 Convention, or, alternatively under s.3 Family Law Act 1996. His argument was that the child remained habitually resident in the jurisdiction of England & Wales at the time of his application.

The application came before Mrs Justice Arbuthnot in the High Court who found that the child, at the time of the hearing in November 2022 and at the time of the Father's application, was habitually resident in Zambia as she had 'some degree of integration' there, and therefore the Court in England & Wales did not have jurisdiction to hear the matter. She also found that Article 7 of the 1996 Convention did not apply as Zambia was not a contracting state.

The Appeal

The Father appealed that decision on 3 grounds:

(i) The judge was wrong when she decided that the relevant date to assess habitual residence, for the purposes of determining jurisdiction, was the date of the hearing and not the date of the application;

(ii) (2) The judge's decisions that A was habitually resident in Zambia at the date of the application and at the date of the hearing were both wrong;

(iii) (3) The Judge was wrong when she decided that article 7 of the 1996 Hague Child Protection Convention ("the 1996 Convention") did not apply in this case because A had been wrongfully retained in a non-Contracting State.

Lord Justice Moylan, when giving the Father permission to appeal, identified that the case raised broad issues as to "*the application of the Family Law Act 1986 ("the FLA 1986") and the 1996 Convention, in particular the date at which, for the purposes of determining jurisdiction under article 5 of the 1996 Convention, the court decides where the child the subject of proceedings is habitually resident*" **[4]**.

It is further recorded that the date of the application vs the date of the hearing arguments have often divided the judges of the Family Division of the High Court. In this case, however, the Judge did not feel the issue was relevant to consider when looking at either Article 5 or Article 7 of the 1996 Convention, as, if it was clear as it was that the child's residence had changed *during proceedings*, then the relevant date had to be the date of the application. The issue was then whether Arbuthnot J's decision on the child's habitual residence at the date of the application was wrong.

The Decision

In allowing the appeal, the Court referred to Hayden J's decision in *Re B*, simply that 'some degree of integration' was not enough to establish habitual residence. The Court reiterates that in determining 'habitual residence', there is "*an open-ended, not a closed, list of potentially relevant factors*" **[42]**.

Moylan J refers to *Proceedings brought by A* where the CJEU dealt with this issue at length **[43]**:

> "*[37] The "habitual residence" of a child, within the meaning of article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case.*
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> *[38] In addition to the physical presence of the child in a member state, other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.*
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> *[39] In particular, the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration*
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> *[40] As the Advocate General pointed out in para 44 of her opinion, the parents' intention to settle permanently with the child in another member state, manifested by certain tangible steps such as the purchase or lease of a residence in the host member state, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that state.*
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> *[41] By contrast, the fact that the children are staying in a member state where, for a short period, they carry on a peripatetic life, is liable to constitute an indicator that they do not habitually reside in that state.*
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> *[42] In the light of the criteria laid down in paras 38-41 of this judgment and according to an overall assessment, it is for the national court to establish the place of the children's habitual residence.*"

The Court added that "*a test of whether a child had "some degree of integration" in any one country cannot be sufficient when a child might be said to have some degree of integration in more than one State*" **[46]**.

Finally, the Court concluded that: "*the courts of England and Wales would have jurisdiction if A was habitually resident here at the date of the father's application, even if the father is wrong as to the relevant date for the purposes of article 5 and even if A became habitually resident in Zambia by the date of the final hearing. This is because, pursuant to the provisions of the FLA 1986, the date for determining this court's jurisdiction would be based on A's habitual residence at the date of the application*" **[68]**.

The Court of Appeal expressed a view **[73]** that, on paper, the argument that the child was habitually resident in England & Wales at the time of the application was a strong one, however the application was remitted for re-hearing before a different Judge in order for oral evidence to be heard.

Full link to the judgment can be found here - https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2023/659.html&query=(EWCA)+AND+(Civ)+AND+(659)