Neutral Citation Number: [2021] EWHC 946 (Fam)

Case No: FD21P00039

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 April 2021

Before :

THE HONOURABLE MR JUSTICE MOSTYN

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Between :

AC	**Applicant**
- and -	
NC	**Respondent**

- -
- -

The Applicant appeared in person.
Paul Edwards (instructed by **Major Family Law**) for the **Respondent**.

Hearing date: 14 April 2021

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in private. This anonymised version of the judgment has been prepared for publication on the Bailii website.

Mr Justice Mostyn:

1. This application concerns K, a boy born in January 2017 (now aged 4). K's father, AC ("the father"), has applied for an order for K's immediate return to the USA under the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The father, a USA national, lives in the USA and is a police officer. K currently lives with his mother, NC ("the mother"), in the north-east of England. The mother is a British national, and works for a software company. K is a dual national of both the USA and the UK.

2. The parents met and began their relationship in 2014, while the mother was on a work placement in the USA. They married on 16 November 2015 in State A in the USA, and initially lived there together after their marriage.

3. While the mother was pregnant with K in 2016, she went on a visit to England to see her family, and for medical reasons had to remain in England rather than return to the USA. K was consequently born in England, and his birth was registered there. The father travelled to England for K's birth and remained there for two weeks, but he then had to return to the USA for his work.

4. There is a minor factual dispute between the parties over when the mother returned to the USA with K. The mother says they returned in February 2018, when K was nearly 14 months old. The father says they first returned when K was nine months old, but that the mother then took K back to England when he was 18 months old and remained there until after his second birthday. I have not found it necessary to resolve this dispute. In any event, the parties resumed living together in the USA with K at some point between late 2017 and early 2019.

5. In April 2019, the parents separated. On 22 October 2019, they signed a "Marital Settlement Agreement" ("the agreement"), governed by the law of State A. That agreement compromised the parties' respective capital and income claims against each other, and also set out the future arrangements that would apply regarding the care of K.

6. Paragraph 3 of the agreement set out that:

> "Upon finalization of Divorce, [NC] (Mother) and [K] (Child) will be relocating to the United Kingdom (UK), with agreement from [AC] (Father). We agree to Joint (50/50) Custody of Child, whereby Child will attend school in the United Kingdom, and have his school breaks in the USA with his Father."

7. It further stated that each year K would make a minimum of three visits to see his father in the USA.

8. On 24 January 2020, a Family Magistrate sitting in the Circuit Court of State A heard an application which had been made by the mother for absolute divorce. On that occasion the agreement was approved by the court, as, no doubt, was the mother's application for a divorce. On 18 February 2020, the order reflecting those decisions ("the USA order") was issued. This granted the mother the absolute divorce she had sought. The part of the order relating to the care of K reads as follows:

> "…ORDERED, that the parties be awarded joint legal custody of the minor child of the parties, namely [K], born on [a date in January] 2017; and it is further,
>
> ORDERED, that the Plaintiff [the mother] shall be the primary residential custodian, with reasonable rights of parenting time granted to the Defendant [the father]; and it is further
>
> ORDERED, that the Defendant shall have parenting time in accordance with the terms of the Written Settlement Agreement dated October 22, 2019; and it is further,
>
> ORDERED, that the Written settlement [sic] agreement dated October 22, 2019 be incorporated, but not merged, into this Judgment…"

9. The agreement was therefore specifically endorsed by the Court in State A, and formed part of the order which that Court made upon the parents' divorce.

10. On 27 January 2020, three days after the hearing before the Family Magistrate in State A, and in accordance with the agreement, the mother and K moved to England. They have lived at the mother's parents' house in the north-east of England since that time.

11. Unfortunately, in April 2020 the Covid-19 pandemic and subsequent lockdown and travel restrictions meant that the mother was not able to fly with K to the USA over Easter 2020, in accordance with the agreement. The mother had booked flights and was due to depart for the USA on 31 March 2020, but those flights were cancelled and so the trip did not go ahead.

12. The mother intended for K to travel to the USA over the summer of 2020, in accordance with the agreement. However, the quarantine obligations put in place because of Covid-19 meant that it was impossible for K to spend a full six-week period with the father, as it would have resulted in K missing the start of his first year at school in September 2020 while he was in quarantine following his return to England. (K was due to start at primary school in April 2020, but as a result of the school closures during the pandemic he in fact started there in September 2020.) The mother therefore suggested that K should spend a two-week period in the USA, but that was not acceptable to the father.

13. K was again due to fly to the USA during his school Christmas holiday, but the quarantine obligations once again made travel to the USA impossible.

14. The mother suggested that instead of K travelling to the USA for the summer and Christmas visits, the father could fly to England given that that would not result in K having to miss any school. However, that was not possible for the father because of his work commitments.

15. The mother has facilitated video contact between K and his father every other day, as well as video contact between K and his paternal grandparents.

16. On 29 October 2020, the father filed both a petition for contempt and a petition to modify custody at the Circuit Court in State A. He alleged that the mother had violated the USA

order, and sought full custody of K. The mother responded to those petitions on 24 November 2020 and a settlement conference took place in State A on 11 February 2021. The proceedings in State A are ongoing. I asked the father to explain to me what was the jurisdictional foundation for the proceedings in State A given that, as I shall explain below, by October 2020, K was habitually resident in England and Wales, and had been for a long time. The father was not able to answer my question.

17. On 19 January 2021, the father also filed an application in England in Form C67 seeking K's immediate return to the USA under the Hague Convention.

18. The first hearing of that application took place before Nicholas Cusworth QC, sitting as a Deputy High Court Judge, on 28 January 2021. A hearing to determine K's habitual residence was listed.

19. A further hearing then took place before Arbuthnot J on 12 March 2021, at which the matter was adjourned and relisted. I then heard the application on 14 April 2021.

20. In section 4 of his Form C67 the father pleaded his case under the Hague Convention as follows:

> "The father was married to the mother of the child and the divorce was finalised on the 4/1/2020 which activated the custody and contact agreement made as part of the divorce proceedings within the court in [State A]. The mother has failed to keep her side of this agreement and the father filed an application for full custody in respect of the child in the court in [State A] and dated 29/10/2020 before he was aware of the ability to issue Hague proceedings which are now issued for the return of the child to the USA. It is disputed that the child is now habitually resident in England as the mother's solicitors have asserted in a letter to the father because permission to relocate to England was only made on the basis on the agreement which has not been adhered to by the mother."

The elementary rule

21. It is elementary that the 1980 Hague Convention can only be invoked where the child's habitual residence has not changed to the new state prior to the alleged act of removal or retention: see, among countless other authorities, *In re L (A Child) (Custody: Habitual Residence)* [2013] UKSC 75, [2014] AC 1017, at [17], where Baroness Hale of Richmond stated:

> "It is not at all uncommon for there to be competing custody orders made in different jurisdictions, as there are here. Under the Convention, the tie-breaker is the habitual residence of the child. As the preamble to the Convention states, it was the desire of the States parties "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence". Article 3 provides that:

> 'The removal or the retention of a child is to be considered wrongful where - (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention. . . .'
>
> Hence it is common ground that the father can only succeed in his application under the Convention if K was habitually resident in the United States on either 31 July or 29 August 2012 when the mother's disobedience of the Texan order became wrongful."

22. Earlier, in the same vein, in *Re G (A Minor) (Enforcement of Access Abroad)* [1993] Fam. 216, a case with similar facts to the present case, Butler-Sloss LJ stated:

> "After the consent order of the Canadian judge [G] was permitted to live in England and left the jurisdiction of the Ontario court [with the mother]. Mr Turner accepted and there can be no doubt that she acquired an habitual residence in England during 1992 and well before the hearing in July 1992. Habitual residence of a child is not fixed but may change according to the circumstances of the parent or other principal carer with whom the child lives and who is lawfully exercising rights of custody. It may change within months or even weeks: see *In re F. (A Minor) (Child Abduction)* [1992] 1 FLR 548. When her mother came to England and was allowed to bring G with her, G's habitual residence changed to that of her mother and consequently she became habitually resident in this jurisdiction before the potential breach of access rights was known. If G were in the future to be wrongfully removed from England an application to the contracting state to which she was taken would be to return her to England as the state in which she was habitually resident before the wrongful removal. Canada would not be the country to which she would be returned. Equally on an application in respect of rights of access the relevant jurisdiction under Article 4 is the English court and not the Canadian court. The effect of the order of Judge Nevins is to transfer the primary control by a court over the child from Ontario to England and to put the English court in the driving seat."

The test for habitual residence

23. The test for determining where a child has his or her habitual residence has been set by the CJEU in *Proceedings brought by A* (Case C-523/07) [2010] Fam 42, [2009] 2 FLR 1, at [44]:

> "Therefore, the answer to the second question is that the concept of "habitual residence" under Article 8(1) of the Regulation must be interpreted as meaning that it corresponds

> to the place which reflects some degree of integration by the child in a social and family environment. To that end, 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. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case."

24. In his very recent decision of *Re C (A Child)* [2021] EWFC 32 Sir James Munby provided a characteristically lucid exposition of the learning in this field. At [69] he described this statement by the CJEU as "canonical". I agree. Despite all the copious learning, the exercise always boils down to answering the simple question: has there been, on the relevant date in the new state, the requisite degree of integration by the child in a social and family environment? This is a determination of pure fact.

25. In *Re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] UKSC 4, [2016] AC 606 at [45] Lord Wilson JSC offered an extremely valuable aid to that determination:

> "I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it."

And at [46]:

> "The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him: (a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state; (b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus

> to represent for him a continuing link with the old state, probably the less fast his achievement of it."

26. It is a truism that in every case where it is said that there has been a change of the child's habitual residence, there will have been a moment in time, a *punctum temporis*, when that change happened. As Lord Wilson says, it is highly unlikely (albeit conceivable) that a child can be left in limbo where he or she has lost habitual residence in state A but not gained it in state B. Although Lord Wilson says this scenario is "conceivable", I sense that he is saying that it is vanishingly unlikely. I would agree. Limbo must be near-impossible.

27. The see-saw metaphor seems to have generated a certain amount of confusion, but it is in my judgment both simple and valuable. Its origination in the nation's highest court indicates strongly that it should be used by me in my analysis. In the motion of a see-saw there is a moment when the point of equilibrium is passed. The motion of the see-saw can be fast or slow. The speed of the players depends on the length of the seesaw, the mass at each end, and the upward propulsive force. But whatever the speed, the point of equilibrium will be passed. There is no scope for limbo on this analogy.

28. The passing of the point of equilibrium is the analogue for the change of habitual residence. It is not when the downward travelling end of the seesaw hits the ground. It would be a serious fallacy to interpret the metaphor as saying that there needs to be an equivalent degree of integration in the new state to that which obtained in the original state before habitual residence can change.

29. In my judgment, all that Lord Wilson is saying is that the build up to the moment of the change of habitual residence can happen at a slow pace, or alternatively it can happen very quickly indeed, although probably not as soon as the moment that the aeroplane enters the airspace of the new state (see [47] and [56]). In *Re C* Sir James Munby at [71], rightly in my judgment, put it this way:

> "The process of a change of habitual residence can happen quickly or slowly. The key, indeed only, question is whether by the relevant date that change has happened. This is a pure matter of fact. In answering the key question, the court examines the links to the previous state of habitual residence, the extent to which those links have ended, and the extent of the establishment of new links in the second state."

30. It is because a change of habitual residence can happen quickly that an international measure has been formulated which has the effect, in a case of a wrongful removal or retention, and provided that certain conditions are met, of preserving jurisdiction over the child in the original state notwithstanding that habitual residence of the child has changed to the new state: see Article 7 of the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996. This was repeated in similar, but not identical, terms in Article 10 of Council Regulation (EC) No 2201/2003 ("B2R"). But these extra-territorial powers only apply where both states are contracting states under the 1996 Convention (see Article 10(3)) or, when B2R applies, where both states are members of the EU (see *SS v MCP* (Case No. C-603/20 PPU, CJEU)). In this case the USA is not a contracting state under the 1996 Convention. Therefore, in order to succeed

on his application under the 1980 Convention, the father has to show that at the point of wrongful removal or retention the child remained habitually resident in the USA.

The father's case

31. As stated above, the father pleads that K at all times has remained habitually resident in the USA because the mother, right from the moment of their departure on 27 January 2020, dishonestly intended to breach the father's spending time rights under the terms of the agreement and the USA order. If I have understood it correctly, his argument is that the agreed change of habitual residence of K is vitiated by the mother's fraud, and that therefore K was wrongfully removed from the USA; alternatively that he was wrongfully retained in England when he was not brought to the USA at Easter 2020.

32. I have explained above that the question of habitual residence is one of pure fact. The intention, or state of mind of the mother, is a fact, just like any other fact (see *Edgington v Fitzmaurice* (1885) 29 Ch D 459, where Bowen LJ stated that the state of a man's mind is as much a fact as the state of his digestion) [1]. It is a fact, albeit a psychological fact, to go into the mix with all the other facts to answer the simple question whether there has been in this country the requisite degree of integration by the child in a social and family environment: see *Re C* at [66].

33. I am not aware of any authority which states that an agreed relocation, with a concomitant change of habitual residence, can be voided ab initio on the ground of fraud. Of course, it is trite law that fraud unravels everything, but I have never heard of a practical child arrangement order, providing for time to be spent with the non-residential parent, ever being undone on this basis. Be that as it may, no order has been made in the USA voiding ab initio the agreement and the USA order. It is equally trite law that an order is valid until it is set aside, and this applies even to an order where there was no original jurisdiction to make it: see *M v Home Office* [1993] UKHL 5, [1994] 1 AC 377 at 423; *Isaacs v Robertson* [1985] AC 97 at 101-103.

34. Even if the USA order were to be set aside, this could not avail the father on a later application for a return order under the 1980 Hague Convention: see *In re L (A Child) (Custody: Habitual Residence)* where an order made in the USA permitting a mother to return with the child to England was later set aside, and the mother was ordered to return the child to the USA. The father sought to enforce that order by commencing proceedings under the 1980 Hague Convention in England. The application was dismissed, because by the time that the father came to make his application the child was habitually resident in England. The position would be the same in this case.

Conclusions

[1] But not everyone agrees that a state of mind is a fact. See for example *Leland v. Oregon*, 343 US 790 (1952) where Frankfurter J wrote of "how vast a darkness still envelops man's understanding of man's mind" citing the famous dictum of the fifteenth century jurist Brian CJ that "the thought of man is not triable, for the devil himself knows not the thought of man" (YB 17 Ed IV 1). See however *Greene v The King* (1949) 79 CLR 353 where Latham CJ disputes this belief, holding that "it did not need recent developments in psychology to establish that states of mind are not only facts, but the most important facts in human life" and that "a doctrine which declines to regard a state of mind as a fact is to me completely incomprehensible."

35. On 27 January 2020, that is three days after the appearance of the parents before the Court in State A when their agreement was approved and their divorce was authorised, the mother and K travelled to England. This was completely lawful. Even if the mother was harbouring a dishonest intention later to deprive the father of his spending time rights under the agreement there is no possible basis for saying that the removal was not lawful.

36. In any event, having considered the evidence carefully, I am completely satisfied that the mother did not harbour that dishonest intention. I am satisfied that when she left, shortly before the eruption of the global pandemic, she fully intended to comply with the terms of the agreement.

37. There was no wrongful removal in this case.

38. The next question is whether the mother wrongfully retained K in England at Easter 2020 when she did not travel to the USA with him so that he might spend time with his father pursuant to the terms of the agreement. The evidence clearly shows that the mother had reasonable grounds not to travel to the USA at that time on account of the impact of the Covid-19 pandemic. Therefore, there was no wrongful retention.

39. But even if that were not the case, I cannot see that the Convention could be engaged because plainly by Easter 2020 K had acquired habitual residence in England. Even if the mother had harboured the dishonest reservation to which I have referred, this fact alone could not outweigh all the other facts which fully demonstrate, in my judgment, that by Easter 2020 K had developed the requisite degree of integration in a social and family environment in this country, and therefore, by that time, was habitually resident here.

40. It is not necessary for me to make a specific finding as to the occurrence of the *punctum temporis* when K's habitual residence changed from the USA to England. It is sufficient for me to find as a fact that it changed well before Easter 2020. This was a planned, agreed, relocation from the USA to England. When the mother and K left on 27 January 2020 they severed all their links with the USA leaving in place only those necessary to give effect to the spending-time provisions in favour of the father in the agreement. They returned to this country, where arrangements had been put in place for their long-term permanent residence. Applying Lord Wilson's criteria in *Re B* at [46], it is my judgment that the detailed pre-planning, including the obtaining of all consents required by the law for a permanent relocation, indicates that the requisite degree of integration in England was reached very quickly, and well before Easter 2020.

41. There was no wrongful retention in this case.

42. It seems to me that the father's true complaint is that he is being denied what the Convention refers to as rights of access. Article 21 of the Convention requires state parties to facilitate the enjoyment of that right. It is an administrative obligation to afford a domestic remedy, which in this jurisdiction would be the right to have heard an application under section 8 of the Children Act 1989: see *Re G* at 229 per Hoffmann LJ. However, and crucially, while the Convention recognises rights of access, it offers no return remedy for a breach of those rights: *Abbott v Abbott* 560 US 1 (2010), per Kennedy J at 5.

43. The hearing before me was conducted remotely using Microsoft Teams, and the father was able to participate from the USA. He chose to represent himself, having fired the

solicitors and counsel granted to him free of charge on non-means-tested legal aid. In my discussion with him I offered to treat his application under the Convention as having been made pursuant to Article 21 to secure effective rights of access. I explained, however, that this could not entail a return order but would instead be treated as a domestic application under section 8 of the 1989 Act which would be heard, in the normal way, in the Central Family Court. The father showed no interest in this process. It was therefore not pursued further.

44. The father has not made at any point an alternative application that K be returned to the USA pursuant to the inherent jurisdiction of the High Court. Had he done so, it would have been refused in the light of the findings that I have made above.

45. In such circumstances the only order which I make is to dismiss the father's application of 19 January 2021.

46. I give leave to the parties to disclose the un-anonymised version of this judgment, as well as the electronic court bundle, to the court in State A hearing the father's applications referred to above.

47. That concludes this judgment.