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[21/07/1995; Family Court of Australia (Melbourne); First Instance]
Paterson, Department of Health and Community Services v. Casse (1995) FLC 92-629

FAMILY LAW ACT 1975

IN THE FAMILY COURT OF AUSTRALIA, Melbourne

BEFORE: Kay J

13-14 July 1995

No. ML.3607 of 1995

IN THE MATTER OF:

John Pryde Paterson

Department of Health and Community Services

State Central Authority (Applicant)

-and-

Marie Lorna Casse

(Respondent)

REASONS FOR JUDGMENT

APPEARANCES:

Miss Bennett of Counsel, instructed by the Victorian Government Solicitor, appeared on behalf of the applicant.

Miss Frederico of Counsel, instructed by Fernandez and Johnson, appeared on behalf of the respondent.

JUDGMENT:

Kay J: Before the Court is an application by the State Central Authority, under the provisions of the Convention on Civil Aspects of International Child Abduction (known as the Hague Convention, which has been incorporated into the law of Australia by operation of the Family Law Child Abduction Convention Regulations, seeking an order that A.C. born 9 September 1987, Jo.C. born 20 October 1989, and Ju.C. born 30 August 1991 (hereinafter collectively referred to as 'the children') be returned to Mauritius.

The respondent to the proceedings is the children's mother, M.C. (hereinafter referred to as "the wife").

The parents of the children being the wife and M.C. (hereinafter referred to as 'the husband') were both born in Mauritius and are citizens of Mauritius. They married in Mauritius on 20 February 1986. The children were all born in Mauritius. On 5 January 1993 the husband and the wife completed an Application for Migration to Australia on behalf of themselves and the children, and lodged the application with the Department of Immigration Local Government and Ethnic Affairs at Nairobi in Kenya.

At some time prior to mid-1993 the wife's mother had migrated to Australia as the spouse of an Australian citizen she had met in Mauritius. Some time after her arrival in Australia the wife's mother had obtained permanent resident status.

In December 1994 the husband the wife applied to the Australian High Commission in Mauritius for Visitors' Visas for themselves and the children to enable them to come to Australia. Although the visitors' visas would only entitle their holders to remain in Australia for a maximum period of three months from the date of first entry, and although the parties had to give certain undertakings which will be referred to shortly, it was the wife's case that the husband and wife intended to endeavour to change their visa status once they got to Australia to that of permanent residents.

It is common ground that the parties sold much of their furniture, including beds, a refrigerator and a motor vehicle before leaving Mauritius. The wife gave evidence which was not contradicted that she brought with her all of her personal possessions. She said the only thing left behind was some surplus furniture.

The husband and the wife were each granted visas on 13 January 1995 (including visas for the children) which contained the following:

CLASS TR VISITOR P<<

SUB CLASS 670

CONDITIONS MIG. REGS. SCHED.8

8101 NO WORK

8201 MAX 3 MONTHS NON - FORMAL STUDY GRANTED 13 JAN 95. MUST NOT ARRIVE AFTER 13 JAN 1996 MULTIPLE TRAVEL. HOLDER(S) PERMITTED TO REMAIN IN AUSTRALIA FOR 03 MONTHS FROM DATE OF EACH ARRIVAL.

From a document bearing government Printers' Note PT.983i-(5.94) issued by the Department of Immigration and Ethnic Affairs being an information sheet provided to applicants for visitors' visas, it appears that each of the parties had to given undertakings that -

*** they would possess or have access to sufficient funds for living expenses and return travel without the need to work while in Australia;**

*** will leave Australia before or at the end of their authorised period of stay;**

*** would not seek authority during their visit to settle permanently in Australia;**

*** would not work or attend a formal course of study during their visit; and**

*** had no outstanding debts to the Commonwealth of Australia.**

On 17 January 1995 the husband, the wife and the children arrived in Australia. By 2 February 1995 the husband and the wife attended upon a firm of solicitors, Barlow and Co., for certain advice relating to their immigration status. The husband could speak fluent English and the wife only halting English basically understanding only French. They were given certain advice by the solicitors and the husband over the ensuing weeks paid solicitors' fees in the sum of $2,255.

Notwithstanding the advice of the Department relating to the conditions of their visitor's visa, the wife was apparently able to apply, whilst in Australia, to remain permanently in Australia on the ground that her mother was dependent upon her. She was given the title "main applicant". By reason of her status as main applicant, her husband and children were apparently entitled to be given consideration for permanency.

On 16 February 1995 both the wife and the husband signed the necessary application, the husband compiling in his own hand a list of reasons to be submitted to the relevant authorities as to why the application should be granted.

The document executed on 16 February 1995 was a draft application. The final application was executed by the husband and the wife on 21 February 1995 and subsequently lodged with the appropriate department.

Whether or not the parties had intended to come to Australia as bona fide visitors or under a ruse with the intent of endeavouring to permanently stay in Australia once they got here, I am satisfied that by 2 February 1995 both the husband and the wife had formed the intention to permanently reside in Australia subject only to the vagaries of the immigration laws. They, together with the children, were present in Australia and intended to stay here as long as the Immigration Department would let them. The evidence did not disclose when if ever, the husband and the wife would return to Mauritius again.

Some time after the parties put in effect their application to remain in Australia the relationship between them deteriorated. It is common ground of the parties that by the middle of March the wife had commenced an intimate relationship with one G.C. Whilst the husband alleges he had his suspicions prior to that date, both the wife and Mr C. swear the relationship did not commence until 13 March 1995. Mr C. was not cross-examined on his affidavit.

It is perhaps a convenient time for me to indicate that I was not thoroughly satisfied as to the accuracy of the evidence of either party. Emotions were running high and English is not the native tongue of either of the parties. I do not want to suggest that either party has set out to mislead the Court, but I felt that some of the evidence of the parties, especially that of the husband was coloured by their emotions in the circumstances.

The evidence is less than satisfactory as to the comings and goings of the parties between late February and 20 March 1995. It would appear that the husband and wife together with the children lived first with the wife's mother in accommodation that was inadequate for all six people. Whether by reason of the state of their relationship or by reason of the congested accommodation, the husband, wife and children moved to a bungalow at the rear of the premises in * Street, Reservoir. There was apparently an argument between the husband and the wife about 4 March 1995 when the husband threatened to take the children back with him to Mauritius.**

On 18 March 1995 some five days after the wife admitted her relationship with Mr C. became intimate, the husband locked his wife and mother-in-law out of their home, but retained the children. On 19 March he told the wife that he was intending to return with the children to Mauritius. The wife begged the husband to return the children to her. Eventually on 22 March the husband returned the children to the wife. However on 20 March he wrote to Messrs Barlow and Co. a letter saying the following:

"I wish to advise the company that I am withdrawing my-our ex-wife and I application for permanent residents citizenship at this stage. Would you please reimburse the money placed in your trust Fund as soon as practically possible. In intend flying back to my Country as soon as we possibly can, with my three children."

Whatever had been the husband's intentions when he wrote that letter, I am satisfied that by 24 March 1995 he had changed his mind. He and the wife both signed a letter to Barlow and Co. in his hand-writing which read as follows:

"Sir,

Due to some change in circumstances we hereby make a joint letter, Lorna Casse.

We have come to an agreement that both of us will continue to forward our application for permanent residence on the same ground, i.e.. Lorna Casse Principal Applicant and Manson Casse, spouse of applicant. The three children included are A, JO and JU. We declare that as from this date, we will act jointly in every matters concerning the application."

It was the husband's evidence that he was hopeful of a reconciliation and he signed the letter, believing a reconciliation would take place. It is also his evidence that the family would pack up and return to Mauritius. He said that he agreed to go to Sydney for some days and that upon his return the family would leave when he got back. He was gone three days and came back on 27 March 1995. He said he was then informed by the wife that he had already been removed from the immigration application because of his letter of 20 March 1995, and would not be put back on it. He was further informed that the wife was not going to go back to Mauritius with him, nor would she let the children go.

The wife's evidence was that there was no discussion about the parties' returning to Mauritius at all. She accepts that there was discussion about reconciliation, but always on the grounds that the parties would continue to live in Australia.

As to the events surrounding the 24 and 27 March 1995, I prefer the wife's evidence. I am satisfied that on 27 March 1995 the husband learned that the wife saw little or no future in their relationship. He probably told her at that time that he wanted to go to Mauritius and would insist upon the children going back too.

There was much coming and going between the parties over the next few weeks. At one time the wife sought and obtained intervention orders against the husband. She sought and obtained ex parte in this Court, custody orders relating to the three children and a restraint on the husband removing the children from Australia. The husband had taken the child Ju, in a motor vehicle and headed off towards Adelaide with him accompanied by some other friends. He dumped the other friends beside the road in Ararat. They informed the police who in turn informed the wife of his behaviour.

The husband made telephone contact with the wife on 6 April whilst she was at the Family Court obtaining the custody orders. I am satisifed he knew about their existence. He returned the child Ju to the wife that day, and then spent some time with friends in Sydney.

The husband returned to Victoria on or about 27 April 1995. The parties met on several occasions after that. The wife and children stayed with the husband for three or four nights in the husband's room in Fitzroy. The husband thought this was clear evidence of the wife's care for him. She said she did it because she was scared that he might abduct the children.

The next day after the wife had returned to live with her mother the husband purchased a bed and moved into the mother's home where he stayed with the wife until 29 May 1995.

I am satisfied that the situation was very fluid. The husband was urging the wife to give up her boyfriend and return to him. She was sending out mixed signals to the husband. She was well aware at that time that the husband wanted the children to be returned to Mauritius in the event that there was no reconciliation. In paragraph 39 of her affidavit filed 12 July 1995 she said:

"I say that the husband suggested that I discontinue the application for custody in the Family Court, and he would stop his application of the children be returned to Mauritius if I would stop all contact with Mr C."

Whilst the husband alleges again that on 29 May 1995, the parties reached agreement that they would return to Mauritius with the children as soon as possible, I accept that at no time has the wife moved away from her view that she would like to stay in Australia if at all possible.

By early June 1995 the wife decided to place some breathing space between her and the husband and she and Mr C. moved to an address in Hastings, which was not disclosed to the husband. It was after that event that the husband obtained advice that he may be able to bring proceedings for the return of the children to Mauritius under the provisions of the Hague Convention.

On 3 July 1995 the State Central Authority filed its application in these proceedings seeking a return of the children to Mauritius.

The Hague Convention came into force in Australia on 1 January 1987. Mauritius acceded to the Hague Convention on 1 January 1994.

Regulation 13 of the Child Abduction Convention Regulations provides:

Where the Commonwealth Central Authority receives an application in respect of a child removed from a convention country to Australia and is satisfied that the application is an application to which the Convention applies and is in accordance with the requirements of that Convention, the Commonwealth Central Authority shall take action under the Convention to secure the return of the child to the applicant.

Regulation 15 of the Regulations provides:

(1) The responsible Central Authority may, in relation to a child removed to Australia, apply to a court having jurisdiction under the Act for:

...

(d) an order for the return of the child to the applicant.

...

(2) A court may, in respect of:

(a) an application made under subregulation (1); or

(b) an answer, or an answer and cross application, made under subregulation (1B);

make an order mentioned in subregulation (1) or any other order that the court thinks fit.

Regulation 16 of the Abduction Regulations provides:

(1) Subject to subregulation (3), a court shall order the return of a child pursuant to an application made under subregulation 15 (1) if the day on which that application was filed is a date less than one year after the date of the removal of the child to Australia.

...

(3) A court may refuse to make an order under subregulation (1) or (2) if it is satisfied that:

(a) the person, institution or other body having the care of the child in the convention country from which the child was removed was not exercising rights of custody at the time of the removal of the child and those rights would not have been exercised if the child had not been removed, or had consented to or acquiesced in the child's removal; (b) there is a grave risk that the child's return to the applicant would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;

...

By operation of Regulation 2, "Removal" of a child means: "the wrongful removal or retention of a child within the meaning of the Convention".

Article 3 of the Convention provides insofar as is relevant:

The removal or the retention of a child is to be considered wrongful where -

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

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

The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 5 provides:

For the purposes of this Convention -

(a) rights of custody shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

Three issues arise in these proceedings.

1. The important threshold question is in what country were these children habitually resident when it is alleged that they were wrongfully retained within the meaning of the Hague Convention?

2. If they were wrongfully retained in Australia within the meaning of the Convention has the husband acquiesced in the retention?

3. Are any other Reg 16 defences applicable?

Acquiescence

Counsel for the State Central Authority pointed directly to the events of 27 March 1995 as constituting the wrongful retention. It was on that date that the husband alleged the wife told him that she was not intending to return to Mauritius with the children contrary to his wishes.

It is clear from the evidence that whatever changes of attitude there had been between the parties from the time their relationship seriously deteriorated early in March 1994, until 24 March 1994, on that date the husband and wife signed the letter agreeing to continue with their application for permanent residence in Australia. Any previous disputes about whether the children should or should not stay in Australia had then been compromised.

In my view if there had been prior to 24 March 1994, a wrongful retention of the children within Australia by the wife, the husband's behavior on 24 March 1995 in executing the document amounted to an acquiescence in such conduct. However, the husband then indicated on 27 March 1995 when the wife informed him that she no longer wished to reconcile with him, that he once again desired to return with the children to Mauritius.

I am satisfied that the husband made that desire known to the wife and that she equally made her desire to resist any such move well known to the husband.

I am satisfied that at no time after 27 March 1995 had the husband acquiesced in the wife retaining the children in Australia. He spent many weeks hopeful of a reconciliation. In my view he still remains hopeful of a reconciliation, particularly if he can get the wife and children back to Mauritius.

I would adopt the views of the Court of Appeal in Re R. (Child Abduction) 1995 1 FLR 716 at 727 that there needs to be clear and unequivocal words and conduct which could properly be interpreted as acquiescence on the part of the father. In my view there cannot be true acquiescence where the parties are in a state of confusion and emotional turmoil (as identified by Stewart-Smith LJ in Re: A (Abduction: Custody Rights) 1992 Fam 106 at 121).

Being hopeful of a reconciliation in this case the husband was prepared to pamper to the wife's demands over the weeks following 27 March. The wife's counsel was unable to point to any conduct on his behalf after that time which could clearly and unequivocally amount to an acquiescence by him in the wife's opposition to his returning with the children to Mauritius.

The husband's rights under the Law of Mauritius

I am satisfied that the retention of the children in Australia was contrary to the husband's rights of custody within the terms of the law of Mauritius. I have before me some extracts from the relevant laws of Mauritius, and in particular Article 371 of the Mauritius Civil Code which insofar as is relevant and as has been translated to me reads as follows:

371 - The child at any age owes respect and honour to his father and his mother

371-1 He stays under their authority until he reaches his majority or his emancipation by marriage

371-2 It is the authority of the father and mother to protect the child in his security, his health, his morality. They have towards him the obligation and right to custody, supervision and education.

371-3 Subject to special conditions contrary to the established regulations under the present Article, the child cannot without the permission of his father and his mother, leave the parental house and he can only be taken away from the parental house in cases necessitated by law. However the Judge in Chambers can authorise the child to leave the parental house at the request of one of the parents, when the over possessive refusal of the other parent is not justified in the interest of the child. 372 During the marriage the father and mother exercise jointly their parental authority.

Habitual residence

Notwithstanding that I am satisfied that from 27 March 1995 the husband wished to have the children return with him to Mauritius in the event that he could not achieve a reconciliation with the wife and that at no time has he waivered from that wish, and notwithstanding that I am satisfied that the wife at all times has fervently intended to remain in Australia, subject only to the threat of deportation, I am satisfied that these children do not come within the purview of the Hague Convention. In my view as at 27 March 1995 and as the date of filing of the application the children were not habitually resident in Mauritius, but they were habitually resident in Australia. In those circumstances retention of the children in Australia was not wrongful within the meaning of the Hague Convention.

In order for the matter to fall within the scope of the Convention, it must be demonstrated that:

- the child was habitually resident in a Contracting State immediately before any breach of custody or access rights (Article 4)

- the child is under 16 years of age (Article 4)

- and, the removal or retention is wrongful.

It is to be remembered that the habitual residence that the Court is to consider is always that of the child and not that of the parent.

Adair Dyer in "Childhood's Rights in Private International Law" (1991) Australian Journal of Family Law 103 at 104, comments that the term 'habitual residence' as emphasised in the Report of the second Special commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction (18-21 January 1993) drawn up by the Permanent Bureau; p.30:

"remains without any comprehensive legal definition, so that it will avoid the encrustations which have attached to the term 'domicile' as used in different countries for different purposes.

The term encourages Courts to focus on the facts of the case, rather than on the intent of a particular party to live in a specific country.

The District Court of Kansas in Levesque v Levesque 25 February 1993, (93-4037-DES . (William Hilton's database of Decisions and Articles on the Hague Convention) commented that the term 'habitual residence' is not defined in the Convention and:

"necessarily depends on the facts and circumstances of each case...The intent is for the concept to remain fluid and fact based without becoming rigid."

In d'Assignies v Escalante, 9 December 1991 (BDO 51876), C.B Kaufman, Judge of the Superior Court of California, commented that "habitual residence" is an undefined term which was deliberately not defined in order to escape the rigidity and inconsistencies as between different legal systems that such technical rules can produce.

The Court of Appeal in C v S (Minor: Abduction: Illegitimate Child) (1990) 2 FLR 442 concluded that "habitual residence" was a status which could be changed in a single day by leaving a country with a settled intention not to return. A mother of an ex-nuptial child took the child from Western Australia to England. Under WA law the child was in the mother's sole custody.

The notion that the habitual residence of a child can change immediately one parent forms a settled intention not to return and acts on that intention, appears to undermine the philosophy of the Convention that custody issues are best determined by the country in which the child normally resided prior to its unilateral removal.

In Artso and Artso (1995) FLC 92-566 the parties decided to try to migrate to Australia from England. The wife was English and the husband Australian. The wife came with the children, for a trial period, ahead of the husband. She was unhappy here and wanted to take the children back to the United Kingdom with her. The father then came to Australia and she returned to England without the children, then made an application for their return under the provisions of the Hague Convention. Mushin J held that as the parents had joint custody and guardianship, the unilateral intention of the father to reside in Australia could not bind the children, as the mother wished to return to the United Kingdom. In order for the habitual residence of the children to have changed to Australia, both parents must have decided to remain in Australia.

The United States Court of Appeal in Friedrich v Friedrich, 22 January 1992, 982 F 2d 1396, remarked on the meaning of 'habitual residence';

"We agree that habitual residence must not be confused with domicile. To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions...

"A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward."

The Court held that the child's habitual residence can only be altered by: "a change in geography and the passage of time, not by changes in parental affection and responsibility."

The United States District Court of Arizona considered the concept of 'habitual residence' in Meredith, M v Meredith, S, 26 February 1991, (79 F.Supp 1432). Mrs Meredith took the children to France and then on to the United Kingdom, keeping their whereabouts secret from her husband. Once the father found where the mother and the children were, he went to England and removed the children. The mother then made an application under the Hague Convention. The issue was whether or not it could be said that England was the 'habitual residence' of the children. The Court held that habitual residence was to be

determined by the facts and the circumstances of the particular case and that the mother had failed to demonstrate that the children were habitually resident in the United Kingdom. Indeed, "(it) would be inequitable and unjust to allow such conduct to create 'habitual residence'." The Court continued:

"To equate the temporary removal and subsequent sequestration of the minor child to legal status of 'habitual residence' in another country would be to reward the petitioner for her ability to conceal the child from the respondent..."

In the recent decision of Re B. (A Minor: Abduction) 1994 2 FLR 249, the Court of Appeal held (per Waite LJ at 260):

"The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression 'rights of custody' when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases, that will involve giving the terms the widest sense possible.

The Court of Appeal in Re F. (A Minor) (Child Abduction) 1992 1 FLR 548 dealt with a case where an English father and an Australian mother brought their English born child to Australia in April 1991. The father came on a visitor's visa having given a declaration that he would not seek authority to settle in Australia, and he would not undertake employment or formal studies here. He came with return tickets requiring return by July 1991. Nineteen packing cases were sent to arrive six weeks after the family.

The mother's case was that the parties came to Australia intending to immigrate and to regularise the father's resident status after arrival. The marriage deteriorated. On 3 July 1991 the wife told the husband that the marriage was at an end. On 10 July 1991 he flew back to England with the child. The wife applied in England under the Hague Convention on the basis that the child was habitually resident in Australia and had been wrongfully removed. Johnson J was satisfied there had been a wrongful removal and ordered the return of the child to Australia. The father appealed. The Court of Appeal dismissed the appeal. Butler-Sloss LJ said at 551:

"It is equally common ground that the child and his parents were all habitually resident in England prior to 10 April 1991. The only issue is, therefore, whether the child was habitually resident in Australia immediately before his removal on 10 July 1991. A young child cannot acquire habitual residence from those who care for him."

Her Lordship cited with approval the words of Lord Brandon in Re J (A Minor: Abduction) (1992) AC 562 at 578, where his Lordship said:

"The first point is that the expression "habitually resident" as used in Art 3 of the Convention is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, its rather to be understood according to the ordinary natural meaning of the two words which it contains. The second point is that the question of whether a person is or is not habitually resident in a specified country is a question of fact to be decided with reference to all the circumstances of any particular case...

A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it, but to take up long term residence in country B.

instead. Such a person cannot however, become habitually resident in country B. in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time, the person will have ceased to be habitually resident in country A., but not yet have become habitually resident in country B."

The Full Court recently examined the concept of habitual residence in Cooper v Casey (1995) FLC 92-575. The case concerned some children who spent some of their time in Australia, some of their time in France, but most of their time in the United States of America. Nicholson CJ (with whom Kay and Graham JJ concurred) said at p 81,694:

However, she (counsel for the wife) submitted before Ellis J and before this Court, that the children were not habitual residents of the United States and in fact were not habitual residents of any State. She did not argue that the children were habitually resident in Australia, nor did she argue that their stay in France constituted habitual residence in that country.

In his judgment Ellis J pointed out that habitual residence is not defined either in the Regulations or the Convention and is in each case a question of fact. His Honour referred to the observations of the majority of the United States Court of Appeal, Sixth Circuit in Friedrich v Friedrich, 983 F2d 1396, decided 22 January 1993, as to the meaning of habitual residence as follows at page 1401:

"We agree that habitual residence must not be confused with domicile. To determine habitual residence the court must focus on the child not the parents and examine past experience not future intentions. ...

A person can have only one habitual residence. On its face habitual residence pertains to customary residence prior to the removal. The court must look back in time not forward."

... In Re B (Minors) (Abduction) (No 2)1993, 1 FLR 993, Waite J, after referring to a number of authorities, summarised (at page 995) the principles relevant to the case before him as follows:

"1. The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.

2. Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being whether it is of short or of long duration. All that the law requires for a "settled purpose" is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.

3. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention. The House of Lords in Re J, sub nom C v S (above) refrained, no doubt advisedly, from giving any indication as to what an 'appreciable period' would be. Logic would suggest that provided the purpose was settled, the period of habitation need not be long. Certainly in Re F (above) the Court of Appeal approved a judicial finding that a family had acquired a fresh habitual residence only one month after arrival in a new country."

It may be commented in relation to the above passage, that the period with which we are presently dealing is a much longer one than that in Re F (A Minor) (Child Abduction) (1992) 1 FLR 548 and it may also be commented that, although evidence was given that the wife and children were planning to return to France, the evidence suggested that that was for a limited period only, for the summer holidays. In those circumstances, it seems difficult to argue that the period that had elapsed following their return to France did not amount to a "settled purpose" within the meaning of the term as used in the above passage.

In Re F., supra, Butler-Sloss LJ delivering the principal judgment of the Court of Appeal, pointed to conflicting evidence which could conceivably have justified a finding that the children in question had abandoned their principal place of residence of the United Kingdom and not acquired one in Australia and said ,at pages 555-6: "The judge was entitled to make the finding that the family did intend to emigrate from the UK and settle in Australia. With that settled intention, a month can be, as I believe to be in this case, an appreciable period of time. Looking realistically at the position of A, by the time he left Sydney on 10 July 1991, he had been resident in Australia for the substantial period of nearly three months. Mr Setright, wearing two hats, on behalf of the mother and of the Lord Chancellor as the central authority, reminds us that 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 his argument, we should not strain to find a lack of habitual residence, where on a broad canvas, the child has settled in a particular country."

Change of residence in breach of visa requirements

In Bashir (No.9435 of 1994, judgment delivered 1 February 1995), I followed a significant line of authority holding that one can obtain a domicile of choice even as an illegal immigrant. (see Lim v Lim and Titcumb 1973 VR 370, Salacup v Salacup (1993) FLC 92-431, In re Marriage of Dick (1993) 15 Cal App 4th 44, 18 Cal Rptr 2d 743). I see no reason why that line of authority should not equally apply to residence as well as domicile.

Conclusion

I repeat my earlier finding that on the evidence I am not satisfied that Mauritius was the place of habitual residence of the children when, on 27 March 1995 the husband informed the wife he wanted the children to return there with him.

Although the written material made some reference to the wife raising defences under Reg 16 that the children would be exposed to a grave risk of harm if returned to Mauritius, her counsel did not press these matters at trial. In any event the wife volunteered evidence concerning her willingness to allow the children to return for access or appropriate family occassions. That evidence did not sit at all comfortably with the written material.

In the circumstances it is my view that the application should fail.

I am not entirely sure that the framers of the Convention intended it to apply to cases where the parties and the children took themselves, by mutual agreement, to a country other than their 'habitual residence' then one of the parties decided to go 'home'. Whose right of custody should then prevail? That of the parent who wants to go 'home' or that of the parent who wants to stay? A wrongful removal entails taking the child from a country in breach of a custodial right. A wrongful retention entails retaining the child in a country in clear breach of such right. When does this right arise where there parties are in the new State by agreement?

Artso and Re F. both dealt with agreements to remain temporarily. Here the agreement was to remain permanently but seemingly neither party had turned their mind to the possible breakdown of the marriage. Was the agreement vitiated? Could either parent then demand a return to their previous home and invoke the Hague Convention to achieve that demand?

I raise these issues for consideration by the relevant authorities including the Convention Permanent Secretariat.

It is not intended that the dismissal of this application should in any way affect the father's rights pursuant to the provisions of the Family Law Act to apply to the Court for an order for custody of, or access to, his children or for an order that any proceedings relating to such matters be determined in Mauritius. I express significant sympathy with his predicament. It is clearly in the interests of the children, from the little I have seen of this case, that he continue to have a close relationship with them. I trust that the officers of the relevant departments will give close consideration to enabling these children to stay in close proximity to their father. Orders

That the application of the State Central Authority filed the 10th July 1995 be dismissed.

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