

Application by a mother for the return of her twin children from Cameroon to England and Wales.

An application in wardship proceedings for an order that the children be returned to the jurisdiction of England and Wales and the care and control of the Plaintiff mother. The application concerned twin children born in late 2007 who at the time of the application were living in the care of the paternal grandmother in the Cameroon, West Africa.

The parents had undergone a customary marriage in Cameroon and a civil ceremony in England in early 2007, before the twins were born. The mother alleged domestic violence and asserted that she had been bullied and controlled by the father and abused by the paternal grandmother during the relationship. In November 2008 the children, who had British passports obtained by the father, went to live in Cameroon. They were accompanied by the paternal grandmother and had lived in Cameroon ever since. It was common ground that until their removal the children were habitually resident in England and Wales. In July 2009 the mother gave birth to a third child, although by this time the parties' relationship had broken down and the mother was living in a refuge. It was common ground that the father had no relationship with this child and doubted his paternity.

In mid to late 2009 the mother sought legal advice and was informed by her solicitors that the Foreign and Commonwealth Office could not assist in securing the twins' return. She was further informed by the LSC that her application for public funding had been refused on the basis that she should pursue her application in Cameroon.

The mother made her application in April 2010, some 18 months after the children had travelled to Cameroon. The mother argued that the children had been wrongly removed in November 2008 and had therefore never lost their habitual residence in England and Wales.

The father asserted that the mother had agreed to the removal and the children were habitually resident in Cameroon; in any event, the children had been in Cameroon for such a length of time with the mother's acquiescence that even if they were habitually resident in England and Wales the court should exercise its jurisdiction to refuse a return.

Held, giving judgment on the preliminary issue in relation to the children's habitual residence and dismissing the mother's originating summons:

1. Habitual residence is a question of fact, as is the question of whether the children had lost their habitual residence: finding therefore:

a) that the mother had agreed to the removal of the children in November 2008, although the agreement was open-ended and there was no fixed date for the twins' return;

b) that the children were currently habitually resident in Cameroon, having acquired that habitual residence in the time they had been in Cameroon.

2. Even if the court was wrong on the habitual residence point, it would in any event not exercise the discretion to order a return due to (i) the length of time the children had spent in Cameroon and (ii) the mother's failure promptly to pursue the remedies open to her, which failure was not wholly the result of bad legal advice.

Summary by [Stephen Jarmain](#), barrister, [1 Garden Court Family Law Chambers](#)

Neutral Citation Number: [2010] EWHC 1113 (Fam)

Case No: RG09P01767
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/05/2010

Before:
SIR NICHOLAS WALL, THE PRESIDENT OF THE FAMILY DIVISION

Between:

ES (Applicant)

- and -

AJ (Respondent)

- and -

PL (Second Respondent)

Alev Giz (instructed by Tanner & Taylor LLP) for the Applicant
Richard Clough (instructed by Truemans) for the Respondent

Hearing dates: 29 April 2010

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR NICHOLAS WALL, THE PRESIDENT OF THE FAMILY DIVISION

This judgment is being handed down in private on 19 May 2010 It consists of 7 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Sir Nicholas Wall P :

1. This is an application in wardship proceedings made by the mother of twin children born in 2007 (the twins) for an order against their father that the twins be returned forthwith to the jurisdiction of England and Wales and into her care and control.
2. A preliminary issue has arisen, which can be shortly stated. Since an unspecified date in November 2008 the twins have been living with their paternal grandmother in the British Cameroons in West Africa (the Cameroons). Under the Family Law Act 1986 I only have jurisdiction to make the orders sought by the mother if either (a) the twins are physically present in England and Wales (which plainly they are not); or (b) if they are habitually resident in England and Wales.
3. The mother's case is that the twins were wrongly removed by their father from this jurisdiction in November 2008 and, that as a consequence, they have never lost the habitual residence in England and Wales which it is common ground they had immediately prior to their removal. The father's case is that over the period between November 2008 and today's date the twins have become habitually resident in the Cameroons.
4. In the alternative, the father argues that if I find the twins to be habitually resident in England and Wales, I should, nonetheless, on the facts and as an exercise of discretion, refuse to make an order for their return to England and Wales. In this respect, the father relies upon the length of time which the twins have spent in the Cameroons, coupled with that he submits was the mother's agreement that they should go there in the first place, and her subsequent acquiescence in the twins remaining there.

The Facts

5. Both the parents originate from the Cameroons, although the father has lived most of his life in England and Wales. He told me that he underwent his secondary education in this country. He and the mother met whilst he was on a visit to his family in the

Cameroons. It is plain that the parents' respective families live within close proximity of each other in the Cameroons, and know each other well. The mother was born and brought up in the Cameroons, where she was educated to University level.

6. The parents underwent a customary marriage in the Cameroons and a civil ceremony of marriage in England on 7 April 2007. The twins were born in England in late 2007. The parents lived in the house of the paternal grandmother. The mother's case is that she was abused both by the father and the paternal grandmother, and regularly taunted with the fact that she did not have permanent leave to remain in England and was therefore vulnerable to the father's controlling behaviour towards her.

7. In November 2008, the children, who had British passports obtained by the father, went to live in the Cameroons. They were accompanied by the paternal grandmother. They have lived in the Cameroons ever since.

8. The mother's case is that the despatch of the twins to the Cameroons was done without her consent and contrary to her wishes. She accepts that she accompanied the children to the airport and that she saw them off. She explains this by saying that she had been presented with a *fait accompli* and was unable to prevent the father and his mother removing the children. The mother also says that she could not travel because she did not have a British passport and that the mother was holding her Cameroons passport

9. The father's case is that the decision to send the children to the Cameroons was consensual; that his mother's house was on the point of being re-possessed; that the parties, who were both working but had lost their jobs, were not in a financial position to care for the twins, and that it was therefore expedient to send the twins abroad for a time, until their parents' financial position improved.

10. Amongst the somewhat exiguous documentation with which I have been provided is a form from the Citizens Advice Bureau (CAB) which records that on 17 November 2008, the mother made an enquiry of the CAB about her situation and rights "as I am going through some matrimonial problems". Whether this appointment precedes or post-dates the removal of the children is not clear. What, however, is plain is that as at 17 November the mother either knew the children were going or that they had gone; and what is equally plain is that she did not seek advice from the CAB either about the proposed removal or about how the return of the children could be achieved.

11. In the supplemental form C1A to her Form 100 relating to D, which is dated 4 November 2009, the mother asserts that in the early hours of 3 February 2009, the father attempted to throttle her and held a knife to her throat.

12. In April 2009 there was an incident between the parents which resulted in the police being called and the father being arrested. The mother says that he beat her and that as a result she went to hospital. The father was, however, released without charge. In the same statement, the mother asserts that on a regular basis she was locked out of her home; that the father would push her and that, throughout her pregnancy with D, the father was

verbally and emotionally abusive towards her. These allegations are denied by the father, and I make no findings in relation to them.

13. On 25 July 2009, the mother gave birth to third child, a boy, D. By this point it would seem that the marriage had irretrievably broken down and the parents did not resume cohabitation after D's birth. The mother went to live in a refuge, where she remains. Indeed, the father has never even seen D. His case is that the mother effectively disappeared. He had no idea of her whereabouts, and no knowledge until much later that she had given birth to D, of whom he suspects that he may not in any event be the father.

14. The mother's case is that she was the victim of domestic abuse at the father's hands and that he was, effectively, fleeing from him and from his violence. It is common ground that he does not know her address, and has no relationship with D, who remains in his mother's care

15. According to a chronology provided by those advising the mother, she obtained indefinite leave to remain in this country in July 2009.

16. Correspondence which I have been shown demonstrates that on 5 June 2009, the mother saw solicitors, and in a letter dated 24 June 2009 the latter advised her that the Foreign and Commonwealth Office (which had been contacted) would not be able to assist with trying to secure the twins' return to the United Kingdom. The mother was also advised that the case could become "more complicated", and that she should complete and return a set of public funding forms. On 6 October 2009, she was informed by the Legal Service Commission (the LSC) that her application for public funding had been refused, on the basis that she had to pursue the case through the legal system in the Camerouns. On 2 November 2009, the mother was informed by the same solicitors that her file had been closed.

17. It was thus not until 10 November 2009 that the mother was able to institute proceedings in the County Court in relation to D, in which she asserted that she was fleeing domestic violence and that the father had abducted the twins. Proceedings relating to the twins themselves do not appear to have been instituted before 21 April 2010.

The law

My approach to the question of habitual residence follows that identified by the House of Lords in the early Hague Convention case of *Re J (a minor) (abduction: custody rights)* [1990] 2 AC 562 at 578-9, where Lord Brandon said:

"..... The first point is that the expression "habitually resident, as used in Article 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, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case..... "

18. Habitual residence is thus a question of fact. Normally speaking where a family is living together, children's habitual residence follows that of their parents. Equally, if the parents send their children abroad for their education or for any other purpose, with the intention that the children will return to resume family life in England, the children remain habitually resident here, even though they are temporarily living abroad. Generally speaking, although both parents often – as here – have parental responsibility for their children, it is well established that one parent cannot unilaterally change the habitual residence: it requires agreement between the parents or, as the very least, the acquiescence by other in the altered arrangements brought about by the other. In addition, it is common ground and well established that, in certain circumstances, a person can lose habitual residence very quickly, whereas it takes a period of time (usually months or years) combined, with adults, with a settled intention not to return to acquire it.

19. It follows that on birth a child usually acquires the habitual residence of his or her parents. Here it is common ground that after their birth in England, and for as long as they lived with their parents in England, the twins were habitually resident in England. The question is thus whether or not the twins have lost their English habitual residence and gained habitual residence in the Cameroons. This, once again, is a question of fact.

Findings of fact

20. Since habitual residence itself constitutes a finding of fact, it is necessary for me to examine the decision in November 2008 to send the twins to the Cameroons. Furthermore, as this seemed to me critical to an understanding of the current situation, I heard oral evidence from each of the parties about it.

21. Having done so, I am quite satisfied that there was an agreement between the mother and the father to send the twins to the Cameroons in November 2008. Whilst the father may have been the originator of the scheme, I reject the mother's evidence that the children were sent to the Cameroons in the teeth of her opposition. I find as a fact that she agreed to the children going.

22. I also find as a fact that the agreement between the twins' parents was far less hard edged than either now asserts. Whilst it may well have been their mutual intention that the children should return to their care after a few months – for example, in the spring of 2009, their return, in my judgment, was dependent upon their parents' situation. Thus if all had been going well, and had the parents finally decided to make their future in England, then the twins would have returned.

23. I find, however, that there was no fixed date for the twins' return, and that the arrangement was an open ended one which enabled the wider family (including the mother's family) to care for the twins until their parents were in a position to do so. Such family arrangements are by no means uncommon or inappropriate.

24. I am equally satisfied, and so find, that the parents themselves were uncertain about where the family would ultimately reside. The father's statement, which is dated 27 April 2010, and which was filed pursuant to an order made by Coleridge J, contains an

assertion that the children would live in the Cameroons until the parents had improved their financial position. It also contains the assertion that there was an agreement between the parents to relocate to the Cameroons "in five years time". In a statement received on 7 April 2009, the paternal grandmother, from whom I have not heard oral evidence, supports the father's position and states that the three adults "discussed and concluded that it will be better if the twin(s) live with me for a while, in order for them to search for jobs and or to go to school to have some financial base".

25. Both the father and his mother assert that the mother is fully aware of the children's whereabouts, and the father asserts that the mother has been in regular contact with the children. I accept that evidence. He also asserts that whilst in May 2009 he was contemplating sending for the children, his current plan is to work in the Cameroons as a sound engineer and for the children to "attend private day school in Cameroon starting in September". Once again, I find that evidence credible.

26. In any event, these statements all confirm my view that the parents' plans for their children were inchoate following the agreed removal to the Cameroons in November 2008. I am thus satisfied that there was an agreement to send the children to the Cameroons in November 2008; and that it was open-ended. I also find that had the marriage not irretrievably broken down, and had the parents established themselves in England the children might well have been returned to this country. I find that whereas the mother now wishes to resume the care of the children in England, the father's plans are uncertain.

27. I, am, however, entirely satisfied that on the unusual facts of this case, and due largely to the open-ended and uncertain nature of the parents' plans, the twins are currently habitually resident in the Cameroons, and that this court has no jurisdiction over them. That is where they are living and, in my judgment, "the ordinary and natural meaning of the two words" habitual residence aptly covers the twins' situation in the Cameroons. This, of course, does not leave the mother without a remedy, but if she wishes to pursue it in relation to the twins, she must do so in the Cameroons. I reject her evidence both that it is impracticable for her to do so, and that she would not obtain a fair hearing in that jurisdiction.

28. For the mother it is argued that there was a fixed agreement for the twins' return in the spring of 2009, and that it is not open to the father unilaterally to change the twins' English habitual residence. For the reasons I have already given, I do not think that there was such an agreement, and I do not think that the father has unilaterally changed the children's habitual residence: I find as a fact that over the period of 18 months during which the twins have been living with their paternal grandmother they have acquired habitual residence in the Cameroons.

29. This is sufficient to dispose of the case. On the assumption, however, that I am wrong on the habitual residence issue, this is not a case in which I would exercise my discretion to make a peremptory order in the mother's favour. In this respect I am influenced not merely by the length of time which the twins have spent in the Cameroons, (some 18

months) but by the mother's failure promptly to pursue the remedies open to her. Whilst no judge would wish to be critical of a parent who is given bad advice, the fact remains that the mother is an educated woman, who sought advice as long ago as 17 November 2008, when she was "going through some matrimonial problems". The fact that proceedings in relation to the twins were not issued until April 2010 cannot be entirely explained by poor advice and delays in obtaining public funding.

30. It follows that if the parents cannot agree about the future of the twins, it must be decided by the courts of the Cameroons.

31. The originating summons relating to the twins is, accordingly, dismissed.