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Judgment: approved by the Court for handing down *Delivered:* **22/04/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF AM (A MINOR)

AND IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

BETWEEN:

PM

Plaintiff;

-and-

AAM

Defendant.

GILLEN J

Application

[1] This is an application by the plaintiff for the return of his son AM from Northern Ireland to Poland pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (hereinafter called "the Hague Convention"). The defendant is the mother of the child who currently resides in N. Ireland with the boy.

Relevant Legislation

[2] There was no material dispute between the parties as to the legal principles that governed this case. It was agreed that countries within the European Union are subject to "Brussels II Revised 2001/2003"which became applicable on 1 March 2005. This takes precedence over the European Convention and thus Brussels II R takes precedence over the Hague Convention in relation to the countries to which it applies.

[3] The court must determine whether a "wrongful removal or retention" has taken place by applying Regulation 2(11) of Brussels II R as opposed to Article 3 of the Hague Convention. Article 2(11) of Brussels II R (hereinafter called B11R) states the terms "wrongful removal or retention" shall mean a child's removal or retention where:

(a) it is in breach of rights of custody acquired by judgment or operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the wrongful removal or retention; and

(b) provided that, at the time of the removal or retention, the rights of custody were actually exercised … .

[4] It was common case that the burden of proof rests on the plaintiff to establish that he had rights of custody in respect of the child which he was exercising at the time of the alleged wrongful removal and that the child was habitually resident in Poland before the wrongful removal and retention.

[5] The preliminary matter to be determined in this case, and which is the subject of this judgment, is whether or not the child was habitually resident in Poland before the wrongful removal and retention. Unless that is established, there is no basis for an application under the Hague Convention. In the event that I should rule that the child was habitually resident in Poland at the material time, it was agreed that I should then proceed on to hear the rest of the case.

Expedited Hearing

[6] Time is of the essence in child abduction cases. The administrative or judicial authorities of contracting States must act expeditiously. In a case to which B II R applies, not only must the court apply the most expeditious procedures available to achieve an expedited hearing, but, save in exceptional circumstances, the final judgment on the application for a return must be issued not later than six weeks after the application is lodged. (See B II R, Art 11(3)).

[7] In the present case, the application was issued on 28 November 2012. The case came on for full hearing before me on the 10 March 2013. All parties agreed that the delay in hearing this matter had been purposeful and occurred at the request of the parties made during the course of reviews of the case by the court for the following reasons:

- Documentation relevant to the hearing required to be translated from Polish into English.

- In particular, as is indicated below, the decisions of two courts in Warsaw required to be translated. There were conflicting translations of the Court Orders which required to be addressed.

- There was dispute as to the meaning of the court decisions in Warsaw.

[8] It was necessary to obtain the opinion of a Polish lawyer on the meaning of these judgments and orders. Despite the efforts of both parties, this took some time to perfect. It was the primary reason for the delay in the hearing of the case.

[9] This court is extremely conscious of the need to expedite these hearings and the delay involved in this case was carefully monitored and permitted only with the approval

of both the parties.

Habitual Residence

[10] As indicated above, there was no dispute between the parties as to the legal principles governing the concept of habitual residence. Ms Ross, who appeared on behalf of the applicant, and Ms Hannigan, who appeared on behalf of the respondent, had provided me with paradigm skeleton arguments on this issue. They have conducted this case with commendable skill and economy of time. It allows me to outline in relatively short form the principles that govern this hearing as follows.

[11] First, habitual residence is the criterion used by the Convention to demonstrate a nexus between a child and a particular State. The phrase is not statutorily defined and should not be treated as a term of art with some special meaning. (Re J (a minor) (Abduction: Custody Rights) (1990) 2 AC 562.

[12] Habitual residence has strong similarities with "ordinary residence". (See V v B (a minor) (Abduction) 1991 1 FLR 266). For the purposes of the Hague Convention there is no difference in the core meaning of the terms "ordinary residence" and "habitual residence".

[13] A leading authority on the meaning of the term "ordinary residence" is found in the judgment of Lord Scarman in R v Barratt London Borough Council, ex parte Milish Shah (1983) 2 AC 209 (Shah's case) (cited with approval in Re M (Minors) (residence)1 FLR 887 at 891G-892A) where he stated the test as follows:

> "Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."

[14] Accordingly, the test of habitual residence is not where "the real home" is. There is a distinction to be drawn between being settled in a new place or country and being resident there for a settled purpose which may be fulfilled by meeting a purpose of short duration or one conditional upon future events. (See Re P-J (Abduction: Habitual Residence: Consent) (2009) 2 FLR 1051. It is therefore inappropriate to ask whether the family is settled in the sense of putting down substantial roots.

[15] Accordingly, habitual residence may be acquired despite the fact that the purpose of the move was intended to be fulfilled within a comparatively short duration or the move was only on a trial basis. This must be contrasted with the stricter requirement when establishing a domicile of choice, where an intention to reside permanently or for an indefinite period is required.

[16] Re H-K (Habitual Residence) (2012) 1 FLR 436 is an important decision in England where the Court of Appeal held that suggestions in the Court of Justice of the European Union in Mercredi v Chaffe (2011) 1 FLR 1293 that before habitual residence can be

transferred it is of "paramount importance that the person concerned has a mind to establish there the permanent or habitual centre of his interest" have to be read consistently with Lord Scarman's opinion in Shah's case that residence could be of short or long duration provided that it was adopted "for settled purposes as part of their regular order of … life for the time being".

[17] 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 (see Re J (A Minor) (Abduction: Custody Rights) (1990) 2 AC 562; Re KM (a minor) (habitual residence) [1996] 2 FLR 333 and AlHabtoor v Fotheringham [2001] 1 FCR 385 at p401-402). The court should normally stand back from the evidence and take a general view rather than conducting a microscopic search. It is the habitual residence immediately before the wrongful removal that is the determining factor.

[18] Where the habitual residence of a child is in dispute, the burden of proving a new habitual residence is upon the party who asserts that a change has taken place.

[19] In this context there is a significant difference between a person ceasing to be habitually resident in one country, and his subsequently becoming habitually resident in another. A person may cease to be habitually resident in one country in a single day if he leaves with a settled intention to take up a long term residence in another country. Such a person cannot, however, acquire a new habitual residence overnight. In order to lose habitual residence in country A and/or acquire a new habitual residence elsewhere, it is not necessary to establish a settled intention never to return to country A.

[20] An appreciable period of time and a settled intention are necessary before a new habitual residence is established. (See Re J supra.) It must be shown that the residence has become "habitual" and will, or is likely to, continue to be habitual. (See Nessa v Chief Adjudication Officer (1999) 2 FLR 1116). However, the requisite period of time is not fixed and will depend upon the facts of each case. Thus in re F (A Minor) (Child Abduction) (1992) 1 FLR 582 on the facts a period of one month was sufficient and in M v M (Abduction: England and Scotland) (1997) 2 FLR 263 at 267H the court held that it was unlikely that a period of two years will not be treated as a habitual residence.

[21] In essence, common sense ought to be used to answer the question as to whether there was a settled intention. I respectfully adopt the statement of Waite J in Re B (Minors) (Abduction) (No.2) (1993) 1 FLR 993 when he said:

> "A settled purpose is not something to be searched for under a microscope. If it is there at all, it will stand out clearly as a matter of general impression."

[22] Equally so, it is important that the court look at evidence of matters susceptible of objective proof rather than simply evidence as to state of mind. (See Lord Scarman in Shah's case (1983) 2 AC 309).

[23] The habitual residence of young children of married parents all living together as a family is the same as the habitual residence of the parents themselves and neither parent can change it without the consent of the other or an order of the court. One parent may not unilaterally change a child's habitual residence without the agreement of the other parent

unless quite independent circumstances have arisen pointing to a change. On the other hand I think there is merit in the point made by Ms Hannigan that the reality is that in practice it is often not possible to distinguish between habitual residence of a young baby and that of its primary carer, in this case the mother. It is hard to see how this child could have acquired an habitual residence in isolation from the mother who cared for him.

Common facts in this case

[24] The mother and father of this child are Polish nationals. However, the mother had moved permanently to Northern Ireland in 2004 and had remained there until the events that are subject to scrutiny in this case. The parties had met in Northern Ireland, married in Belfast in October 2010 and resided in Northern Ireland as a married couple until December 2010. They then separated and the father returned to live in Poland. The mother was six months pregnant at this time and remained in Northern Ireland residing in Belfast, where she had resided since 2004. The child was born in Northern Ireland on 10 April 2011.

[25] The mother returned to Poland with the child and lived with the plaintiff for six weeks between September 2011 and October 2011. The plaintiff contends that during this time the defendant had formed a settled intention to relocate to Poland with the child and the defendant had arranged for both her and the child's belongings to be transported to his home in Poland upon her return to Belfast in anticipation of the relocation. It is the defendant's contention that in September 2011, after five months of silence, the plaintiff contacted her and threatened to take her to court over the child. The defendant contends that she thought she owed it to her son to bring him to see his father and to see if there was any future for them as a family. She never had a settled purpose in returning and was simply exploring the possibility of reconciliation outside the context of any regular order of her life.

[26] It is the contention of the defendant that her period of six weeks in Poland with the plaintiff was very unhappy culminating in an attack upon her by him. The plaintiff denies any such attack. The respondent then contends that she returned to Belfast in October 2011 and thereafter returned to Poland in November 2011. It is her contention that she felt under a lot of pressure to make the marriage work because in her culture there was an expectation for a family to be together and for marriage vows to be obeyed. She felt she had no choice but to try and make the matter work. Consequently, she travelled to Poland with the child in November 2011 and informed the plaintiff that she would be staying at home with her mother for Christmas 2011 because she was nervous and fearful about their future.

[27] It is also common case that the parties agreed to speak to a priest about the family situation. On the evening after the visit to the priest in January 2012, the parties returned to the plaintiff's hotel. The defendant alleges that a violent incident occurred which again is denied by the plaintiff.

[28] Thereafter I have determined a number of matters, namely:

- The defendant remained in Poland until her return to Belfast on 4 June 2012 residing with her mother.

- The plaintiff was concerned that the respondent might remove the child from Poland without his knowledge. Accordingly, he wrote to the police in Krosno outlining his concerns asking them to take steps to prevent any attempted abduction of the child. He also sent a letter to the Passport Division of the regional office of the Governor's Office in Krosno on 20 March 2012 advising them of his concerns and making it clear he did not consent to a passport being issued for AM. He was informed by that Authority on the 30th April 2012 that a passport had been issued for the child following a written request from the defendant.

- The plaintiff then contacted the police in Krosno to intervene. The defendant asserts that the police did visit her although they were sympathetic to her after she told them that the petitioner had been violent to her and that she was in fear of him. They allegedly advised her to seek the services of social welfare and to apply to the court for child support.

- The parties last met in June 2102 when the plaintiff came to the city where she was residing to register the birth of the child and saw the child in a park. It is the defendant's case that he informed her he had filed for divorce and then attacked her, an assertion which he denies. The defendant thereafter spoke to the Polish consul in Edinburgh who advised her that if there was no court prohibition, which there was not, she could return to Belfast. Accordingly she returned to Belfast on 7 June 2012 where she has remained ever since.

[29] In looking for the settled intention in any case, it is wise to remind myself of the cautionary words of Waite J set out in para 21 of this judgment that a settled purpose is not something to be searched for under a microscope. If it is there at all, it will stand out clearly as a matter of general impression.

[30] Equally so, it is wise to rely more on the evidence of matter susceptible to objective proof rather than evidence as to state of mind (see Lord Scarman in Shah's case.

Decisions of the courts in Warsaw

[31] The plaintiff in this case had issued a petition for divorce in Poland and requested that exercise of parental responsibility be entrusted to him. Before the District Court in Warsaw on 8 August 2012, the plaintiff had sought a temporary injunction to prohibit the defendant from leaving Poland with the child. The decision of that court was to the effect that since the defendant was then currently residing in Northern Ireland the request for a temporary injunction in the form of a prohibition on leaving the country by the child was pointless. That court also recorded "The mother has directly looked after the child since he was born and it follows from the information provided by the respondent that she is domiciled in Belfast".

[32] Before the District Court in Warsaw (VI) Family Division for Appeals, the plaintiff then sought to process the hearing for divorce and the exercise of parental responsibility for the child to him. On 4 March 2013 that court postponed the proceedings together with

the application for temporary injunction until this court in Belfast had "passed its legally binding and final decision".

[33] Wisely the parties obtained the opinion of a Polish lawyer to interpret these proceedings. Questions were posed to that lawyer and those, together with his answers, were furnished to the court. His interpretation was that the appellate court had simply stated that the child was born in Belfast, that the mother was with the child and that accordingly the application for protective measures could not be considered in light of these facts. He went on to state that at the hearing nothing was excluded in terms of a final decision and the only issue that was considered was a protective measure against the mother and the child prohibiting them to leave the country which understandably could not be entertained with the child in Belfast.

[34] Accordingly I consider the decisions from these two distinguished courts of law in Poland amounted to no more than an adjournment of the proceedings pending the outcome of the Hague Convention application in Belfast and a refusal to grant an injunction prohibiting the child being taken out of Poland for the very logical reason that the child was already outside Poland.

[35] In this context, I direct my decision in the instant case be translated into Polish and directly communicated to both of these courts as a matter of urgency.

The plaintiff's case

[36] Ms Ross made the following points on behalf of the plaintiff:

- When the defendant returned to Poland in November 2011, her settled purpose was to remain in Poland living there with her mother.
- This is evidenced by the fact that even if she is correct in saying that she had decided in January that her attempts at reconciliation with her husband were over, she nonetheless remained in Poland until June 2012.
- If as she contends the defendant was frightened to leave because of fear of arrest by the police in Poland, this does not account for her continued presence in Poland in February when she would have been unaware the petitioner was attempting to contact the police.
- These matters support the plaintiff's contention in paragraph 10 of his affidavit that the defendant had set her dreams on living in Poland. The birth of her child was registered in Poland. She had done very little to reconcile with the petitioner and it is noteworthy that in the proceedings in Warsaw of 4 March 2013 she is recorded as testifying "I am a permanent resident in Krosno".

The defendant's case

[37] Ms Hannigan made the following points on behalf of the defendant:

- She clearly had settled in Northern Ireland since 2004 having found employment, become socially integrated and established her ordinary life there. She married in Belfast and continued to live there after her marriage and the birth of the child. It is therefore not easily established that her habitual residence had transferred to

Poland.

- She had only returned to Poland in 2011 because of pressures to make an attempt to reconcile with her husband and save her marriage. This was never a settled purpose as evidenced by the fact that she did not even to go to live with him when she returned in November 2011. Her exploration of the chances of reconciliation are evidenced by her decision to engage in mediation through a priest and discussions with the plaintiff.
- After the incident in January 2012 when she alleges she was violently assaulted by the petitioner (which he denies), she only continued to reside in Poland because of her fear that the plaintiff would succeed in efforts to have her arrested and the child taken away if she tried to leave. It cannot be a coincidence that a continued presence in Poland coincided with the plaintiff's efforts to contact the police and prevent her from obtaining a passport for the child to leave Poland.
- The reference to "permanent residence in Krosno" is clearly a mistranslation since at that time she was, and had been, living in Belfast.
- She had no settled purpose to reside in Poland.

Conclusions

[38] Applying the ordinary and natural meaning of the phrase "habitually resident ", taking a common sense view of the facts of this case, standing back from the evidence and taking a general view rather than conducting a microscopic search, I have come to the conclusion that at the time of the alleged abduction, the defendant mother and the child were habitually resident in Northern Ireland.

[39] I am satisfied that the only reason that the respondent returned to Poland in November 2011 was to explore the possibility of reconciliation. Whilst her reasoning does not evoke a picture of rational perfection, nonetheless I can think of no plausible reason why having spent many years in Belfast, and having married and established a life there with her child, she would have returned to Poland for reasons other than those she expressed in paragraph 26 of her affidavit where she said:

> "Despite these issues I felt under a lot of pressure to make the marriage work. In my culture there was an expectation for a family to be together and for marriage vows to be obeyed. I felt I had no choice but to try and make it work. I travelled to Poland with the child in November 2011. Despite this I remained apprehensive and fearful and I told the plaintiff that I would be at home with my mother for Christmas 2011."

[40] Whilst I am unaware as to what degree of optimism may have laced the expectations surrounding her visit, nonetheless, I am satisfied that the objective evidence points to the truth of this statement. Why would she have sent, as the plaintiff admits, some of the child's clothing to the plaintiff's address if she had not been contemplating the possibility of reconciliation? Why else would she have agreed to seek out mediation with the priest? Why else would she have agreed in the wake of that meeting to return to his hotel with him to discuss the matter further? Even on the plaintiff's case, at paragraph 13 of his affidavit, he records that "the respondent suggested seeking some help from a priest

in Krosno, she wanted him to act as a mediator between us. I asked for help. The advice from the priest did not satisfy the respondent and again she ceased contact with me." This tentative uncertain but searching approach to the chances of reconciliation all fit in with her decision at this time to reside with her mother rather than the plaintiff. This illustrates that she had no *settled* purpose or regular order of her life at that time.

[41] I have no doubt that whatever happened in the wake of that meeting with the priest in January 2012 served to unhinge any real possibility of a reconciliation process but I am satisfied that she had made the effort.

[42] The plaintiff's assertion, through counsel, that her settled purpose was to return to Poland, not to reconcile, but to live with her mother, is belied by his clear belief that she was intending to return to Belfast after the breakdown of relations in January 2012. Why else would he have invoked the assistance of the police and attempted to prevent her obtaining a passport unless he believed that it was her intention to return to Northern Ireland? I have little doubt that this was consistent with his understanding that matters had reached an impasse as a result of whatever occurred in January (and I note there is dispute as to whether she was assaulted as alleged by the respondent or not as alleged by the petitioner). He also moved for a divorce within a relatively short time. All of this satisfies me that both of them felt that any vague possibility of reconciliation had now gone for all intents and purposes and it was only a question of when the defendant would return to Belfast.

[43] What precisely may have been going through the defendant's mind between February and June 2012 is something of an imponderable. Her decisions may not have been taken with lambent precision. The intensity of any judicial probe into the events of February and March must be seen in the context of the comment of paragraph 37 above. I must stand back and form a general impression.

[44] The fact of the matter is that most of the complex traffic of human interrelation assumes that trust is the basic currency of personal lives. It is clear that there was no trust on either side here from January 2012 onwards and both parties I believe were satisfied that a return to Belfast was on the cards for the defendant and the child. It was only a question of timing as to when the plaintiff was likely to return to her habitual residence in Belfast. I am satisfied that her assertion that the delay was occasioned by her fear that he would have her arrested and the child taken away is consistent with the fact that the plaintiff did go to the police for that very reason, he attempted to prevent her getting a passport and instituted divorce proceedings. I also consider that it is no coincidence that her return to Belfast coincided with a meeting or contact with the Polish Consul in Edinburgh which of course may well have served to alleviate all her fears and crystallise her travel plans.

[45] I am satisfied that this defendant's habitual residence in Belfast remained in place from 2004 up until the present date and was not interrupted by her brief sojourn in Poland in September-October 2011 and November-June 2012. I have formed the general impression that she had no settled purpose in returning to Poland in September or November 2011 outside a vague notion of exploring the possibilities of reconciliation which in the event did not even get off the ground. The habitual residence of both her and the child remained in Northern Ireland.

[46] In all the circumstances therefore I consider that there is no basis for a claim by the plaintiff under the Hague Convention and I dismiss his application.