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Judgment: approved by the Court for handing down | *Delivered:* **14/07/11**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

M

Appellant / Respondent;

and

M

Respondent / Applicant.

In relation to C, M and T (Wrongful retention: return order)

Before: The Lord Chief Justice, Higgins LJ and Sir John Sheil

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HIGGINS LJ (giving the judgment of the court)

[1] This is an appeal from a decision of Stephens J whereby he ordered the return to Australia, of the three children of the appellant and the respondent, having found at the relevant time the children were habitually resident in that country. The appellant and the respondent (the parents) are North Irish in origin and were married in 2000. The three children were born in Northern Ireland; C was born in 2001, M and T are twins born in 2003. The respondent was previously married to McC and has three older children (I, J and K) all of whom have taken her new surname. I lives in Donegal, J is 20 years of age and studies in Northern Ireland and K who is 17 years of age resides in Australia with the respondent's sister. Two other sisters, who are married with families, reside in Australia, one of whom lives near K. The appellant has not worked regularly since 2005.

[2] In December 2006 the parents and the three children (the family) together with K and J, visited Australia for about a month. On return the parents decided to apply for a permanent skilled migration visa. A formal

application was made on 6 September 2007. In December 2007 the respondent obtained leave from the Family Proceedings Court in Belfast to remove K from the jurisdiction. On 13 May 2008 the visa application was granted. In August 2008 the family together with K and J 'emigrated' to Australia. They took with them twenty boxes of possessions. They did not sell the family home or car and left some possessions in the roof-space of the house. In Australia they rented accommodation and the children commenced at a local school. J returned after six weeks as she wished to finish her education in Northern Ireland. In May 2009 the appellant and one child returned to Northern Ireland to visit his mother who was unwell and in August 2009 the entire family came back for a family wedding and later returned to Australia. The return to Australia was on a return ticket, the return date being 31 December 2009. This was later extended to July 2010. The appellant was unable to secure employment in Australia though the respondent after some attempts at self-employment eventually obtained more permanent employment.

[3] On 8 July 2010 the family returned to Northern Ireland and took up residence in the family home, which hitherto in their absence had been leased for one year from their departure. K remained in Australia and school fees for the children at the school they had attended in Australia were paid for the year 2011. The respondent's prospective employers undertook to keep her job open for her return. The respondent maintained that this return was for a maximum period of six months. By November 2010 it had become evident that the appellant did not wish to return to Australia. A letter was received by the appellant from the respondent's solicitors indicating her wish to return to Australia as planned after the expiry of the six months period. On 31 January 2011 the respondent caused proceedings to be issued under the Child Abduction and Custody Act 1985. This Act incorporates the Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) into domestic law. The respondent sought a declaration that the retention of the children in Northern Ireland was wrongful pursuant to Article 3 of the Hague Convention and also sought a return order pursuant to Article 12.

[4] It was evident from the papers that there was a serious disagreement between the parents about the factual background. Unusually in Hague Convention proceedings the learned trial heard oral evidence from the parents. The respondent's case was that the family had decided to emigrate permanently and in accordance with that decision did so in August 2008 and that thereafter the family was habitually resident in Australia. The father's evidence was that the move to Australia was initially on a trial basis for a period of one year and if any of them was unhappy there they would return to Northern Ireland. They did so return. The appellant's evidence was that he only agreed to return to Australia in 2009 (and to the extension to July 2010), in order to allow the respondent to 'get Australia out of her system'.

The learned trial judge concluded that on any issue in which there was a conflict between the evidence of the respondent and the appellant he accepted the evidence of the respondent. At paragraph 48 of his judgment he found that the appellant was not a credible witness on any matter of significant conflict between them. As he accepted the respondent's evidence that the family had emigrated he determined that the children were habitually resident in Australia.

[5] The Grounds of Appeal are –

> 1. That the learned trial judge, in holding that the respondent is guilty of detaining the children of the family in Northern Ireland, made a finding that was wholly against the weight of the evidence.
> 2. Even if the learned trial judge was correct to form a view from all the evidence that the children of the parties are being detained by the respondent, the learned trial judge has erred in law in holding that the detention of the children in Northern Ireland, living in a home owned jointly the parties and in which they have resided, could be considered to be wrongful within the meaning of the article 3 of the Hague Convention (sic).
> 3. The learned trial judge erred in fact and in law in holding that the children of the family were habitually resident in Australia immediately prior to any detention of the children.
> 4. That the learned trial judge erred in law in holding that the fact of the case gave rise to the application of the Hague Convention. This is not a case involving issues of wrongful removal or unlawful detention of the children; it is a case about the breakdown of a marital relationship over the issue of its emigration.

[6] Mr O'Donoghue QC who with Miss McKee appeared on behalf of the appellant, submitted that the judge adopted an extremely narrow approach to the factual issue to be determined. He described it as a 'black and white' approach which was inappropriate for a fluid and nuanced issue between parents in a marriage which was disintegrating. Furthermore it was submitted that the judge approached the issue of habitual residence on too narrow a legal basis. Alternatively, it was suggested that the finding was against the weight of the evidence. In particular it was disputed that there was evidence or sufficient evidence of a common intention to settle permanently in Australia. It was postulated that the children could have two countries of habitual residence. He highlighted the specific problems that a

finding of habitual residence in Australia would have for the appellant and the children. It was submitted that it was inappropriate to use the Hague Convention in the particular circumstances of this case.

[7] Mrs Dinsmore QC who with Miss Rice appeared on behalf of the respondent submitted that it was entirely appropriate to use the Hague Convention in this case. As the judge preferred the evidence of the respondent his finding of habitual residence in Australia was one which he was entitled to reach on his view of the evidence and was unimpeachable on appeal.

[8] When the family travelled to Australia in 2008 they flew on return tickets. When they returned to Australia after the wedding in August 2009 they flew on tickets with a return date to Northern Ireland of 30 December 2009. This return ticket was extended to July 2010 and the family returned to Northern Ireland on this ticket. There was evidence that there were advantages to be gained from purchasing return tickets. The lease on the property in Australia was determined early. Prior to travelling to Australia in August 2008 the family were in receipt of benefits. It seems they lived on benefits with an ever increasing amount of debt. Benefits continued to be claimed and paid in Northern Ireland after August 2008. They were paid into a joint account in this jurisdiction. The advantage of applying for and being granted a permanent visa to emigrate to Australia was that on arrival the family were entitled to immediate benefits which they claimed and received, at the same time receiving benefits in Northern Ireland. The appellant claimed that both of them signed the necessary forms to enable the benefits to be claimed. The trial judge found that the respondent was 'not involved' in this deception. He did not find that she was unaware of it. Indeed it would be a rare household in which the mother was not aware of the source and extent of the income on which they lived. On leaving Australia on 8 July 2010 exit forms were completed by the appellant stating that the children would be returning in four weeks. He maintained this was in order to ensure the continued payment of benefits by the Australian authorities. Critical to the issue to be decided was why the family went to Australia and returned to Northern Ireland when they did. Both parties gave conflicting accounts about this.

[9] The learned trial judge summarised the sequence of events and the evidence of the parents between paragraphs 23 and 27 of his judgment.

> "[23] In August 2009 the father and the mother, the children and ~K~ returned to Northern Ireland. There is a conflict of evidence as to the basis upon which they do so. The mother's evidence is that this was for the purpose of attending the wedding of the father's sister. The father states that prior to coming

home he was informed by the mother that she would not come unless he agreed to come back again to Australia for a wee while and she wanted to spend a bit more time there. That as he wanted to keep his wife happy he agreed. That in pursuit of that agreement they bought return tickets so that when they went out again to Australia there was a return date to Northern Ireland of 30 December 2009. That it was their settled intention to be permanently back in Belfast for New Year's Eve 2009.

[24] The mother states that there was never any agreement to return on 30 September 2009. That the return tickets were purchased at a small additional cost for their convenience if there was pressing reason to return to Northern Ireland such as looking after J or the equivalent of the need to return due to the illness of aunt. But there is no significance to the return date on the tickets as they were valid for one year and any date could be chosen at random.

[25] This conflict of evidence then continues with the events towards the end of 2009. The father's evidence is that as the time got nearer to leaving Australia in December 2009 the mother kicked up a stink about coming back and she became confrontational and said she was sad. That he was devastated. That they had no home in Australia and no work. That the mother then asked if he would bear with her for a further period of time and that she would agree to return home permanently in July 2010. That he did not know what to do or whether to believe her but that the tickets were extended so that they could all move to Northern Ireland in July 2010.

[26] The mother's evidence was that these events in December 2009 did not occur, but that rather in June 2010 the father informed her that his mother was ill in Northern Ireland and that he was extremely worried about her. That after much discussion they decided to return to Northern Ireland for up to six months as this would be an opportunity to settle ~J~ into university in Belfast do repairs to the house in Northern Ireland, look again at the property market with a view to selling and provide physical and emotional support to the father's mother.

> [27] On 8 July 2010 the father and the mother and the children left Australia and returned to Northern Ireland. The father's evidence is that this was to be a permanent move back to Northern Ireland. The mother's evidence is that this was for a period up to six months with there being a possibility of an earlier return. ~K~ remained in Australia with a maternal aunt and her family."

[10] It seems clear from this summary that the appellant was according to his evidence always returning permanently to Northern Ireland. The respondent's account was that they were returning for up to six months. The appellant maintained that the respondent agreed to return to Northern Ireland permanently but the judge did not accept his evidence. In addition there were statements from other members of the respondent's family that supported her account that the family would be returning to Australia plus the fact that K was still there. Crucially the judge found that the appellant filled in the exit forms the way he did in order to deceive his wife, the deception being that they were returning to Australia. At paragraphs 33 of his judgment the judge stated –

> "I have no doubt that the mother intended to return to Australia for the reasons which I will explain. I consider that the father was also agreeing <u>at that stage</u> to return to Australia." [my emphasis]

At paragraph 48 he stated his conclusions in these terms –

> "[48] In conclusion I accept the evidence of the mother. I do not consider the father to be a credible witness in relation to any matter where there is a significant conflict of evidence between him and the mother. I prefer the evidence of the mother. I make it clear that in preferring the evidence of the mother I consider that she was induced to return to Northern Ireland under a false pretence by the father. That at the time that he persuaded her return to Northern Ireland on the basis of a stay of up to six months he had no intention of returning to Australia"

[11] The judge stated that the issue was the habitual residence of the children. He noted that this expression is not defined. He referred to the

description of it in Re A (Area of Freedom, Security and Justice) 2009 2 FLR 1 at page 9.

> "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."

On the question of acquiring a new habitual residence he referred to Herschman and McFarlane at Chapter H paragraphs 150B – 150C. The essence of the decision of the learned trial judge was, on his acceptance of the evidence of the respondent, that the family emigrated to Australia in August 2008 and thereby acquired habitual residence in that country thereafter.

[12] The meaning to be attributed to the words 'habitual residence' has been explored in many cases. The words are not defined in the Convention or elsewhere. They do not amount to a term of art with special meaning. They are to be understood according to the ordinary and natural meaning of the two words – see Lord Brandon of Oakbrook in Re J (a Minor) (Abduction: Custody Rights) 1990 2 AC 562 at 578E. They have much in common with the words 'ordinary residence' though they may not always be synonymous. In R v Barnet London Borough Council, ex parte Nilish Shah 1983 2 AC 309 Lord Scarman stated the test for 'ordinary residence' in these terms -

> "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."

The test to be applied is not to ask where the real home is. That approach was rejected by Lord Scarman in Shah – see page 348G. In In re P-J (Children) (Abduction: Consent) 2010 1 WLR it was held that there was a distinction "to be drawn between 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 Ward LJ at paragraph 26(4). In Shah Lord Scarman gave examples of what might constitute a settled purpose. They include education, business or profession, employment, health, family or merely love of the place. In Re J 1990 2 AC 562 Lord Brandon highlighted the significant differences between losing habitual residence and acquiring a new habitual residence. At 578 he said –

> "there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. 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."

Paragraphs 150B – 150C of Hershman and McFarlane were referred to by the judge. They are headed 'Losing and Acquiring Habitual Residence'. After quoting from Lord Brandon's speech in Re J (see above) the authors continue as follows –

> "An appreciable period of time and a settled intention are necessary before a new habitual residence is established. A person must be actually resident in a country in order to establish habitual residence. It must be shown that the residence has become 'habitual' and will, or is likely to, continue to be habitual. The requisite period of time is not fixed and will depend upon the facts of each case. Bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, 'durable ties' with the country of residence or intended residence and many other factors have to be taken into account.

> In Re F (A Minor) (Child Abduction) it was held that, in the circumstances of that case, 'a month can be an appreciable period of time'. This was described as the 'high water mark' in Re S, where the Court of Appeal upheld the trial judge's finding that six weeks was sufficient to result in the acquisition of a new habitual residence in the context of a family moving across a European border in pursuit of the right of citizens to work anywhere within the member states of Europe."

[13] Whether a person is or is not habitually resident in a particular country is a question of fact to be determined by reference to all the circumstances of the case (see Lord Brandon in Re J at page 578G). In this case there were significant conflicts between the appellant and the respondent on material issues. It was in those circumstances that the learned trial judge decided unusually to hear her oral evidence.

[14] There were four significant areas where Stephens J resolved those differences. The first concerned the circumstances in which the family travelled to Australia in August 2008. The appellant contended that it was agreed that this would be a trial period and that the family would return to Northern Ireland if either the parents or the children did not settle. The respondent stated that it was the firm intention of the parents to emigrate permanently to Australia at that stage. She pointed to the considerable preparations that they had made to obtain permanent visas and the permission that she had obtained from the court in relation to K. The learned trial judge accepted her evidence.

[15] The second issue concerned the circumstances in which the parents had decided not to sell the family home in Northern Ireland prior to their departure to Australia. The appellant contended that this was consistent with his case that they might need to return to the family home if Australia did not work out for them. The respondent stated that they had taken advice from an estate agent around May 2008 who advised that the property market had fallen considerably. He suggested that they consider renting the property out in the hope that there may be some improvement in the market. In fact they leased the property for a year and thereafter from month to month until their return in the summer of 2010. The learned trial judge rejected the appellant's evidence on this issue.

[16] The appellant contended that a return ticket purchased in August 2008 with a return date in August 2009 was evidence supporting his assertion that the departure to Australia was for a trial period. The learned trial Judge accepted the evidence of the respondent that the return ticket had been obtained primarily because it had been the intention of the family to return to

Northern Ireland for the wedding of the appellant's sister. The appellant had not referred to this issue when dealing with the return ticket in his affidavit. The respondent also made the point that a return ticket was considerably cheaper than two single tickets and that the availability of a flexible return meant that any issues concerning J or other members of the family which required their temporary return could be dealt with. The learned trial Judge accepted the respondent's evidence.

[17] In respect of the return to Northern Ireland in July 2010 the appellant contended that it had been the intention of the parents to return to Australia in August 2009 so that the respondent could get Australia "out of her system" but then to return permanently to Northern Ireland in December 2009. The return ticket was booked for that date although it was common case that the ticket was flexible and could, therefore, be varied. The appellant contended that in December 2009 the respondent refused to return but agreed that if the family stayed until July 2010 she would return permanently to Northern Ireland. The respondent denied that any such conversation or agreement had taken place. She said that the appellant had indicated in June 2010 that his mother was unwell and that she had agreed to return to Northern Ireland to enable the appellant to provide physical and emotional support to his mother, to settle J into her university, to do repairs to their property and test the property market on the basis that they would return to Australia at most six months later. The learned trial judge rejected the appellant's evidence on this issue.

[18] Where the trial judge has had the opportunity to assess the witnesses on issues of credibility the court will not interfere unless he took some irrelevant fact into account, failed to have regard to some relevant fact so as to have made some material error or can be shown to have been plainly wrong. In his carefully presented attack on the conclusions reached by the learned trial Judge Mr O'Donoghue QC contended that the issues in this case did not lend themselves to a black and white determination of who was right and who was wrong. He submitted that the proper approach was to recognise that there were nuances of difference between the parties and their accounts. This was a submission which he advanced before the learned trial judge and we have been referred to the discussion between Mr O'Donoghue and the learned trial Judge on this issue. Although we accept that the submission was perfectly valid in the context of the case at first instance it was clearly rejected by the learned trial Judge. The rejection of the submission does not in any sense suggest that the learned trial judge was plainly wrong or that he otherwise erred in reaching his conclusions.

[19] In light of the findings of the learned trial Judge it follows inevitably that the parents and children lost their habitual residence in Northern Ireland within a fairly short time of their permanent move to Australia in August 2008. They rented property, set about looking for work and arranged for their

children to get schooling. They had made extensive arrangements to present as permanent residents. The loss of habitual residence in Northern Ireland did not immediately lead to the conclusion that they were habitually resident in Australia and the conclusion of the learned trial Judge that they had become habitually resident in Australia by August 2008 is open to argument. Looking, however, at the broad circumstances it is impossible to resist the conclusion that the parents and children had become habitually resident in Australia within a short number of months of August 2008.

[20] If the children remained habitually resident in Australia during their stay in Northern Ireland commencing in July 2010 it appears from paragraph 37 of the judgment that the appellant's decision to seek a Prohibited Steps Order in January 2011 was the act which gave rise to the unlawful detention of children in this jurisdiction.

[21] The appellant argues that even if the children became habitually resident in Australia they lost that residence and became habitually resident in Northern Ireland by January 2011. It is common case that where both parents have equal rights of custody or parental responsibility neither can unilaterally change the habitual residence of the child (see In re S (minors) (Child Abduction: Wrongful Retention) [1994] 1 FLR 82). Although, therefore, the learned trial judge found that the appellant intended to return permanently to Northern Ireland in July 2010 a change in the habitual residence of the children could only occur if it could be said that the respondent had returned to Northern Ireland in circumstances where she too could be said to have altered her habitual residence.

[22] The question which will assist in the determination of that issue is found in the judgment of Lord Scarman in Ex p Nilish Shah [1983] 2 AC 309. Can it be said that the respondent has shown that she has habitually and normally resided in Australia from choice and for a settled purpose throughout the period with which this case is concerned apart from temporary or occasional absences? Although the learned trial Judge did not address this issue at any length in his judgment it is clear that he took into account the continuing intention of the respondent to permanently reside in Australia, the fact that she had kept her job open, that she had registered the children to go back to school in January 2011, that many of her possessions were still in Australia and that she had made arrangements for further rented accommodation.

[23] There is no proper basis for concluding that the learned trial judge was plainly wrong in determining that there was no change in the habitual residence of the wife or the children or that he took into account any irrelevant consideration or left out of account any relevant consideration. Although the respondent remained in Northern Ireland for the hearing of the appeal she returned to Australia shortly thereafter. It is, of course,

disappointing that the parties were not able to reach some agreement as to how each of them should play an important part in the lives of the children but the fact that they were not able to reach such an agreement while they were here together should not inhibit the proper use of the Hague Convention mechanism which is designed to give clarity as to the jurisdiction which ought to determine the best interests of the children. The determination of this issue by the court in Australia will clearly present logistical difficulties for the appellant but in light of the breakdown of the relationship between the parents one of them is inevitably going to have to deal with this problem if they cannot resolve their differences by agreement. Such a consequence does not indicate any breach of a convention right. Neulinger v Switzerland (2010) does not indicate otherwise.

[24] In all the circumstances this appeal must fail. The Order of Stephens J should not be implemented immediately. A period of 28 days should be allowed to make the necessary arrangements.