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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

AND IN THE MATTER OF COUNCIL REGULATION 2201/2003 CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATRIMONIAL MATTERS AND IN MATTERS OF PARENTAL RESPONSIBILITY

Between:

MR K

Plaintiff

and

MS Y

Defendant

IN THE MATTER OF S (A MINOR) (HAGUE CHILD ABDUCTION CONVENTION 1980: HABITUAL RESIDENCE)

Ms Smyth QC with Ms McHugh BL (instructed by Caldwell & Robinson Solicitors) for the Plaintiff
Mr Magee QC with Ms Gilpin BL (instructed by Wilson Nesbitt Solicitors) for the Defendant
Ms Murphy BL (instructed to represent the interests of the child by the Official Solicitor)

KEEGAN J

Nothing must be published which would identify the family or child. The parties have been anonymised as this case involves a child.

Introduction

[1] This is an application dated 5 June 2020 in relation to S, a child of the parties who is now 4 and a half years old. The parents were married in a religious

ceremony but the marriage was not registered. They are both Nigerian by origin. The father has Nigerian nationality and he has a residence permit to live in the Netherlands. The mother was born in Nigeria but she also has Dutch nationality. Until 2018 both parents resided in the Netherlands. The child was born in the Netherlands and resided there permanently until his removal to Northern Ireland in July 2018. There are two half siblings on the mother's side aged 9 and 13 who currently live in Northern Ireland with her. The father has four other children, two boys and two girls. The three eldest children he had with his wife in Nigeria and the youngest is 11 years who he says lives with her mother in Belgium.

[2] By virtue of this application the plaintiff seeks return of the child to the Netherlands pursuant to the provisions of the Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) as enacted into domestic law by the Child Abduction and Custody Act 1985. The arguments of counsel focussed upon the habitual residence of the child. This is the core issue. Helpfully, the parties agreed a chronology as far as they could. There are a number of matters that were not agreed however the core factual matrix is described by counsel as follows:

Chronology of Key Events

2015	The plaintiff and defendant commence a relationship after meeting in 2012.
22 November 2015	The plaintiff and defendant hold a religious marriage ceremony. No civil registration was undertaken.
June 2016	S is born.
February 2018	The defendant suggests that the parties discuss the schooling of the defendant's two older children at this stage and decided that the defendant and all three children would move to Northern Ireland.
March 2018	The defendant asserts that she travelled to the UK for one night to obtain a national insurance number.
31 July 2018	S travels to Northern Ireland with his mother and half-siblings. The mother retains her address in the Netherlands. The payment of child benefit for S by the authorities in the Netherlands continues to be to the defendant until October 2018.
16 August 2018	S begins to live at an address in Belfast after his mother secures a tenancy for that property.

September 2018	The defendant asserts that S's half-siblings commence school in Belfast. By this stage S is not yet of school age.
17 September 2018	S is registered with a GP in Northern Ireland.
11 October 2018	A medical card is issued for S in Northern Ireland.
October 2018	The plaintiff asserts that the payment of child benefit for S in the Netherlands transfers to the plaintiff. The defendant asserts that the payment of child benefit for S to the defendant in the Netherlands ceased and payment of child benefit for S in Northern Ireland commences to be paid to the defendant.
25 October 2018	S attends a new patient appointment with the GP in Northern Ireland.
28 October 2018	The defendant writes a letter to confirm S would be living in the Netherlands with the defendant at the family home and confirms that she and her elder two children have left. In fact S remains at this time with the defendant in Northern Ireland.
24-26 Dec 2018	The plaintiff asserts that he travels to Northern Ireland to spend Christmas with the defendant and children.
Late Dec 2018	The plaintiff asserts that S travels to the Netherlands with the plaintiff.
24 January 2019	The defendant is granted leave to remain in Northern Ireland for 5 years.
4 February 2019	S is granted leave to remain in Northern Ireland for 5 years.
February 2019	The defendant asserts that the plaintiff visits the defendant and the children in Northern Ireland.
20 February 2019	The defendant asserts that S travels to the Netherlands with the plaintiff, that the plaintiff and S are stopped by immigration authorities at the airport querying whether it is agreed S can travel alone with the plaintiff. The immigration officials contact the defendant. The plaintiff accepts that he was stopped by immigration in the Netherlands while travelling with S but asserts the incident was after the grant of joint parental authority in March 2019.
26 February 2019	The plaintiff and defendant sign an application for joint parental authority. That application is made to the court in the

	Netherlands and cites each of the parties and S as resident in that country.
23 March 2019	S returns to Northern Ireland. The plaintiff travels with him and stays for a short time before his return to the Netherlands.
27 March 2019	Shared parental authority granted by the District Court in The Hague, Netherlands in relation to S so that the plaintiff and defendant each have equal rights.
March 2019	The plaintiff asserts that he was evicted from the former matrimonial home, that S is registered as living in the Netherlands with him.
July 2019	The plaintiff asserts that an ID card is issued for S in the Netherlands, his registration for health services in the Netherlands transfers from the defendant's name to the plaintiff's name.
28 July 2019	S travels to the Netherlands to spend time with the plaintiff, his half-siblings also travel with him.
21 August 2019	S returns to Northern Ireland, the plaintiff returns him and stays for a short visit.
9 September 2019	S commences nursery school in Belfast.
October 2019	The plaintiff says S was due to travel to the Netherlands to return to his care. The defendant says in this month the plaintiff travels to Nigeria and then briefly holidays in Northern Ireland. She says S has been in her primary care throughout and there was no agreement for S to return to live in the Netherlands.
9 October 2019	The defendant seeks legal advice in the Netherlands.
14 October 2019	The plaintiff books flights for S to travel to the Netherlands (with the defendant on 31 October 2019) with a return flight to Belfast on 2 November 2019. Neither S nor the defendant actually travelled.
November 2019	The plaintiff asserts that S does not return to the Netherlands as had been agreed following an initial agreement to delay his anticipated return in October 2019.

January 2020	The defendant reopens her registration with a letting agency in the Netherlands.
11 January 2020	The plaintiff visits S and the defendant and his half-siblings in Northern Ireland.
February 2020	The plaintiff is due to travel to Northern Ireland but is prevented from travelling due to the change in status of his visa as a consequence of Brexit.
March 2020	The plaintiff again says that it was agreed S would return to the Netherlands. S does not return and remains in Northern Ireland.
19-20 March 2020	The defendant asserts a discovery that the plaintiff had been claiming child benefit for S in the Netherlands and reports him to the Dutch authorities.
March 2020	The relationship between the plaintiff and the defendant ends.
21 April 2020	The plaintiff asserts that he made a complaint to the Central Authority in the Netherlands regarding the retention of S in Northern Ireland.

[3] An affidavit of laws was obtained on the basis of joint instruction to deal with the issue of the father's rights of custody given the unmarried status of the two parents. This is dated 16 July 2020. The conclusion of the Dutch lawyer is that the parties' registration of joint parental authority with the custody register at the District Court in The Hague which was entered on 27 March 2019 gave the father joint parental responsibility. The opinion also recites the following precepts from Dutch law. First, a father does not have parental responsibility over the child if born out of wedlock and there is no application for joint parental responsibility. Registering joint parental responsibility does impact the father's rights as he obtains decision-making power. The rights to care and contact are the same. But without parental authority the father must rely on the mother's goodwill to take his opinion into account when taking important decisions regarding the child. With parental responsibility, the father can actively take part in decision-making and block any decisions he may feel are unfavourable just as the mother can do *vice versa*. The opinion concludes that:

> "Strictly speaking the parents have joint parental authority since the registration is complete, so March 27 2019. However, there is case law that a mother is not permitted to take decisions about a child (like a relocation) without taking the father's opinion and interest into consideration, if the application was filed but

> not yet processed. So although filing the joint application in itself is insufficient to confer rights to custody on the father under the Brussels II Revised Convention and The Hague Convention 1980, in practice the fact that the application was filed will be taken into account."

The Evidence

[4] Both parties asked me to determine this case on the basis of the written evidence which I have considered. The plaintiff has filed four affidavits which were sworn on 5 and 26 June 2020, 27 August and 8 September 2020. The defendant has filed three affidavits which were approved and lodged on 11 June, 11 August and 4 September. All of these affidavits were formally sworn on 7 September 2020. I have considered all of the affidavit evidence in reaching my conclusion.

[5] It will be apparent from this section that there were a number of factual disputes between the parties about events. In the originating summons and affidavit of 5 June 2020 the plaintiff confirms that the parties share parental rights and cohabited from 2014 until 2018. The plaintiff also states that in 2018 the defendant relocated from the Netherlands to the United Kingdom with her two children from previous relationships and that "by agreement, the subject child S remained in the Netherlands with the plaintiff." He states that in August 2019 the subject child S went on holiday to Northern Ireland to visit the defendant, and was due to return in October 2019. The plaintiff then contends that:

> "At the beginning of October 2019, the defendant informed the plaintiff that she would not permit the subject child to travel back to the Netherlands. However, when the plaintiff sought and instructed a lawyer, the defendant confirmed that she would return the child at the end of November 2019. However, the defendant did not return the child to the Netherlands at the end of November 2019 as agreed and thereafter made a further promise to return the subject child by March 2020. The child was not returned. To date, despite repeated requests for the subject child to be returned to the care of the plaintiff the child has not been returned to the Netherlands."

[6] The plaintiff's clear assertion was that the child had been in the Netherlands until a holiday in August 2019. However, this was a false version of the facts because on filing of the affidavit by the defendant it was clear that the child had by agreement left the Netherlands with the mother and his half-siblings in July 2018 to travel to Northern Ireland. The plaintiff then changed his case and said that he made a mistake in the original case pleaded. I will return to this issue in due course.

[7] In the originating affidavit the plaintiff also states that after his departure to the UK in 2018 S had regular contact with his mother both through video calls and by travelling to the UK to stay with his mother. Again, this cannot be correct in terms of the video calls whenever S was actually in Northern Ireland. The plaintiff also states that there was a period of 3 months up to July 2019 when he returned to Nigeria for an extended period. After that he states that S was returned to his care on his return to the Netherlands in early July 2019 where he remained until August 2019 when he was due to see his mother for a short holiday. Thereafter, the plaintiff contends that there was a holiday but a failure to return. This evidence is all contained in the plaintiff's first affidavit of 5 June 2020.

[8] The replying affidavit of the defendant disputes the plaintiff's case and asserts that habitual residence in this case is in Northern Ireland. In relation to the joint parental responsibility agreement which was signed in March 2019 the defendant states that she helped the plaintiff to sign this, on the clear understanding that the parental responsibility was shared in name only and the purpose of the document was to assist the plaintiff as regards his immigration status. In this affidavit the defendant also states that in and around early 2018 she and the plaintiff were concerned about the schooling of their two elder children as they were both struggling with the Dutch language. She states that both parents wanted them to attend an English speaking school. She states that the decision to move to Belfast was one which was discussed over a number of months and one that the parents took together. The defendant is clear that the plaintiff helped her pack her bags as she was slightly reluctant about this plan and he drove her to the airport with all three children. In this affidavit the defendant confirms that "it is simply not the case that we agreed to leave S behind with the plaintiff."

[9] In paragraph 9 of this affidavit the defendant also states that the plaintiff contacted her in and around October 2018 by telephone to advise her that his solicitor had told him that he would not get a permit to remain in the Netherlands unless he had a dependent child registered as living with him. The plaintiff therefore registered himself as living with S at the plaintiff's old address with her consent and she deregistered herself and her older children given they were living in Northern Ireland. The defendant says that she did this to assist the plaintiff and that it was not a wise course of action. The defendant also states that she did not agree with the plaintiff claiming child benefit in the Netherlands and that she only found this out in March 2020.

[10] In her written evidence the defendant also states that after she came to Northern Ireland the plaintiff came to Northern Ireland for short visits on 7 occasions and on each occasion he stayed with them at the house. She also states that when the plaintiff came to Northern Ireland in February 2019 he advised her that his sister would be travelling from France to the Netherlands and that he wanted S to meet his sister so the defendant agreed to S travelling with the plaintiff to the Netherlands in February 2019 and S was brought back to Northern Ireland in March 2019. The defendant states that once again S went with the plaintiff to the

Netherlands from Northern Ireland in late July 2019 together with her two older children and returned on 21 August 2019 and that she was in Nigeria at the time. The defendant also refers to the plaintiff trying to visit as a surprise in February 2020 but being stopped at the airport and told that he did not have a valid visa.

[11] On the defendant's case the relationship between the parties persisted until a *denouement* in March 2020 when she discovered that the plaintiff had been claiming child benefit in the Netherlands. At that stage the defendant reported the plaintiff to the authorities.

[12] In addition to these matters the defendant makes some allegations against the plaintiff including claims of abuse and a controlling nature. These are denied by the plaintiff.

[13] In terms of her residence in Northern Ireland the defendant states that she has been living at an address in Belfast since 16 August 2018 having initially been assisted by social services who put the family up in a guest house. She provides details of her employment in a care home nearby. She refers to the fact that the child has a GP here and has had regular check-ups, is settled and is now in Primary 1 at school. The defendant makes the point that she made an application to the UK Home Office for limited leave to remain in the United Kingdom for 5 years for herself and her children and was successful as confirmed in letters dated 24 January 2019 and 4 February 2019.

[14] The plaintiff responded in some detail to this affidavit and I draw out some particular points as follows. Firstly, the plaintiff denies that the defendant only agreed to share parental authority to assist with immigration status. Secondly, the plaintiff refers to a letter dated 28 October 2018 in which the defendant informed the Dutch authorities that S would be living at that address with him in the Netherlands. He states that from that time he had been receiving child benefit and the child related budget supplement in respect of S. He states that these payments were backdated to October 2018. He states that in and about February 2019 there was an argument and the defendant contacted the city council to surrender the lease which led to the plaintiff receiving two weeks' notice to quit. He states that S was in his care at that time and he had to seek alternative accommodation. The plaintiff maintains that he moved into another home until March 2020 when he moved to a present address. In this affidavit the plaintiff stresses the fact that S has also been registered in the Netherlands for health care. Also, he highlights that on 11 February 2019 the defendant signed an open consent letter so that S could travel abroad with him and the joint parental authority was completed in March 2019.

[15] At paragraph 14 of this affidavit the plaintiff accepts that the defendant's affidavit is correct when it states that they discussed her older children being educated in the UK. However, he contends that the plan was that her mother would look after the older children in Northern Ireland and that the defendant would

return to the Netherlands with S where she and the plaintiff would resume living together.

[16] By this stage in the filing of evidence the plaintiff had been shown the travel documents. As a result, in this replying affidavit the plaintiff formally accepts that S travelled to Belfast with the defendant on 31 July 2018. He also accepts that he was mistaken about S living with him. In relation to his travelling to Northern Ireland he confirms that the defendant's affidavit is correct that he travelled to Belfast a number of times and stayed with the defendant and S travelled with him on a number of occasions but he states that he cannot be precise about dates and recollections. The plaintiff relies on a number of photographs attached to this affidavit because he says that from late 2018 S was with him in the Netherlands until he was taken back on 23 March 2019. Some photographs are attached by way of exhibit dating from February and March 2019.

[17] The plaintiff disputes the assertion made by the defendant that she travelled to the Netherlands in February 2019 as his sister wanted to meet S. At paragraph 25 of this affidavit the plaintiff points out that he took advice from a solicitor when S was not returned in October 2019. Then the plaintiff states that he travelled to Belfast in January 2020 and by that stage he had begun to suspect that the defendant was deceiving him. He states that he wanted to see if he could sort things out amicably and there was a promise he says that the child would be brought back in March which was not kept. The plaintiff says that he did want to come to Belfast in February 2020 however when he got to the airport he was told that on account of Brexit his visa was no longer valid for travel.

[18] In relation to child benefit the plaintiff accepts in his evidence that he has been claiming child benefit and child related budget for S and he maintains that the benefits would not have been paid to him had the defendant not agreed to it. He references an ID card issued by the Netherlands for S. In this affidavit at paragraph 31 the plaintiff accepts that the defendant has been in Belfast since July 2018, but he does not accept that S has been living there since that time. He maintains that S's home is in the Netherlands and it was not intended that his permanent residence would change.

[19] In a further substantial reply to this affidavit the defendant attaches proof of her residence in Northern Ireland. These relate to the renting of a property, getting work, registering at a GP and schooling for her older children and subsequently schooling for S. One point raised by the plaintiff which the defendant deals with at paragraph 25 of this affidavit is in relation to her reopening her registration with her letting agency in the Netherlands in and around January 2020. She explains in this paragraph that she did this because she was unsure as to whether or not she would return to the Netherlands in the future and she knew from experience that to get points for housing can require a significant wait of several years. She states that she did not include the plaintiff in any of the registration details and she did not register to live with him. She says she told the plaintiff that she had done this and he told

her that he did not believe her. In this affidavit the defendant denies that she agreed that the child would return in March 2020. She states that she mentioned to the plaintiff that when she was granted her annual leave she would likely book a holiday to Spain, however this did not come to pass due to the coronavirus pandemic. The defendant also states that she was not aware until March 2020 that the plaintiff was claiming child benefit for S at that stage she contacted the relevant authorities.

[20] At paragraph 40 of this affidavit the defendant states that she never acted in any way in relation to S without consulting the plaintiff first. She states the plaintiff was aware of every decision that she took in respect of S's care and freely gave his consent to same. In this paragraph the defendant states:

> "I repeat that the plaintiff was the one who encouraged the move to Northern Ireland and drove me and the children to Schiphol Airport. It is the case that the plaintiff and I discussed his moving to Northern Ireland and he applied for his own residence permit for leave to remain here under the EU Settlement Scheme. I understand he filled out the form online. I then learnt that the plaintiff intended to use this as a means of bringing his brother from Nigeria to Northern Ireland and I reported this to the Home Office in and around March 2020."

[21] In reply to the new matters raised I allowed the plaintiff to file a further affidavit. In this the plaintiff again disputed the allegations of behaviour made against him. He states that the defendant did make an application for her sister to come to Northern Ireland but she said that her sister was her mother as she did not feel her mother's application would be successful as she was elderly. He says that it is not correct that the joint parental custody was to make it easier for S to travel with him. In relation to his status he confirms at paragraph 7 of this affidavit that he obtained a residence permit in September 2018 and it was granted on the basis that he is a family member of an EU citizen. He maintains that at that time the defendant wrote the letter of 28 October 2018 he had residence status. The plaintiff also states that it is not correct that the defendant consulted him about all decisions in relation to S's care. In this affidavit the plaintiff accepts that he drove the defendant and the children to the airport when they were leaving in July 2018 but it was in the circumstances described in his previous affidavit. He says that he did apply for an EEA family permit to join the defendant in the United Kingdom as the unmarried partner of an EEA national to make travel between the Netherlands and Northern Ireland easier however that application was refused. The plaintiff also disputes any plan to bring his brother from Nigeria and he states that one of his brothers is living with his family in Nigeria and the other lives in South Africa.

[22] The plaintiff also filed a final affidavit to deal with his receipt of child benefit and housing benefit. In this he confirms that child benefit was applied for in February 2019 and backdated to October 2018. He also confirms that an application for housing subsidy was made in March 2020 with S registered as living at the plaintiff's current address in the Netherlands.

[23] I asked that a further affidavit be sworn by the defendant to explain all of the exhibits to the previous affidavit. Both parties have now successfully explained the exhibits that they rely upon. These are important documents which were stressed by both parties and which I will now refer to as part and parcel of the arguments made.

The arguments made by the parties

[24] On behalf of the plaintiff, Ms Smyth, argued that the case was one of wrongful retention. She accepted that the child had lawfully moved by the agreement of her client in July 2018 to Northern Ireland with the defendant and her two elder children. However, she contended that by October 2019 the child had been wrongfully retained in Northern Ireland and at that date the habitual residence was the Netherlands. The case made by Ms Smyth was that by virtue of the joint parental authority granted in March 2019 that her client was exercising rights of custody at this stage. Ms Smyth accepted that there was no contemporaneous records of discussions between the parties at the relevant time. Therefore, she relied upon the evidence filed by way of affidavit and stressed various aspects of this and some exhibits as follows:

(i) Firstly, a translation of a handwritten letter sent by the defendant to the Dutch authorities. This is dated 20 October 2018 and reads:

> "My name is Y, social security number. I want to inform you that from 20 October 2018 on I no longer live at [address] in Netherlands. I relocated to England. At this moment I don't have any address. The reason why I don't write down a (new address) my husband K will stay at [address] in Netherlands together with my son S. This means that I, Y, need to be deregistered at the address. I hope to have informed you sufficiently."

(ii) A document dated 26 April 2020 from the Municipality of The Hague which deals with the personal records data base of the plaintiff. It was registered with the Municipality at the address from 10 March 2020 to present day at one address from 18 March 2019 until 10 March 2020 at another address and 19 June 2016 to 18 March 2019 at a third address. This document included a phrase "category residence under investigation."

(iii) A document entitled Letter of Consent, 11 February 2019 which states:

> "I, Y, born on [date] hereby give my consent that my son Master S born on [date] can travel abroad with his father, K, born on [date]. Thank you for your co-operation."

(iv) By way of translated document to the Holland Home Office sent on 20 March 2020 the defendant stated:

> "My name is Y. I am the mother of S. I want my son S to be de-registered from the Municipality of The Hague because, since November 2018, my son is living abroad with me. Father just wants him (to stay) registered so that his residence permit will stay valid, but he does not look after my child at all and he gets children's allowance and special care allowance, whilst just using it for his own life without using it for my son. I want to have full authority because I am the only one who has cared for my son for the whole of his life. My BSN number is [], my son's date of birth is [date], his BSN number is []."

(v) In addition, Ms Smyth relied on the evidence of the child's registration with health in the Netherlands and other supporting documents of his time in the Netherlands.

(vi) Ms Smyth also relied upon the joint parental responsibility agreement as proof of intention given that this was a document registered in the Netherlands.

(vii) In summary Ms Smyth contended that the child was born in the Netherlands and lived there and there was no intention to remove to Northern Ireland permanently and therefore that the return order should be made. In terms of the law Ms Smyth helpfully provided me with a recent authority of the English Court of Appeal of Lord Justice Moylan in *Re M* [2020] EWCA Civ 1105 which deals with the issue of habitual residence.

[25] In reply, Mr Magee represented on behalf of the mother that there was no basis for a return order as the habitual residence of this child was Northern Ireland at the date of the alleged wrongful retention. He did not take issue with Ms Smyth's case that the wrongful retention was October 2019. He relied on a number of exhibits in this regard as follows:

(i) Easy Jet flights from Amsterdam to Belfast, Tuesday 31 August 2018 for a mother and three children which were one way.

(ii) Easy Jet flights for the father from 24 December to 26 December 2018.

(iii) Easy Jet flights from Belfast to Amsterdam of 31 October 2019 returning on 2 November 2019 for the mother and child.

(iv) Evidence from medical records of attendances on 25 October 2018 where there was a new patient screen in relation to the child and also an attendance on 4 February 2019 when a Mantoux test was administered to decide whether a BCG was required.

(v) A Ryan Air bill for £37.81 from 14 February 2019 which the mother said was to add the child to a flight in February 2019.

(vi) A document purporting to be issued to the father at the mother's address in Belfast which was an application for a national insurance number made on 12 February 2019 which was refused.

(vii) Transcripts of audio calls to the father in March 2020 in relation to the issue of child maintenance.

(viii) Overall, Mr Magee made the case that the evidence was clear that the child had an integrated life in Northern Ireland since coming in July 2018. He maintained that the only proof of the child going to the Netherlands was for two periods, one between February and March 2019 and one between July and August 2019. As such during the period July 2018 to October 2019 the child lived in Northern Ireland for 13 months. Mr Magee also made the case that S was clearly settled in Northern Ireland evidenced by his residence, school and integration. He said that the father's pattern of travel was by way of visitation.

(ix) Mr Magee accepted the argument put forth by Ms Smyth as a fair articulation of the law on habitual residence. He submitted that the case should end there because I should be able to find on the facts that habitual residence is Northern Ireland. In the alternative Mr Magee submitted that if I could not agree with the main thrust of his case in relation to habitual residence that the father had acquiesced in any wrongful retention after the child was in Northern Ireland.

[26] The Official Solicitor filed a position paper given the age of the child. Ms Murphy assisted in relation to the relevant law but given the factual disputes she did not enter the arena in any other way.

The Law

[27] I am grateful to all parties for their skeleton arguments which highlight the consensus as to the legal principles. This is unsurprising given that the question of habitual residence has been before the Supreme Court in six cases from *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and*

others intervening) [2014] AC 1 to *In re C and another (Children) (International Centre for Family Law, Policy and Practice intervening)* I have also been made aware of the case of *Re B (A Child: Custody Rights, Habitual Residence)* and the recent case of *RE M* which Ms Smyth provided. This latter case, summarises the law as it stands after the Supreme Court cases and reiterates that any consideration of habitual residence is a factual enquiry the outcome of which will depend on the particular circumstances of each case. At paragraph 45 of *Re M* Moylan LJ states this:

> "It has been established for some time that the correct approach to the issue of habitual residence is the same as that adopted by the Court of Justice of the European Union ("CJEU"). Accordingly, in *A v A*, at [48], Lady Hale quoted from the operative part of the CJEU's judgment in Proceedings brought by A [2010] Fam 42, at p.69:
>
> > '2. The concept of 'habitual residence' under article 8(1) of Council Regulation (EC) No 2201/2003 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.'"

[28] In *RE M* Moylan LJ also refers to the fact that it is important to distinguish habitual residence from temporary or intermittent residence. Flowing from the Supreme Court case of *In Re LC Children Reunite International Child Abduction Centre Intervening* [2014] AC 1038 there must be an assessment as to the nature and quality of that residence. Moylan LJ explains that an expression used to assist in this is again derived from the European authorities which is a consideration of the stability of the residence.

[29] The *LC* case refers to "some degree of integration." At paragraph 48 of *RE M* Moylan LJ explains this as follows:

> "As Lord Wilson said in In Re B, at [39], there does not have to be "full integration in the environment of the new state … only a degree of it." He also said: "It is clear that

> in certain circumstances the requisite degree of integration can occur quickly." In In re LC, Lady Hale, at [60], referred to the "essential question" as being "whether the child has achieved a sufficient degree of integration into a social and family environment in the country in question for his or her residence there to be termed 'habitual.'"

[30] Another case that is referred to is *Re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2015] UKSC 35 in which Lord Reed referred to both the degree of integration and the stability of the residence. This case also pointed out that there was no requirement that the child should have been resident in the country in question for a particular period of time, nor was there any requirement that there should be an intention on the part of one or both parents to reside there permanently or indefinitely. Lord Reed summarised at [17] what Lady Hale had said in *A v A* at [54] emphasising that (i) habitual residence is a question of fact which requires an evaluation of all relevant circumstances; (ii) the focus is on the child's situation with the purposes and intentions of the parents being merely among the relevant factors; (iii) it is necessary to assess the degree of integration of the child into a social and family environment in the country in question; (iv) the younger the child, the more their social and family environment will be shared with those on whom the child is dependent, giving increased significance to the degree of integration of that person or persons.

[31] In *LC* Lord Wilson coined the see-saw analogy which refers to the circumstances in which a child loses his or her habitual residence and gains a further habitual residence. However, as Moylan LJ, reflects in *RE M* this should not distract from the key question which, in every case, is: where is the child habitually resident? "Even though the acquisition of a new habitual residence can be expected to coincide with the loss of the previous one, hence the see-saw analogy, this issue is not determined by asking simply the question whether a child has lost their habitual residence." This was the problem which the Court of Appeal identified with the lower court in *Re M* case and caused it to overturn a first instance decision. Moylan LJ also stresses that an analysis is required of the child's connections with the state or states in which he or she is said to be habitually resident for the determination. A useful summary of all of this is provided by Hayden J's decision of *Re B (A Child) (Custody Rights: Habitual Residence)* 2016 EWHC 2174 (save point 8 which Moylan LJ says may be distracting).

[32] In summary, this is a factual exercise. The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment. Parental intention is relevant but not determinative. It is the stability of the child's residence as opposed to its permanence. There must be some degree of integration the acquisition of which will depend on the facts of each case. The child is at the centre of the exercise as it is the child's integration which is under consideration.

[33] Finally, in relation to the law, it is important to stress that the question of habitual residence is key to whether the Hague Convention can be invoked. In *Re H (Abduction: Retention in Non-Contracting State)* [2019] 2 FLR 653 paragraph 52 the basic requirements for the application of the 1980 Convention are set out as follows:

> "[52] In my view, the only basic requirements for the application of the Convention are:
>
> (a) the child must have been habitually resident in a Contracting State at the date of the alleged removal or retention;
>
> (b) the removal or retention must be wrongful;
>
> (c) the application must be determined in the Contracting State where the child is; and
>
> (d) the Convention must be in force between both States."

[34] The Hague Convention is concerned with summary return to the jurisdiction of the child's habitual residence to decide on welfare. In *RE H* the court also said that "The Convention applies whenever the child is habitually resident at the relevant date in a Contracting State, subject only to it being other than the requested state. It does not apply if the child is habitually resident in the requested state at the date of the retention or removal because, as explained by Lord Hughes in *In re C* at [34]:

> "The Convention cannot be invoked if by the time of the alleged wrongful act, whether removal or retention, the child is habitually resident in the state where the request for return is lodged. In such a case, that state has primary jurisdiction to make a decision on the merits, based on the habitual residence of the child and there is no room for a mandatory summary return elsewhere without such a decision."

Conclusion

[35] I have conducted a holistic factual enquiry. I have considered the factual question as to the child's habitual residence at the date of the alleged wrongful retention in October 2019. I agree that this is the relevant date and that the father sought legal advice around this time. The Hague Convention provisions as to the age of the child are satisfied and whilst the application was brought some time after the alleged wrongful retention, it is within the year. The father had rights of custody by virtue of the parental responsibility agreement and was exercising them.

[36] I take into account all of the evidence provided by the parties and having done so I am of the view that the habitual residence at the relevant date was Northern Ireland. In reaching this conclusion I recognise that there are difficulties with the evidence of both parties in certain respects. As will be apparent from the hearing I am particularly concerned as to why child benefit has been claimed in the two jurisdictions. Also, there are clearly issues in relation to housing in the Netherlands and the representations made by both parties which have not been wholly accurate. It is plain to me that immigration issues have motivated some of the actions in this case. However, the question I am concerned with is - where is the child habitually resident? On the balance of probabilities it seems to me that the defendant has succeeded in relation to the establishment of habitual residence in Northern Ireland for the following reasons:

(i) It is clear that the child came to Northern Ireland by consent of both parties in July 2018. I do not accept that this was a temporary arrangement. There is no contemporaneous evidence to support that proposition. In my view it is much more likely that the mother would stay with the children during their education and that education for S in Northern Ireland would also be considered given the family preference.

(ii) Even if the case made by the plaintiff is correct that once the defendant's mother came to Northern Ireland the defendant would return with S to the Netherlands, there was no evidence as to whether this plan was feasible or the timescale of it.

(iii) The evidence establishes that S stayed in Northern Ireland from July 2018 for a continuous period until February 2019. There is absolutely no proof provided by the father that the child went back to the Netherlands in December 2018. There is some conflicting evidence about the date that S went in February 2019 but I am not convinced that that is particularly material.

(iv) The evidence establishes that S did go to the Netherlands from February to 23 March 2019 but he returned to Northern Ireland at that time. Also, S clearly returned to the Netherlands for a holiday with his half siblings while the mother was in Nigeria between July and August 2019. For the remaining 13 months he was in Northern Ireland. The length of time spent in Northern Ireland is not determinative in itself but it is an obvious factor to be taken into account in assessing integration.

(v) The evidence presented by the mother in relation to flights is persuasive. In particular, I note that flights were booked for 31 October to return on 2 November to Northern Ireland. This document from Easy Jet completely contradicts the father's case because if there was a wrongful retention from October why was there a return flight booked for November 2019 (albeit it was not taken up).

(vi) I find the objective medical evidence presented by Mr Magee compelling in relation to attendances in Northern Ireland, in particular, the attendance on 4 February 2019 which occurred in Northern Ireland at a time when the father said that the child was in the Netherlands.

(vii) I have serious concerns about the case made by the father in his original affidavit and summons to the effect that the child stayed with him in the Netherlands until August 2019. I do not find the explanation for this mistake convincing at all. It is clear that the father only changed his case when he saw the flight details provided by the mother in her replying affidavit. It is hard to believe that the father would make a mistake about this core issue when in fact he drove the family to the airport in July 2018. I agree with Mr Magee that this raises a serious question mark as to the father's credibility.

(viii) The child did have his habitual residence in the Netherlands prior to his move to Northern Ireland. However, that has changed. I find that there is a sufficient degree of integration in Northern Ireland by reason of the child's residence here. His mother obtained a tenancy and a job here. His half-siblings were at school. He was registered with a GP and subsequently has registered in Nursery. Clearly the child has achieved stability in Northern Ireland in a social and family environment. In my view this is not a temporary or intermittent stay.

(ix) S's travels to the Netherlands maintained his link with the Netherlands but I cannot see that those periods can lead me to a conclusion that his habitual residence in the Netherlands was maintained until October 2019.

(x) In my view it is probably right that in February 2019 the father was stopped at the airport and that led to the parental responsibility agreement and the letter of consent. I therefore accept the mother's case that she signed the parental responsibility forms for a purpose of helping the father given the timing of that. That is not to undermine the father's relationship with the child which he has maintained. It is not definitive that this registration was in the Netherlands as Ms Smyth asserts.

(xi) There are issues with the mother's evidence as I have said particularly her representation to the Dutch housing authorities that the child was with the plaintiff. The mother accepts that was to assist the father's residence in the Netherlands which appears correct. However, it was also a false representation, the consequences of which the mother may have to face in another forum. This does not assist me in determining the child's habitual residence.

(xii) I also note the mother's explanation for reregistering for housing in the Netherlands in January 2020. As this is a small child the mother's actions are obviously relevant. However, there is no clear evidence that the mother was

going to move again at that time. So whilst I approach the mother's explanations with some scepticism, this step that the mother took is not determinative because ultimately the test is whether the child has achieved integration into the country of habitual residence and on the facts I find that he has.

(xiii) I have been referred to a document addressed to the father in February 2019 whereby it appears that he applied for a national insurance number in Northern Ireland and was refused. I am sceptical as to the father's explanation that he knew nothing about this but again it does not particularly assist me in establishing the child's habitual residence.

(xiv) The issue of child benefit is very concerning as I cannot see how the plaintiff could have claimed in the Netherlands. I suspect that that this may have been to assist the plaintiff's residence as with the housing issue and that it will have to be examined by the relevant authorities in due course.

(xv) There are obvious adult issues in this case as I have said but looking at the case from the child's perspective I am clear that his habitual residence in Northern Ireland has been established at the relevant date.

(xvi) I do not make any specific findings in relation to the wider allegations made against the plaintiff in relation to his behaviour as part of this enquiry. These points may be raised in a future welfare hearing where they can be adjudicated upon.

[37] Overall, having conducted the factual enquiry, I conclude that the habitual residence of S at the date of the alleged wrongful retention was Northern Ireland. This means that the Hague Convention cannot be invoked as by the time of the alleged wrongful retention the child was habitually resident in the State where the request for return is lodged. It follows that Northern Ireland has primary jurisdiction to make a decision on the merits, based on the habitual residence of the child and adopting the words of Lord Hughes "there is no room for a mandatory summary return elsewhere without such a decision." This means that either parent may bring substantive welfare based proceedings in Northern Ireland to determine future arrangements.

[38] Accordingly, the application is dismissed.