

Neutral Citation [2021] EWFC 12

IN THE FAMILY COURT AT COVENTRY
IN THE MATTER OF D, C and M

Date: 15th February 2021

Before :

Her Honour Judge Walker
(sitting as a Judge of the High Court)

Between :

COVENTRY CITY COUNCIL

Applicant

- and -

GA (1)
FS (2)
D, C AND M (by their Children's Guardian (3-
5)
and
CS&CLS (6/7)

Respondents

Miss Sparrow for the Local Authority
Mr Sampson QC and Miss Fairclough for the First Respondent
Mr Goodwin QC and Ms Doran (Instructing Solicitor) for the Second
Respondent
Miss Bugeja for the Children's Guardian
The attendance of the **Sixth and Seventh Respondents** excused

Hearing date: 15th February 2021

JUDGMENT

1. This is the second set of associated proceedings that have come before me to consider the question of this court's jurisdiction. The broad background is that two brothers (being the fathers of the relevant children) were arrested in September of 2020 and charged for offences of human trafficking and child exploitation. It is alleged that this father is the head of an Organised Crime Group who have trafficked and exploited children as young as 12. The mother had been summoned to return to Romania for investigation of her involvement in those activities.
2. In the associated proceedings relating to the family of the 'other brother', my decision was to decline jurisdiction on the basis that I did not consider that those children were habitually resident in England and Wales. My understanding is that they were successfully returned to Romania (their country of origin) on the 12th December 2020.
3. In these proceedings, I am asked either to decline jurisdiction in a similar way, or in the alternative, transfer the proceedings to the Romanian courts pursuant to Article 15 of *Regulation (EC) No 2201/2003 (Brussels II Revisited)*, on the basis that the Romanian court is better placed to hear the case and it is in the best interests of the children to do so.

Background

4. The children concerned are M (aged 12), D (known as L) (aged 7) and C (aged 5). Their mother is GA and their father is FS.
5. All parties agree that the date for consideration of the question of habitual residence is the 23rd September 2020, that being the date that the children were taken into police protection. The children and the parents are Romanian nationals and speak Romanian. Whilst the parents were together at the time the proceedings starting, they have now separated. The mother is pregnant and the baby is expected to be born in [a date in] 2021.
6. Since their reception into care, the children have sadly experienced two foster placement breakdowns. Happily, they are now placed with CS and CLS, who are their godparents and friends of the family. However, it is right to note that the parents have put forward a number of other connected persons as potential carers for the children in the event that they cannot return home. Two of those individuals (AMD and AN) have had positive viability assessments and both reside in Romania.
7. The matters of which the parents are accused have been the subject of a joint investigation by the Scottish and Romanian police. The current disclosure provided by the Scottish police is incomplete, but the parties were informed on the 11th February that it has been agreed that the Romanian police will be taking over the investigation. Both parents have been issued with a summons to answer charges in Romania on the 4th March 2021.

The Law

8. Within my judgment in the associated proceedings, I set out what was an agreed summary of the law. I repeat it within this judgment as the principles to be applied to the question of habitual residence are the same. I remind myself

of decision of the Supreme Court in *A v A* [2013] UKSC 60 and the judgment of Baroness Hale. The salient bullet points are as follows;

- Habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to whereby a child automatically takes the domicile of his or her parents
- It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those conventions
- The test adopted by the European Court is “the place which reflects some degree of integration by the child in a social and family environment” in the country concerned. This depends on numerous factors, including the reasons for the family’s stay in the country in question.
- It is now unlikely that the test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.
- In the view of the Supreme Court, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focused on the situation of the child with the purpose and intentions of the parents being merely one of the relevant factors. The test derived from *R v Barnet London Borough Council ex parte Shah* should be abandoned when deciding the habitual residence of a child
- The social and family environment of an infant or a young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.
- The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce
- As the Advocate General pointed out in AG45 and the court confirmed in para 43 of proceedings brought by A, it is possible that a child may have no country of habitual residence at a particular point in time.
- In addition to the physical presence of the child in a member state, other factors must be chosen which are capable of showing that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.
- Those ‘other factors’ will mainly be, in the case of a child, those which show some degree of integration in a social or family environment. They include -
 - (i) duration, regularity, conditions and reasons for the stay in the state and the family’s move to that state
 - (ii) the child’s nationality
 - (iii) the place and conditions of attendance at school
 - (iv) linguistic knowledge
 - (v) the family and social relationships of the child in that state
- Although the intention of the parents will normally be a relevant factor, “the intention of the person with parental responsibility to settle

permanently with the child in another member state, manifested by certain tangible steps such as the purchase or rental of accommodation in the host member state, may constitute an indicator or the transfer of habitual residence.”

- The duration of the stay is a relevant factor but not determinative.
 - In exceptional circumstances, a person may have no habitual residence, although this is very unlikely in the case of a child.
9. Pursuant to Article 67(1) of the *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community March 2019*, the provisions of Brussels II Revised continues to apply in respect of legal proceedings instituted before the end of the transition period.
10. As to the approach that should be taken to a transfer request pursuant to Article 15, I am referred to *Re N (Children [2016] UKSC 60* in which the Supreme Court reiterated the three principal questions to be considered. These are :
- (a) Does the child have a particular connection with another Member State?
 - (b) Is the Court of that Member State ‘*better placed*’ to hear the case or a specific part thereof?
 - (c) is a transfer of the case or part of it in ‘*the best interests of the child?*’
11. The second and third questions are not interlinked, but independent. Whilst some of the factors may be relevant to both, they are separate questions that must be addressed separately.
12. *Re N* has been recently reviewed by the Court of Appeal in *Re KN (A child) [2020] EWCA Civ 1002* in which Lord Justice Baker considered the applicability of CJEU caselaw and, in particular, *Child and Family Agency v D [2016] EUECJ C-428/15, [2017] 1 FLR 223* in which it was observed that. “*the court having jurisdiction must determine whether the transfer of the case ot that other court is such as to provide genuine and specific added value, with respect to the decision to be taken in relation to the child, as compared with the possibility of the case remaining before the court.*”

The question of habitual residence

13. I am grateful to Mr Sampson QC and Miss Fairclough for their detailed summary of the evidence in relation to the habitual residence of the children. Until 2009/2010, the children had spent their whole lives in Romania. In June 2019, they came to England with their mother for a period of 7 weeks for a holiday. The mother and C visited for a further time in October 2019, but M and D remained in Romania save for a brief visit of five days. During this visit, C was registered at a GP in order to receive her inoculations. The older children have never been so registered.
14. The family travelled to the UK on the 14th March 2020 and rented a property for six months. The mother says that they were investigating the prospect of opening a shop. The children remained registered in their schools in Romania and attended remotely (as all children were doing by that stage as a result of the pandemic). The mother accepts that she signed a business tenancy for her

retail premises with a four-year term on the 11th June 2020. The family retains a home, which the father owns, in Romania.

15. The first lockdown meant that the family could not visit Romania until 7th July 2020, when the mother and children returned for three weeks. On their return, the mother also accepts that she registered the children in English schools, to begin in the September term. Their registration in their schools in Romania was never terminated. The father tells me that their intention at the time was “to give living in the UK a shot” and that it was a “very tentative trial period.”
16. D attended school for twelve days, M for ten days and C for just three days before their removal to foster care. M was unhappy about attending school in Coventry. None of the children speak English with any degree of fluency and whilst in foster care, found themselves having to communicate with the carers through Google translate. They have undoubtedly found the whole experience of being removed from parental care and living with strangers with whom they could not communicate profoundly difficult. It was with some relief that the children moved to live with the only people that they know in this country at the end of January.
17. The father’s movements have been more complex, and he has travelled extensively between the UK and Romania since 2016, without the mother and the children. He has had a series of business ventures.
18. The mother contends that, during the time that the family has been present in Coventry, there has been little, if any, social integration. The shop has never fully opened and never properly traded. It is accepted that the children each had a very brief period of education in this country and C was registered at a doctor’s surgery. It is accepted that the parents made an application for pre-settled status in June 2020, but the mother states that this was made partly out of caution because of Brexit uncertainty. Similar applications were not made for the two younger children, but one was made for M. Mr Sampson reminds me to consider the *stability* of the child’s residence, as opposed to its permanence. In contrast to the position in Coventry, it is argued that the children experienced a high degree of social integration in Romania.

Article 15 transfer

19. Further, both parents argue that, even if I were to be persuaded that the children had achieved habitual residence in England, or that they had, at least, lost their habitual residence in Romania, I should consider transferring the proceedings under Article 15. As Mr Goodwin QC notes in his submissions, whilst the habitual residence question may be nuanced, the arguments in favour of an Article 15 transfer are not.
20. The children’s connection to Romania is unarguable. But in relation to the ‘better placed’ question, both parents argue that the decision of the Romanian police to take over the criminal investigation is hugely significant. Those criminal charges form the basis of the threshold pleading in these proceedings, and if those matters are to be established, witnesses are likely to come from Scotland and Romania, not Coventry or even England and Wales. Therefore, it is contended that the Romanian court is better placed to hear this matter. It is

also the case that it will be necessary to undertake welfare assessments in Romania, as the two possible connected alternative carers live in there, speak Romanian and would want to care for the children there. From a purely practical perspective, for this court to take charge of that process would necessitate multiple translation of documents from Romanian into English and vice versa, the instruction of assessors to travel (in the current context where non-essential travel is currently restricted) and the need for interpreters.

21. Addressing the best interests question, it is contended that a transfer would allow the children and their parents to return to Romania during the lifetime of the proceedings, which, in turn, would enable the children to return to their schools and benefit from the support of their friends and wider family. Due to the fact that the parents *must* return on the 4th March, a transfer would also allow the children to continue to have contact with their mother and father. I am also reminded of the significant delay that has already occurred in these proceedings, and that this delay is indicative of the challenges facing a local authority based in Coventry who is having to collate material from two police forces from different jurisdictions.
22. The local authority confirms that it takes the view that the children are habitually resident in Romania. Even if I am not so satisfied, a transfer pursuant to Article 15 is supported. The Children's Guardian supports the return of the children to Romania on the same basis as the local authority.

Analysis

23. Having considered all the evidence, I am not satisfied that these children have ever achieved habitual residence in this country and that they remain habitually resident in Romania. Whilst it may be that there was some tentative plan on the part of the parents to live in Coventry, for the children, they had achieved virtually no social integration by the time that the proceedings began. They had no friends, no activities and no language skills. Their home here was temporary, and everything that they knew and were familiar with remained in Romania, save for their immediate family unit. For all intents and purposes, they were physically present in this country, but they had established no life here. Their parents were barely different. As I have already noted, physical presence in a country is not sufficient to establish habitual residence.
24. I accept that the intention of the parents is one of the factors that I must consider, but even when considering the evidence in relation to that issue, I am far from satisfied that the mother and father had ever reached a settled intention to remain in Coventry. I accept that the application for settled status does not offer any additional significant evidence, as this was nothing more than a necessary pre-cautionary step in the light of Brexit uncertainty.
25. Whilst it might be said that, had the pandemic not affected all parts of our society in the days immediately after the family came to this country in March of last year, the situation might have been different, I have to consider the reality of the children's position as it was in September of last year. They had been physically present for six months (minus a three week holiday), but had established no links or connections with this country as a result of the lockdown.

26. Even if I were to be wrong about that issue, the evidence in relation to the merits of an Article 15 transfer are overwhelming. There is no doubt in my mind that the Romanian courts are both better placed to hear these proceedings, and that it is in the children's best interests that they do so. Both the fact-finding exercise and the welfare determination are best heard in Romania. The police investigation is taking place there, that investigation being the primary basis for the current involvement of social care in the lives of this family. The children's wider family reside in Romania and there is no doubt in my mind that the Romanian court will be able to undertake a more informed determination as to the outcome which best meets the welfare of the children. I consider that it is also likely that, due to simple questions of practicality and language, that determination is likely to be achieved more quickly for these children who have already experienced an unfortunate period of instability.
27. The arrangements for the return of the children to Romania remain unclear. I intend to continue to exercise my powers for the emergency protection pursuant to Article 20 until such time as appropriate plans can be put into place.