

**IN THE FAMILY COURT AT NEWCASTLE UPON TYNE**

Newcastle Civil & Family Courts and Tribunal Centre  
Barras Bridge  
Newcastle upon Tyne  
NE1 8QF

BEFORE:

**HER HONOUR JUDGE MOIR**

BETWEEN:

**IM  
(BY HIS LITIGATION FRIEND  
THE OFFICIAL SOLICITOR)**

**APPLICANT**

**- and -**

**GATESHEAD COUNCIL  
CITY OF EDINBURGH COUNCIL**

**(1) RESPONDENT  
(2) RESPONDENT**

**Legal Representation**

Mr Simon Wilkinson (instructed by David Gray Solicitors) on behalf of the Applicant  
Ms Peggy Etibet (instructed by Gateshead Council Legal and Democratic Services) on  
behalf of the First Respondent  
Ms Claire van Overdijk (instructed by Irwin Mitchell LLP) on behalf of the Second  
Respondent

**Other Parties Present and their status**

None known

**Judgment**

Judgment date: 3 July 2020  
(start and end times cannot be noted due to audio format)

Reporting Restrictions Applied: No

*“This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.”*

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## Her Honour Judge Moir:

1. This matter is listed before me today primarily to consider the issue of habitual residence and the subsequent jurisdiction of the court and any necessary directions. The background to this matter is set out within the statement of JG (social worker). The Court is concerned with an application pursuant to section 21A of the Mental Capacity Act 2005 made by IM who was born on 6 January 1971 and therefore is aged 49 years. IM is subject to a standard authorisation granted by the First Respondent at Gateshead authorising the deprivation of his liberty at care home one.
2. A standard authorisation was granted on 7 December 2019 and was initially due to expire on 28 February 2020. It was extended by order of the court until the third working day after this particular hearing. A full statement dealing with the background is set out by JG. IM previously resided at the LNC in Dundee, unfortunately that centre closed and so IM had to move to another placement at short notice. The placement at the AM Centre in Gateshead, which we have called care home one, was identified and IM moved there on 20 November 2019 pursuant to the powers under the Scottish Guardianship Order.
3. Prior to moving to LNC IM had his own tenancy and lived in the community in Wester Hailes in the southwest of Edinburgh. In brief there were a number of serious difficulties when IM lived in the community. IM abused alcohol and had some serious health problems. IM has a history of being unable to regulate taking his medication which allied to his excessive alcohol intake has led to a large number of hospital admissions. IM would only sporadically engage with support which he was offered in the community. IM spent his money on alcohol rather than food and would not comply with medical advice in respect of his medical condition. He has deep vein thrombosis in his right leg and there was alcohol related brain damage.
4. The City of Edinburgh Council's view is that the placement at care home one in Gateshead meets his need and is likely to be suitable for IM in the long term. They do not consider that IM can live safely in the community. But JG went on to state that:

**“A considerable amount of planning and consideration went into IM’s move to the placement in Gateshead. I reviewed the placement four to six weeks after the move in accordance with the Council’s practices. I’m of the view that the placement is working well and will be suitable for IM in the longer term. In the circumstances it seems inevitable that habitual residence will move to England and Wales at some point in the future if it has not done so already.”**

5. My task is to consider the issue of habitual residence as of today. The Local Authorities, both Gateshead and Edinburgh, submit that habitual residence in England has not been established and IM continues to be habitually resident in Scotland. Mr Wilkinson on behalf of IM, instructed by the official solicitor, argues that IM is habitually resident in England. Determination of the issue is required because of the consequences which flow thereafter.
6. In this judgment I consider only the issue of whether or not habitual residence in England has been established. If habitual residence in England is established the

powers of the court thereafter are much wider than otherwise. All the advocates within their submissions to me and the skeleton arguments have referred to *Re DB Re E* [2016] EWCOP 30, a decision of Baker J as he was then, and also *An English Local Authority v SW* [2014] EWCOP 43 which is a decision of Moylan J as he was then. It is agreed that the principles in the Court of Protection and in the Family Court are broadly similar. What has been distilled from the authorities in the Court of Protection and from *A v A* [2013] UKSC 60 in the Family Court are the principles and key questions which the court must address. Baroness Hale in *A v A* and summarised by Barker J in *Re DB* summarised the key question thus:

“Has the residence of a particular person in a particular place acquired the necessary degree of stability (permanent is the word used in the English versions of the two CJEU judgments) ... become habitual?”

7. The care home manager at care home one has stated:

**“With one to one support IM goes out every day into the local community.”**

8. Moylan J in *SW* considered the phrase “degree of integration” and stated as follows:

“I would suggest that the ‘degree of integration’, as with centre of interests, is an overarching summary or question rather than the sole, or even necessarily the primary factor in the determination of habitual residence. Otherwise, it would become a legal construct in place of the essential issue which is, of course, that of habitual residence. This is not to say that the degree of integration and a person’s state of mind are not relevant, they are clearly factors to which appropriate weight must be given when the court is undertaking a broad assessment of all circumstances of the case. The broad assessment which is required properly to determine whether the quality of residence is such that it has become habitual, in that it has the necessary degree of stability in order to distinguish it from [the] mere presence or temporary or intermittent residence. This means a sufficient, or some degree of integration, not, I suggest, as a limited factual assessment, but as a question to be answered by reference to the factors suitably applied, referred to by the CJEU and the Supreme Court.”

9. Thus Moylan J emphasised that the definition of habitual residence should be kept free of analytical construct, and was not persuaded that the determinative question was the degree of integration, but rather configured that there were a wide range of factors which would affect the court’s determination of the place of habitual residence. Baker J noted the following principles from family law as expressed in *Re A*,

a) “... habitual residence is a question of fact and not a legal concept such as domicile.”

b) in family cases the CJEU has used the place which reflects some degree of integration by the child in a social and family environment as a test for habitual residence.

c) "... factual ... nature of [the inquiries] should not be glossed with legal concepts which [will] produce a different result from that which the factual inquiry would produce."

d) habitual residence must as a general rule have a certain duration which reflects an adequate degree of permanence and stability though there is no minimum duration.

10. In the *An English Local Authority v SW* case Moylan J confirmed that:

"habitual residence is a question of fact"

He noted that:

"The broad assessment which is required properly to determine whether the quality of residence is such that it has become habitual in that it has the necessary degree of stability in order to distinguish it from mere presence or temporary ... intermittent residence."

11. The factual background to this case therefore has been considered by the Court. The care home manager at care home one has stated that:

**"With one to one support he [i.e. IM] goes out every day into the local community with members of the care staff. He does interact with staff and residents."**

12. The circumstances of Covid-19 have interrupted everyone's lives from 23 March onwards. It has restricted opportunities for IM to fully integrate into the community. Matters have largely remained static for IM over the past few months because of circumstances outside anyone's control. I ask therefore has there been sufficient or some degree of integration? Does the residence have the necessary degree of stability? Can the placement be distinguished from mere presence or temporary or intermittent residence?

13. When IM had capacity, he chose to move to Scotland it seems to search for his birth mother. He had jobs as a chef in Scotland, apparently at one stage he sold the Big Issue and he lived there as a matter of choice for, it seems, ten years. The move to England of now eight months duration was imposed upon IM because of the closure of the care home in which he was then residing. He was not able to remain where he was living in Scotland. His previous tenancy was no longer available even if it had been suitable. The move was at short notice it seems to the nearest suitable facility. It has of course as JG observed in January 2020 been successful to the extent that the placement provides for IM and for his needs.

14. I am told that IM is a private person, he spends most of his time in his room but does interact, it is said, with the staff. I have been told that when he goes out with staff he goes to the bookies but I am not given any further information as to him establishing links within the community.

15. The placement it seems is likely to be suitable long term and the intention when he moved from Scotland was for the placement to continue long term for IM, subject of course, to consideration of how IM settled and coped with being within the placement. It is submitted on behalf of Edinburgh that IM remains habitually resident in Scotland,

although it is acknowledged that IM's habitual residence is fluid and that he is likely to acquire habitual residence in England. In the future if his current residence and care arrangements continue, he will gain an adequate degree of permanence and stability in the longer term. It is hoped by both the local authorities that it should become his long term placement. IM, of course, has made it clear that he wants to be elsewhere.

16. The present application before the Court calls into question the present arrangement and where he will be residing on the section 21A application brought by IM. The whole point of that application is for the Court to consider whether care home one or a different placement will be his long term residence. I must determine the issue as at today.
17. I am not satisfied that he has acquired habitual residence in England. He does not want to be in Gateshead. His first expressed choice is to move back to Scotland or he has now referred to Lancashire. He has been here eight months with three months of enforced lockdown. IM has been resident in England since 20 November 2019, so as at today only a period of 12 months. Of course, the duration of the residence is not the determinative factor, it is a consideration.
18. IM does not want to be in Gateshead. Within a week of being at care home one he attempted to abscond, or leave, breaking down the door. It seems that he has not attempted to leave since. IM has expressed his views to his solicitor most recently on 29 June, that if it was his choice his choice would be Scotland. He identified that he had lived all over the place but in his words he has:

“never stayed anywhere apart from Scotland”
19. He says that he would like to spend time around Hornby or Ormskirk as that is where his nephews live. He referred to being dumped in Gateshead. He said:

“I had just made friends and was starting to socialise in Scotland and I was getting it all together before I was moved here.”
20. I have no evidence to substantiate, support or enlarge upon what IM has said to his solicitor. There is no particular evidence of integration into the community in Gateshead or indeed into the care home itself. He speaks to the staff and other residents, but no evidence has been provided of any strong relationship with either staff members or other residents or any particular activities or places that IM likes to go or do within the community in Gateshead. He goes for a walk with two members of staff, but I am not told anything other than that.
21. It may be intended that the placement is long term, but there are proceedings under section 21A. There is the requirement to determine habitual residence to hear an application under section 21A but that application remains extant. The fact that the placement is intended to be long term cannot logically be the determinative factor in considering habitual residence at this stage. It is a consideration only.
22. IM was habitually resident in Scotland until 20 November 2019. It is undetermined as I consider this issue whether his current residence will actually be his long term residence although both Local Authorities hope that it may be. Further assessment and analysis it seems are required. There is little evidence of IM's integration into the community in the eight months that he has been here. He expresses a view that he

does not want to be in Gateshead. The view that he does not want to be in the placement has been consistent, although where he wants to be more recently includes Lancashire not just Scotland. While I acknowledge that habitual residence may alter in the future, presently I am not satisfied on the basis of what I have been told and up on the evidence before me that the necessary degree of stability and permanence has been established to enable me to determine that IM's habitual residence has moved from Scotland to England and Wales.

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This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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