



Neutral Citation Number: [2021] EWHC 1289 (Fam)

Case No: BM21C00021

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2021

Before :

MRS JUSTICE LIEVEN

Between :

BIRMINGHAM CHILDREN'S TRUST

Applicant

and

Z

First Respondent

and

W

Second Respondent

and

F

Third Respondent

Ms Andrea Davies (instructed by **Birmingham Children's Trust**) for the **Applicant**

The First Respondent did not appear and **was not represented**

Ms Helen Williams for the **Second Respondent**

Ms Carol Silvester (instructed by **Glaisyers LLP**) for the **Third Respondent**

Hearing dates: **16 April 2021**

Approved Judgment

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This case has been listed before me to determine the matter of the jurisdiction of the court both to make urgent orders in respect of the child and to determine whether the court has jurisdiction to make longer term decisions in respect of the child. Her birth has not yet been registered and her parents have used two different names in respect of her. I consider, and hearing no argument to the contrary, the appropriate name to call her by is F. That is the name recorded on the partially completed application for the registration of her birth by her father. I will therefore refer to her as F.
2. The background to this case is that neither parent (and I am going to call them the parents for the purposes of this judgment) has appeared before me today. The Father has been represented by counsel, but Ms Williams has had no instructions from him other than knowing that he seeks to contest jurisdiction, and he has not submitted any further evidence to advance his case. I therefore appreciate that Ms Williams is in a difficult situation today.
3. The Mother is not represented and has chosen not to engage in proceedings although both the Mother and the Father communicated with the social work team yesterday. That means that I am proceeding today on the basis of submissions rather than oral evidence and on the basis of quite limited evidence. In setting out the background I will set out as best I can the facts as can be ascertained from the documentation before me.
4. The Mother is known as Z. She is aged 23 years and is a UK Citizen of Pakistani Heritage. The Father is W, he is aged 27. He is also a UK Citizen of Pakistani heritage. Both speak perfect English and both were raised in the UK. It appears highly likely to be the case, although the Mother did yesterday contest this, that they are the parents of a previous child H born in June 2019. She was born at home, according to the Mother, in the toilet. Both were promptly taken to hospital in I believe La, and I believe H was then taken into care and now is subject to a full care order.
5. The Father was convicted of the offences of aggravated domestic abuse against the Mother, causing distress and alarm, assault and dangerous driving, in November 2019 and was sentenced to 5 months imprisonment. At this stage the chronology moves to what is asserted by the Father in these proceedings. He says that he and the Mother moved to Ireland in April or May of 2020, initially staying with his sister then renting private accommodation in County L in August 2020. I have seen a tenancy agreement for a flat in L between W and Mr S the landlord. Mr S has filed a statement in these proceedings.
6. Mr S said that when the parents signed the agreement and moved into the property, he was told that the Mother was 3 months pregnant, which would provide a due date in February 2021. The Mother and the Father moved into the flat at the end of August 2020.
7. The Father has filed a series of letters from an Irish hospital giving dates for the Mother to attend antenatal appointments, but evidence filed subsequently shows that the Mother did not attend those appointment. Efforts were made to engage with the parents by Irish Social Care, but the parents made deliberate attempts to avoid engagement with the

public health authorities, including the Mother lying about whether or not she had given birth.

8. The evidence suggests that F was born in the flat in County L on or about 28 November 2020. The parents sought no medical support for this birth and did not engage with Irish Health Authorities at all. The reason for believing the birth was around this date is the draft registration application partially completed and exhibited to the Father's court statement.
9. On or around 10-13 December the parents left the flat in L and travelled to the UK. According to the landlord Mr S, he was told by one of the farm workers that the baby was born before 10 December 2020. He went into flat when the parents had left and observed blood on the bed, floor and soiled nappies. That indicates to me very strongly that there was a baby in that flat in early December, although it is not possible to be any more specific than that in respect of the date of birth.
10. On 10 December 2020, a home visit by Irish Social Services was made to the parents' flat in L. At that visit the Mother told the social worker that she was still pregnant, claiming that she had had a private scan and the baby was due in February 2021, and claiming that they could not enter the property as both she and the Father were experiencing COVID-19 symptoms. It is possible that this may have been the trigger for them moving back to UK although, in the absence of them giving evidence, it is not possible to say with certainty.
11. The Father says that on 13 December 2020 (I have no reason to disbelieve this although there is no corroborative evidence in terms of tickets), the parents returned to the UK. The Father says that he intended to leave the UK and return to Ireland at the end of December 2020 and that he had a job lined up. He says he could not go back to Ireland due to the COVID-19 restrictions issued on 19 December 2020. Although an exception to the travel ban would have permitted his return if it was for work purposes. It is not possible to determine the veracity of what the Father says in his witness statement in the absence of him being willing to attend and give evidence. There is good reason for me to treat his evidence with considerable scepticism based on the previous evidence that the parents had been seeking to avoid Irish Authorities and, in all probability, that they had lied to Irish Social Services on 10 December 2020 by saying that F had not been born. I therefore have no choice but to treat what the Father says in his written statement with considerable care.
12. The parents had said earlier to Irish Social Services that they were going to move from the Republic of Ireland to Derry in Northern Ireland in order to access the NHS. The Mother had also mentioned moving to Dublin. It is also relevant to the issue of habitual residence, and therefore jurisdiction, that the evidence of the Landlord is that they had left with rent arrears and left the flat in a poor condition. It is extremely unlikely that he would have allowed them back in. However, I am not going to engage with Irish repossession law and whether, if they had sought to return, they would legally have been able to gain entry to the property.
13. From the date of their return to the UK in December 2020, the parents were living with relatives in the UK. On 1 February 2021 the police went to a house in Birmingham and arrested the parents for neglect, removed F from the house and exercised their police powers of protection. It is not clear to Ms Davies on behalf of the Local Authority nor

to me why the police attended on that day. Evidence on that will be considered later in these proceedings. On arrest the Father is said to have made no comment during interview. The Mother apparently said to the police that the Father is not the father of F, although I do not believe she said who was the father. She did say that the child was born in Ireland but then refused to give any further information.

14. On 2 February 2021 the police referred the matter to Birmingham Social Care having exercised their powers of protection. F was transferred to the care of a foster carer following her hospital admission. She had been noted to be jaundiced but otherwise in good health. An application was made by Birmingham Children's Trust on 4 February 2021 and an ICO was granted. F moved to live with her current foster carers on 8 February 2021.
15. I have two points to make at this stage about the background.
16. Firstly, the Father appears to have been calling the child Z at the start of these proceedings, changing to F later. The parents now call her F and it seems appropriate to record her name as F instead of Z.
17. Secondly, there is some concern by health professionals, and I have seen some evidence to suggest, that F may be younger than her birth date given. However, the evidence of the landlord is that he saw dirty nappies in the flat and that, together with the parents' own evidence, supports her birth as being around the 28 November 2020. I am, therefore, going to accept that F was born on or about that date. Given that F's birth has not been registered, I will have to determine a date of birth and it seems the most likely date, although I cannot be absolutely certain, is that F was born on the 28 November 2020 and the place is County L. Those should be recorded as my findings.
18. The parents were initially engaging with Birmingham Social Care and the Father had asserted that this court had no jurisdiction to deal with this matter because F was born in Ireland. He argued that the parents were resident and habitually resident in Ireland at the date she was born. The Father asserts that F herself was habitually resident in Ireland at the time of birth and, therefore, the appropriate court is the Irish court. The Father filed a statement supporting that position which was approved on 1 March 2021.
19. I turn then to the law in respect of jurisdiction. The first point which is not in contest is that pursuant to s31(8)(b) of the Children Act 1989 this court has the power to make urgent orders in respect of F, that is because the child is physically present and in need of urgent protection. There is no question that I have jurisdiction to make urgent orders.
20. The more difficult question is whether I can make non-urgent orders and whether the court can continue on the basis of habitual residence. Habitual residence is the test for jurisdiction, and it was considered by The President in *Re: F (Care Proceedings: Habitual Residence)*[2014] EWFC 26:

*"Where BIIR applies, the courts of England and Wales do not have jurisdiction merely because the child is present within England and Wales. The basic principle, set out in Art. *(1), is that jurisdiction under BIIR is dependent upon habitual residence. It is well established by both European and domestic caselaw that BIIR applies to care proceedings. It follows that the courts of England and Wales do not have jurisdiction to*

make a care order merely because the child is present within England and Wales. The starting point in every such case where there is a foreign dimension is, therefore, an inquiry as to where the child is habitually resident.”

21. The position is made somewhat more complicated now because the UK has left the EU and the question is now determined under The Hague Convention on the Protection of Children 1996, Article 5, 8 and 11 and this is the law to be applied. It is not necessary to set out the legal provisions here. All parties agree the test to be applied is one of habitual residence.
22. In terms of how to apply habitual residence there is no shortage of caselaw on this question. The caselaw and the principles to be applied are helpfully summarised within Hayden J's, judgment in *Re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 606.
23. The most recent analysis of the law by the Court of Appeal is set out in *Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105.
24. *Re M* slightly changes *Re B* in respect of one of the factors which states:

“63. In many cases, as in the present case, the parties and the court have used the summary of the law set in by Hayden J in Re B, at [17]. I agree that this is a helpful summary save that, for the same reasons given above, what is set out in sub-paragraph (viii) (which I quote below) might distract the court from the essential task of analysing “the situation of the child” at the date relevant for the purposes of establishing jurisdiction or, as in the present case, whether a retention was wrongful. Accordingly, in future I would suggest that, if Hayden J's summary is being considered, this sub-paragraph should be omitted so that the court is not diverted from applying a keen focus on the child's situation at the relevant date:

“(viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (In re B - see in particular the guidance at para 46).”

25. *Re M* remains a useful checklist for a judge analysing habitual residence subject to the proviso that the court must look at the child's situation at the relevant date with a keen focus.
26. Taking all that case law into account I shall set out the key matters which seem to me to be relevant and then give my view on it.
27. The starting point is that the Mother and Father are British Citizens; both parents have been brought up in England, and their social and educational background is plainly in the UK. Further, it appears at least the majority if not all of the extended family live in England though it appears there are some relatives in Ireland and Northern Ireland. The principle focus of this family's integration is therefore in England.

28. In terms of the parents' integration in Ireland, I have little choice but to accept what the Father says about his move to Ireland in April or May 2020. It appears likely, although I cannot be certain, that they moved to Ireland, at least in part, to avoid scrutiny by social care in England given what had happened to H in 2019. That has some relevance to the degree of integration in Ireland if the move was in part simply to remain under the radar of the authorities. In my view, the integration of the parents in Ireland was limited to renting a flat in County L. Neither parent appears to have a job and they had gone to lengths to avoid social care and health authorities. There is very little evidence of any other integration.
29. The Father says that he had a job set up in late December 2020 or early January 2021, but he didn't return to take up that job. I accept that may have been in whole or in part because of COVID-19 restrictions. As the parents have chosen not to give oral evidence it is impossible to say what their intentions were.
30. What is clear is that they returned to the UK on or about 13 December 2020 and stayed in the UK after that. The Father says that they did not return to Ireland for two reasons, one being Covid and the other that F had been taken into police protection and then into care in early February 2021. However, before that date there is a period of 5 weeks. There was no communication with the landlord or the proposed employer during this period, and it is at least doubtful whether or not the parents intended to move back to Ireland, or whether they had returned to England to avoid Irish services and thus had no intention of going back to Ireland.
31. That is the position so far as the parents are concerned. If I had to make a determination with regard to the parents, I would find that they gave up habitual residence in Ireland when they gave up the flat and came to England and had not communicated with the landlord about leaving.
32. In any event, Lord Justice Moylan in *Re M* places the focus of the enquiry firmly on the child.
33. For F, the relevant date for habitual residence is the date of the care application, being 4 February 2021, or possibly the date when the police powers of protection were exercised on the 1 February 2021. The precise date makes little difference. F probably spent the first 2 weeks of her life in Ireland and then the next 6 weeks in England. She has a fleeting connection with Ireland, but she did not engage with social or health services, nor with any relatives, whilst in Ireland. In contrast, when she was moved to England she was living within a wider family network. Further, she is beyond doubt a British citizen and her wider connections are with the UK.
34. In those circumstances, whatever her parents' intentions were, in the absence of evidence from the Mother and the Father, the evidence indicates that F was habitually resident in England and Wales by at least 1 or 4 February 2021.
35. I therefore conclude that F was habitually resident in England and Wales at the relevant date and the court has jurisdiction to deal with this matter under the Children Act 1989 on this basis.