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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2021] EWHC 2599 (Fam)



No. FD21P00135

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 19 July 2021

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
AND IN THE MATTER OF THE SENIOR COURTS ACT 1981
AND IN THE MATTER OF COUNCIL REGULATION (EC) No. 2201/2003

Before:

SIR JONATHAN COHEN

(In Private)

B E T W E E N :

M

Applicant

- and -

F

Respondent

**REPORTING RESTRICTIONS AND
ANONYMISATION APPLIES**

MR A. PERKINS (instructed by Covent Garden Family Law Solicitors) appeared on behalf of the Applicant.

MR N. ANDERSON (instructed by Dawson Cornwell Solicitors) appeared on behalf of the Respondent.

J U D G M E N T

SIR JONATHAN COHEN:

1 In this case I am concerned with the future of C, a girl now aged four and three quarter years. This is the application of the mother (“M”) for a summary return of C to Georgia from England.

2 It is agreed that although the issues as set out in the parties’ position statements are many and various, the live issues are only three:

(1) am I bound by the decisions of the Civil Chamber of Tbilisi City Court and by the Tbilisi Court of Appeal;

(2) if not, was C habitually resident in Georgia when removed by her father (“F”) on 25 July 2020;

(3) what, if any, protective measures should I put in place?

3 F has effectively abandoned his reliance on Article 13(b) and M has abandoned her attempt to bring into the case her reliance on what she says was F’s violence to her as a relevant factor.

4 In this case I have heard oral evidence from each party in respect of habitual residence and I have had helpful written and oral submissions from counsel who have represented them.

5 The facts are very largely agreed and they are as follows: The parties were both born in Georgia of Georgian parents and had nationality of that country. F left Georgia when aged 11 in 2004 and lived in Belgium until 2009, when he came to England. M was brought up and lived in Georgia until May 2017. The parties met in 2014 and married in Georgia in 2015. C is their only child and was born in Georgia on 11 October 2016.

6 In May 2017 the three of them moved to Belgium, F having previously acquired Belgian nationality. He says that this move was a stepping stone to their move in July 2018 to London where his mother has a home. They lived in England from July 2018 to 24 December 2019. In the spring of 2019 the family visited Georgia and M stayed there with C for two to three months, during which time C attended a private nursery in Tbilisi, paid for by F, before returning to London.

7 It is rightly conceded by M that by 24 December 2019 C was habitually resident in England and Wales. M says that the depth of the integration to England and Wales was not very deep and that the living conditions were less than ideal, involving moves of accommodation within the paternal grandmother’s home to make room for lodgers. I do not think that there is anything in this point. I accept that C’s life was largely spent with Georgian-speaking adults and children but that she had put down roots in London. It was the home of the family and where F worked.

8 The marriage grew unhappy, certainly from M’s perspective. M says that F was intermittently violent to her, which he denies.

9 On 24 December 2019 the parties and C left London for Georgia for what I am satisfied was intended to be (i) a holiday and (ii) an opportunity for M to complete some dental work in Tbilisi. In his oral evidence F said that he envisaged that M and C would stay two to three months in Georgia. There was no fixed return date as it was not known how long the treatment would take.

10 M says that it was always her intention to stay in Georgia permanently if she could summon

up the courage to tell F of her intention and go through with it if he was in opposition. F says there had been no talk before they left England of the visit being other than a temporary visit for holiday and treatment and I accept his evidence on that, not that it was significantly challenged, if at all, by M.

- 11 On arrival in Georgia F, M and C all stayed with her mother and stepfather at their home. They remained there for nearly three weeks until C was admitted to hospital suffering from bronchitis. M stayed in hospital with C and F spent his days at her bedside before returning to his grandmother's home to sleep.
- 12 On 16 January 2020 C was discharged and went back with M to the maternal grandmother's home, but she was readmitted to hospital for about five days on 24 January. When discharged on the 29th she again returned with M to the maternal grandmother's home. A couple of days later F was sufficiently satisfied that C was on the road to recovery that he returned to England and to his job. C went back to the nursery that she attended in spring 2019 in Tbilisi for about eight days either side of her hospital admissions, again paid for by F.
- 13 The result of C's illness was that M's dental treatment was delayed and was only completed in late March 2020, by when the pandemic had struck. Thus, the stay became further extended. On 4 or 5 April F returned to Georgia. He spent ten days in quarantine and when that was finished M and C joined him in Batumi, where F's family had a holiday home. After about a week M left C with him and his mother and went for a short stay in a monastery before returning to Tbilisi. It was between two to three weeks that C was with her paternal grandmother and for most of that time F was with her as well, although he also spent a few days in a monastery.
- 14 C was then collected by her mother and returned to live in Tbilisi. F made his own way to Tbilisi and thereafter C divided her time between her parents, who by then were separated. That remained the position until 2 July.
- 15 F says that by late April or early May he knew that M wanted out of the marriage. There is a dispute about the content of the conversations between the parents and whether they discussed the future for C. It seems to me inevitable that they must have discussed it and I am sure that M said she wanted to remain in Georgia with C. She says that the parents agreed, initially through the two sets of grandmothers, and then directly, that M and C would stay in Georgia with C being educated there and F having C with him for significant parts, maybe most, of the school holidays. F denies there was such a discussion.
- 16 I am sure that M did say as she said. I do not find that it was expressly agreed by F but he was, in my judgment, plainly aware of her wish and intention to remain in Georgia and that is further evidenced by their text exchange about C being registered at a state nursery or primary school in Tbilisi with effect from September 2020. I reject F's explanation that the registration was solely for the purpose of permitting C to go to the nursery when she happened to be visiting her mother. Although I do not find that F expressly agreed to M's proposals, I am satisfied that he did not expressly veto them either. It seems to me that he gave the outward impression of being resigned to them.
- 17 On 2 July C went on holiday with her father and instead of returning her on 25 July as had been agreed, he, without any notice to M, simply boarded a flight to London with C. It was a callous way to behave and plainly in breach of M's rights of custody, the existence of which has not been challenged.
- 18 It is against that background that I turn first to examine the question of whether habitual residence has, as a matter of law, already been settled by the courts of Georgia. The parties

agree that the statement of law that I should apply is that set out in the decisions of MacDonal J in *Uhd v McKay* [2019] EWHC 1239 (Fam) and Bryan J in *MAD Atelier International BV v Manes* [2020 EWHC 1014 (Comm). The statements of law set out in those cases are both derived from a case called *The Sennar (No 2)* [1985] 1 WLR 490. This was distilled by Bryan J into the following conditions which must be satisfied for a foreign judgment to issue estoppel:

“(1) the judgment relied on as creating the estoppel must be (a) by a court of competent jurisdiction; (b) final and conclusive; (c) on the merits;

(2) the parties (or their privies) must be the same in both sets of proceedings;

(3) there must be a clear determination of the issue by the judgment - it must not be merely collateral or *obiter* comment;

(4) the issue in the later action must be the same as the issue decided by the judgment in the earlier proceedings . . .”

19 This test was put very similarly by MacDonal J in the case to which I have referred and I need not set out his formulation of it.

20 So I turn now to examine the proceedings in Georgia. The matter came before the Civil Chamber of Tbilisi City Court on 13 November 2020. The heading of the judgment reads as follows:

“Object of the dispute - Defining the address of place of residence of a minor, imposing the payment of the alimony, restricting the rights of a representative parent.”

Then dropping a line and it continues that the Court:

“Has determined:

“The claim of [M v F] is pending with the Civil Chamber of Tbilisi City Court and claimed defining of place of residence of a minor, imposing the payment of the alimony, regarding restriction of the right of a representative parent.

“The defendant . . . presented statement of defense, in which requests terminating of the proceedings according to article 272, paragraph f, of Civil Procedure Code of Georgia.

“The court familiarized with the case materials and finds that the claim should be left untried due to the following circumstances . . .”

21 I select these representative paragraphs from the judgment:

“The term of place of residence is defined in the article 20 of the Civil Code of Georgia, according to its first part, the place where a natural parent chooses his/her ordinary dwelling shall be deemed to be the place of

residence of the person. The person may have several places of residence. According to the second part of the mentioned article the place of residence of a minor shall be the place of residence of parents having parental rights, and the place of residence of a ward shall be the place of residence of his/her guardian.”

22 It then goes on to recite that F presented his statement that the habitual place of residence of C “is London”. Then it continues:

“ . . . however, establishing a connection with the defendant and a minor is impossible due to the fact that [F] together with his minor child are in the Great Britain.”

23 Then it concludes:

“In the given case, it is stated that place of residence of a child is defined at father’s place of residence, herewith, she lives in the Great Britain from 25th July 2020, namely in London. Accordingly, his place of residence is in the Great Britain.”

24 It will be obvious from what I have read out that there are some problems with the translation, which is neither colloquial, nor, it seems to me, done by a lawyer and it does not make the task of interpreting it any easier.

25 M appealed the decision to the Tbilisi Court of Appeal and it came before that court on 10 February 2021. The mode of hearing is described as “reviewal - without an oral hearing”. I take this to mean that it was a decision made on the papers alone.

26 The judgment recites as follows:

“The Court of Appeals reviewed the submitted private complaint, examined the case materials, considered that the private complaint shouldn’t be satisfied, due to the following circumstances . . . ”

27 There is then a series of references to the Civil Procedure Code of Georgia before the court referred to “an international normative act, namely, the Hague Convention of 19 October 1996”. The court then referred to certain articles which I need not recite and then said this:

“According to article 5 of this convention, the judicial or administrative authorities of the Contracting State of the usual residence of the child have jurisdiction to take measures directed to the protection of the child’s person or property. According to article 7, in the event of a change of usual residence of the child to another Contracting State, the authorities of the new usual residence shall have the jurisdiction.”

28 I have to say, with great respect to the Georgian court, that the omission of the first few lines of Article 7(1) are striking. They read as follows:

“In case of wrongful removal or retention of the child, the authorities of

the contracting state in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State . . . ”

29 The court then went on to refer further to the Convention and said this:

“As a result of the legal analysis of the above mentioned norms, one of the noteworthy circumstances emerges, which largely determined which state’s law is applicable - the child’s usual residence. The usual residence of the person is the place, which a person voluntarily chooses to live in or he/she is actually there.

“Based on this, the chamber doesn’t agree with the position of the author of the private complaint regarding the recognition of the territory of Georgia as the place of residence of the child.”

30 The court then examined what it describes as the case materials and gave a little history. I recite the second part of it:

“ . . . for 3 years after the birth of the child, the child lived permanently outside Georgia, first in Belgium and then for 2 years in the United Kingdom, in London. The child was brought to Georgia in early 2020 and on July 25, 2020, she returned to the UK. This indicates that the main place of residence of the child and her parents is located not in Georgia, but the United Kingdom, where the child is currently. Therefore the chamber considers that the Court of First Instance correctly recognised the child [C’s] habitual residence to be in the United Kingdom, in the city of London.”

31 There is no reference at all to the alleged agreement that C would remain in Georgia. The date when she arrived in Georgia is wrong and there is no reference to the circumstances of the removal being without M’s consent. Nor is there any analysis of where C was habitually resident at 25 July 2020, rather than where she was at the time that the Court of First Instance and then the Court of Appeal made their decisions.

32 As I have already mentioned, I am acutely conscious of the difficulties of reading an unsatisfactory translation of a foreign judgment. I accept that I can read “usual” as being synonymous with “habitual” in describing residence but it is plain to me that whether or not the court in Georgia was asked to, it did not rule on the question I am asked to determine. The question before me is: what was the position on 25 July 2020 immediately before the removal? Where was C then habitually resident? That is the question before me and it is plain that this is not the question which the courts of Georgia asked themselves. I therefore come to the view that I am not bound by the decisions of the court of Georgia.

33 I now come to the second question, namely where C was habitually resident on 25 July. I accept the analysis given by Hayden J in *Re B* [2016] EWHC 2174, as commented on by Moylan LJ in *Re M*, and rather than recite all the tests set out by Hayden J I am going to select those from para.17 which seem to me to be particularly material:

“(i) 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 . . .

(ii) the test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence . . .

. . .

(v) a child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her . . . The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and it follows the child's integration which is under consideration.

(vi) parental intention is relevant . . . but not determinative . . .

. . .

(ix) it is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there . . .

(x) the relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident . . .

. . .

(xii) . . . There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely . . .”

34 I accept and follow what Hayden J says at para.18, namely that what is required when evaluating habitual residence is:

“ . . . a real and detailed consideration of [amongst other things]: the child's day-to-day life and experiences; family environment; interests and hobbies; friends, etc and an appreciation of which adults are most important to the child.”

35 Against that legal background I examine what seem to me to be the relevant factors. It is of course a holistic test which requires examination of the whole of the period that C was in Georgia and an assessment of the extent of her integration in a social and family environment in Georgia as of 25 July 2020.

36 The following factors weigh particularly heavily with me. First of all, factors in favour of Georgia:

(1) both her parents are of Georgian background and nationality, albeit that F renounced his citizenship in 2015 in circumstances which seem to me to be immaterial;

(2) the parents both speak Georgian at home. They speak some English, F better than M, but they both needed recourse to interpreters from time to time and were more comfortable, understandably, in their native language and of course the same applies to C;

(3) all M's family are in Georgia. Her mother and stepfather and her brother live in the house where M and C live, with the great-grandmother on another floor. F's close family are also in Georgia, with the important exception of his mother, who lives in England. M's statement that multigenerational living in Georgia is very much the norm has not been challenged;

(4) both parents have family homes in Georgia with which C is familiar;

(5) C has attended school in both countries and would be moving to a new school in September 2021 wherever she might be;

(6) C had hobbies and interests in both countries but in her seven months in Georgia had taken to attending regular and frequent ballet classes in so far as the pandemic has permitted them to take place;

(7) C has always been in the primary care of M until 2 July 2020 because, of course, F works hard and full-time during the day. The period between 2 - 25 July was a holiday with F which had been agreed between the parents;

(8) C's mother had by 25 July, indeed some three months or so before, clearly formed the plan that her and C's future was going to be in Georgia.

37 All those factors point to the likelihood of a quicker rather than slower acquisition of habitual residence in Georgia. However, on the other hand, I have to weigh these opposing factors. First, C had spent the 17 months prior to her arrival in Georgia in England and had put down sufficient roots there to be habitually resident. She had made friends there and, of course, she had formed an attachment to her paternal grandmother with whom she had been living during that period.

38 Secondly, the stay in Georgia was never anticipated to be of anything like the length it was. It became extended first as a result of C's illness, then the dental works, and then Covid and then, says M, by parental agreement. I recognise and accept the force of the point that C's belongings were largely left in London when the family went to Georgia on 24 December.

39 F says that the degree of, to use Mr Anderson's words, "shunting around" in Georgia between different relatives and different homes meant that C had little chance to put down roots in Georgia. I do not agree. In Georgia she was with people and in places that she knew and no doubt loved. She was living with her relations. For the majority of the time she was under the care of M and for the rest of the time with F and paternal grandmother. This integration which took place into the wider family was an important part of her putting down roots in Georgia.

40 In my judgment, after seven months in Georgia C had put down sufficient roots for the seesaw, as Lord Wilson graphically described it, to have shifted from the place where she had been for the previous 17 months. Seven months in the life of a young child is a long period and although the original agreement for what was intended to be a stay for a limited period had extended it was, in my judgment, extended as a result of M's expressed intention to stay and one which F had not challenged.

41 It follows from all that that I find that on 25 July 2020 C was habitually resident in Georgia and it therefore follows, in the circumstances where the Article 13(b) defence is not pursued,

that I should order her return.

- 42 I then have to consider what, if any, protective measures I should put in place. Both parents want to have her care in Georgia and it may be -- I know not -- that F will apply for permission to relocate to England. That will be a matter for the courts of Georgia, but until the courts of Georgia take over the case and assume jurisdiction, I have to hold the fort between the parents so as to protect C from harm.
- 43 It is clear to me that both parents need to play a major part in C's life and that her time should be divided between them in a way that is practical and pragmatic. If need be I will rule on that, but it seems to me that in the circumstances there should first be discussion between counsel to see if the parties are able to reach agreement about that.
- 44 So what I intend to do is bring this judgment to an end now and I will come back either later today or tomorrow or another convenient time this week, if required, in order to determine any practical issues that remain outstanding.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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