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Citation Number: [2021] EWHC 3842 (Fam)

Case No: FD21P00314

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Friday 3 December 2021

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
INCORPORATING THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF
INTERNATIONAL CHILD ABDUCTION
AND IN THE MATTER OF THE SENIOR COURTS ACT 1981

Before:

HER HONOUR JUDGE ROBERTSHAW

(Sitting as a Deputy High Court Judge)

Between:

EW

Applicant

- and -

KT

Respondent

MISS JENNIFER PERRINS (instructed by **Lyons Davidson Solicitors**) for the **Applicant**
MR ALISTAIR PERKINS (instructed by **Dawson Cornwell Solicitors**) for the **Respondent**

APPROVED JUDGMENT

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HER HONOUR JUDGE ROBERTSHAW:

1. By his application under the Hague Convention 1980, issued on 28 May 2021, the applicant father seeks the summary return to Poland of the parties' daughter N. N will be 4 in January 2022. She is Polish, as are her parents.

The issues to be determined

2. There is no dispute that at the time when N was removed from Poland by her mother on 8 December 2020, the father had, and was exercising, rights of custody. N's removal from Poland will only be wrongful for the purpose of Art.3 of the Convention if she was habitually resident in Poland at the relevant time. It is for the father to prove this essential factual prerequisite on the balance of probabilities. If N was not habitually resident in Poland at that time, Art.3 is not satisfied and the father's application for summary return under the Hague Convention fails. If N was habitually resident in Poland at the relevant time, Art.3 is satisfied and her removal will have been wrongful. Pursuant to Art.12 where a child has been wrongfully removed for the purposes of Art.3 and at the date of the commencement of the proceedings, a period of less than one year has elapsed from the date of the wrongful removal, the court must order the return of the child forthwith unless it is satisfied that one of a limited number of tightly defined exceptions apply.
3. In this case, the mother relies on the exception under Art.13(b) of the Convention, the harm exception.
4. Thus, the following issues fall to be determined:
 - (1) Where was N habitually resident immediately prior to her removal from Poland on 8 December 2020?
 - (2) If N was habitually resident in Poland, has the mother proved, on the balance of probabilities, that there is a grave risk that if N is returned to Poland, she would be exposed to physical or psychological harm, or otherwise be placed in an intolerable situation pursuant to Art.13(b). In this respect, the mother relies on the intolerable aspect of this exception;
 - (3) If the mother establishes that Art.13(b) is engaged, should the court exercise its discretion against ordering summary return?

The law

5. The law and the legal principles to be applied when determining an issue of habitual residence were considered by Moylan LJ in *Re M (Children)(Habitual Residence : 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105. Moylan LJ considered a number of other decisions, including the those of the

Supreme Court in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2014] AC 1, SC (E) and Lord Wilson's judgment in *Re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 606. I have also considered *Re R* [2016] AC 76; *Re G (Children)* [2021] EWCA Civ 139 [para 22] and the judgment of Hayden J in *Re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWC 2174 (Fam) [2016] 4 W.L.R. 156 (disapproved in part).

6. In *Re M*, Moylan LJ noted that habitual residence has been debated in a number of cases, including at least five in the Supreme Court. He considered the law at [42] - [63] of his judgment.
7. There is no dispute regarding the legal principles to be applied. I have borne these in mind throughout my consideration and analysis of the evidence. Drawing on the judgments of Moylan LJ in *Re M* and Hayden J in *Re B* (where approved in *Re M*) these principles can be summarised as follows:
 - (a) the critical question is where was the child habitually resident on the date of the removal? It is not simply: when was a previous habitual residence lost?
 - (b) to answer this, the essential question is whether, at the relevant date, the child has achieved some degree of integration in a social and family environment in the country in question. In this case, the country is Poland.
 - (c) there does not need to be full integration in the environment of the new state; some degree of integration will be sufficient.
 - (d) the need for some degree of integration is to distinguish habitual residence from temporary or intermittent presence (*A v A* drawing upon Sir Peter Singer's analysis of the CJEU's decision in *Mercredi (Area of Freedom, Security and Justice)* [2010] EUECJ C-497/10)
 - (e) in certain circumstances, the requisite degree of integration can occur quickly. For example, the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree of integration. Conversely, the deeper the child's integration in the old state, in this case England, probably the less fast his achievement of the requisite integration in the new.
 - (f) 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.
 - (g) continuing or historical connections are relevant as part of the enquiry, but they are not the primary focus of the court's analysis of the critical question: where is the child's habitual residence?
 - (h) the purposes and intentions of the parents is merely one of the relevant factors to be considered. The parents' intention is not determinative.

(i) in carrying out its factual enquiry and analysis, the court must take into consideration a variety of factors including the duration, regularity, conditions, and reasons for this stay in the state to which the child had been taken; the family's move to that state; the child's nationality; the place and conditions at school; the child's linguistic knowledge; and the family and social relationships of the child in that state.

(j) if all the central members of the child's life in the old state moved with him, probably the faster his achievement of habitual residence. Conversely, if any of the central members of the child's life remained behind in the old state, probably the less fast his achievement of it.

(k) the court will need to consider the nature, quality, and stability of the child's residence.

(l) so far as stability is concerned, it is the stability of the residence that is important and not whether it is of a permanent character.

(m) there is no requirement that the child should have been resident in the country in question for a particular length of time

(n) there is no requirement that there should be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely.

(o) in common with other rules of jurisdiction, the meaning of habitual residence is shaped in the light of the best interests of the child, and, in particular, on the criterion of proximity. Proximity in this context means the practical connection between the child and the country concerned. The court must also weigh up the degree of connection which the child had with the state in which he resided before the move.

(p) in the circumstances where the social and family environment of an infant or young child is shared with the primary carer or dependants, as I have already noted, the integration of that primary carer or parent must be assessed. The child would usually, but not necessarily, have the same habitual residence as the parent who cares for him or her. The younger the child is, the more likely that proposition, but it is not to eclipse the fact that the investigation remains at all times child focused.

(q) the situation in each case will vary enormously. General observations, therefore, must be applied with care so as to ensure that legal concepts or glosses do not lead the court to make a different decision to that which the factual enquiry would have produced.

(r) habitual residence is an overarching question of fact which requires an evaluation of all the relevant circumstances : it is essential that the court should not allow itself to be distracted from that essential factual enquiry.

(s) importantly, the focus of the court's analysis must be on the child's situation at the date of the alleged wrongful removal. In this case, that date is 8 December 2020.

(t) finally, in considering the question of habitual residence, it is not necessary for the court to make a searching or microscopic enquiry.

The background

8. These parents met in Poland in 2015. On 17 August 2016, the mother moved to live in England. The father joined her on 21 November 2016. They hoped that their poor financial situation would be improved by moving to England and the mother says that she did not want to live in Poland with her parents, with whom she has had, at times, a difficult relationship. The mother describes how she and the father both obtained work and developed increasingly stronger ties and relationships in England.
9. The mother and father married in Poland on 2 November 2017. By this time, the mother was pregnant with N. She says that the father persuaded her to stay in Poland with their new born daughter where they could have help from their families. The parents therefore moved back to Poland on 21 November 2017 and lived with the maternal grandmother. N was born in Poland on 9 January 2018 and the parents completed the usual administrative process of registering N to live in Poland.
10. The mother and father stayed in Poland for the duration of the mother's maternity leave. It is not disputed that their intention was always to return to live in England where they wanted to raise their daughter. N was diagnosed with a blood disorder on 13 November 2018 and, following treatment, was given the medical all clear to leave Poland on 14 December 2018, at a check-up appointment. The next day, 15 December 2018, the mother, N, and the father returned to live in England.
11. During 2019, it became clear that the parents' marriage was in trouble. They each accused the other of having extramarital affairs. The mother alleges the father was violent towards her. In his written statement, the father says [C197 at [40]:

I deny being aggressive towards K and intentionally hitting her on 26 June 2019. I admit to hitting K in the face but it was by accident.

In that same paragraph [40], he also admits being verbally abusive towards the mother, as she alleges.

12. The parent' marriage remained turbulent and fragile. They remained together until the father left the family home in England and drove to Poland in October 2020. His departure was unplanned. From about mid to late October 2020 the father started sending the mother messages from Poland indicating that he had suicidal thoughts and that he wanted her help in Poland. The mother has produced screenshots of some of these conversations. The father also sent the mother what Mr Perkins described as eery photographs of a train line at night

in the dark and messages saying such things as he will be “in another side soon”, his “life is worth nothing”, he:

...cannot live any longer with the fact that the child only has one parent. So it will be better for her to hear that her dad had simply died.

He made other references to an obituary and funeral.

13. In his statement, the father denies sending any messages that indicated he was having suicidal thoughts [C199 at [47]]. This denial is inconsistent with his messages. Other messages he sent included “*I am planning to go to the other world*” and “*I will talk to her when she is bigger from the other world*”. [C101]
14. At C103, there are translations of other messages sent by the father including “*Sleep well as every night, if I don’t come back you can search for me on the obituary*”.

At C104: “*I wish you cry loud at my funeral then maybe you will understand*”

These messages plainly indicate that the father was having suicidal thoughts.

15. The mother was worried about the father and, although they were no longer together, she wanted him to be part of N’s life. The father repeatedly asked the mother to come to Poland but she was reluctant to agree as she feared that he would make it difficult for her to return to England. The father promised that he would not do that. In a message he sent to the mother on 5 November 2020 at 10.40hrs, the father said :

I will buy for you and N. You will get in. Fly over. We will spend two weeks together? Is that okay? I will sort out the psychologist. We will go for the meeting, as much as we have time for. Let’s give each other two weeks with nothing else, only for ourselves. I will sort out with your family so we can spend two weeks together. So they could look after N when we go, for example, to the psychologist. No one will be saying anything or present each other with a *fate accompli*. Unless you don’t want to, we can even go to a hotel. I will fix you with a sick leave for this time so you can have an order at work. This would benefit N because we would vaccinate her. After that, you will return. I will not oppose and if you want, we will return by car and then we will sell it.

16. The mother says that, finally, she decided to travel to Poland and talk to the father. The fact that the father offered to drive her and N back to England helped her to decide to visit. The father proposed they could seek some psychological help in Poland. He contends that he and the mother discussed their marriage and that they agreed that she and N would return to Poland “*so that we could live together as a family. We decided that we would start afresh*”.

17. On 16 November 2020, the mother and N returned to Poland. The father says that as they had flown, they could only take limited possessions with them [para.20 of the father's statement at C193] but that the mother agreed, even before she left England, that she would be returning to Poland to live. This is inconsistent with his messages to the mother, for example, that she and N could return to England after two weeks.
18. The parents visited a family psychologist in Poland on 17 November 2020. The father says the mother is wrong to say that they saw the psychologist to help with contact. He contends that they saw the psychologist for marriage counselling. What the mother says in her statement about seeing a psychologist is not wholly inconsistent with the father's position. She says this at C8:

On 17 November 2020, we went to a family psychologist to seek help with establishing contact between E [that is the father's name] and N. However, E did not want to accept that I did not want to fight for our marriage anymore and considered our relationship has ended. For me, the purpose of that meeting was to agree some contact between him and the daughter.

19. During her stay in Poland in November 2020, the mother's family started encouraging her and trying to persuade her to move back to Poland. They also expected her to return to be the father's wife and she felt that she was constantly controlled and monitored by everyone. The father denies this and says that the mother agreed to stay on and live with N in Poland. The father denies that the mother repeatedly expressed a wish to return to England.

16 November 2020 – 8 December 2020

20. I turn now to look more closely at the period when the mother and N were in Poland between 16 November 2020 and 8 December 2020, a period of 23 days. As I have recorded, the mother says this was a temporary visit. The father says that the mother returned with N to live in Poland permanently.
21. Two days after her arrival in Poland on 16 November 2020, N's ID card and passports went missing. The mother believes that the father took these and burned them. The father denies that he did so, but he admits in his statement that he told the mother that he had burned them as a flippant remark [C20 para.50]. Whatever the reason for the disappearance of N's passport and ID card just two days after they arrived in Poland, there is no dispute that those documents went missing. On 26 November 2020, the mother informed the Polish police that they were missing.
22. On 19 November 2020, the mother applied for a new ID card for N in order to get a replacement passport for N, which she would need to enable her to return to England with her. There would have been no urgency or need for the mother to obtain replacement documents so soon if, as the father claims, they were going to be living in Poland permanently.

23. On 26 November 2020, ten days after the mother and N arrived in Poland, the father travelled to England by car to collect belongings from the mother's home and to give notice for the surrender of the tenancy of the property where she and N had been living for some time. The father claims the mother agreed that he could collect the belongings. The mother disputes this and said she did not agree. There is no dispute that the mother left Poland at short notice, just two days later on 28 November 2020 to stop the father taking her belongings. The father says she told him that she had changed her mind but even on his case, therefore, the mother's change of mind about staying in Poland occurred before 28 November 2020. The mother's case is that she never agreed to the father taking her belongings and she had not agreed to stay in Poland. The mother reported the father's behaviour to the police in England.
24. The father returned to Poland on 29 November 2020. The mother returned on 30 November 2020. Both stayed at the maternal grandmother's home. The mother was made to share a bedroom with the father which she did not want to do and says that she was hit by the maternal grandfather because she refused to sign a document saying that she could not leave Poland. There is no dispute that the father and the maternal and paternal grandparents all wanted the mother and N to remain in Poland.
25. On 2 December 2020, the mother left the maternal grandmother's home with N when no one was watching her. On 3 December 2020, the father applied to the Polish court without notice to the mother for an order to prevent N from leaving Poland. On 3 December 2020, the mother collected N's new identification card. On 4 December 2020, the Polish court made an order preventing N from being removed from the jurisdiction of Poland and for supervision for the exercise of the mother's parental authority. The mother was not aware of that order until January 2021. It would appear from the limited documents available for this hearing, that the Polish court did not have a statement from the mother setting out her position at the time the order was made on 4 December 2020.
26. On that same day, 4 December 2020, the mother applied for a divorce in Poland. On 8 December 2020, the mother and N travelled to England by bus and resumed living at their home. The mother informed the father that they were now in England. On 9 December 2020, the mother issued divorce proceedings in Poland. On 19 February 2021, the Polish court dismissed the mother's application for N to live with her. An order was made for N to reside with the father. The mother's appeal was refused on 9 April 2021. I have already referred to the father making his application to the Polish Central Authority, which he did on 15 March 2021, and the issue of his application under the Hague Convention on 18 May 2021.
27. The landscape of N's life up until 16 November 2020 was this:
 - (a) since 15 December 2018, when N was 11 months of age, she, her mother, and, until October 2020, her father, had all lived in England
 - (b) N had visited Poland for one week on three occasions in 2019 and for two weeks on two occasions in 2020.

(c) when the family moved home in England in October 2019 they remained within the locality of their former home. Thus a degree of geographical and social continuity was maintained.

(d) N's application for leave to remain in the United Kingdom until May 2024 under the EU settlement scheme had been granted in May 2019.

(e) From December 2018, N was registered with the NHS. She attended regular GP and specialist hospital appointments from that time.

(f) N's parents received child benefit from December 2018.

(g) N's parents were employed in England throughout

(h) Until N's parents separated and the father left England in October 2020, he maintained an account with a Building Society

(i) the mother was N's primary carer

(j) N was fully integrated in England. Her life was stable and secure here. She enjoyed a busy social life with other children, friends and English based family members.

(k) N had good command of the English language, which she spoke well.

As at November 2020, N was fully and deeply integrated in all aspects of her life in England.

16 November 2020 when the mother left England and travelled to Poland

28. The mother's case is that she only intended to stay in Poland for a week. She believes that the father burned N's travel documents in a deliberate attempt to prevent her from returning to England.

29. The father's case, as Ms Perrins, submitted through her oral and written representations, is that a sufficient degree of integration took place during the period when N was in Poland between 16 November 2020 and 8 December 2020 to establish habitual residence in Poland.

30. This issue of integration needs to be considered against the backdrop of these following factors:

(a) their departure from England was rushed. As Mr Perkins put it, it was a mercy dash.

(b) there was no preparation. There was no pre-planning.

(c) the mother flew with small hand baggage only. All her possessions and N's possessions were left in their home in England.

- (d) no enquiries had been made in Poland for pre-school or nursery facility for N.
- (e) the mother had not resigned from her employment..
- (f) the mother had not relinquished her flat in England.
- (g) no other members of the mother's family or close friends accompanied the mother and N to Poland and no plans were made for them to join her later.
- (h) No 'goodbyes' were made with good friends in England.
- (i) had the mother not had to apply for replacement travel documents for N, (allegedly burnt by the father) they would have returned well before 8 December 2020.
- (j) the mother planned to stay with N in Poland for one week only. The mother and N were very used to visiting these family members for family events, holidays, and medical treatment. N had done so with her mother on a number of occasions over the lengthy period of time (some years) that she had been living in England. For example: from February 2019 to 13 March 2019, the mother and N were in Poland for one month for medical treatment; between 17 August 2019 and 1 September 2019, the mother, father, and N were in Poland for a holiday for two weeks; between 22 September 2019 and 27 September 2019, the mother and N were in Poland to attend a funeral; in February 2020, the mother, father, and N were in Poland for a holiday; they travelled out again on 3 February 2020. (the father, believes they did so in January 2020, not February 2020). The father returned to England after this holiday on 10 February 2020. The mother and N returned after two weeks on 17 February 2020. The mother, father, and N visited Poland for a further holiday for two weeks from 19 August 2020. By this time, they clearly had difficulties in their marriage. Mother and N stayed with her parents. The father stayed with his parents. The mother, father, and N all returned to England after that holiday.
- (k) The father does not contend that during any of these periods, that on the day when N left Poland to return to England, she was then habitually resident in Poland. His case is that the period 16 November 2020 to 8 December 2020 was different from previous visits. The mother disputes this.
- (l) N's maternal and paternal extended families are Polish. They had always lived in Poland.
- (m) life for N in Poland in this period was unstable and unsettled.

The situation on 8 December 2020 when the mother left Poland with N

31. I turn then to look at the situation on 8 December 2020 when the mother left Poland with N. What was the situation on the ground?
- (a) the mother had taken no steps to secure employment in Poland.

- (b) the mother had maintained her employment in England.
- (c) the mother had maintained her home in England. She had taken no steps to relinquish her tenancy.
- (d) N had remained registered with her GP surgery in England where she had been registered since 18 December 2018 when she was just under 1 year of age. The mother and N remained registered with their dentist.
- (e) N remained under the care of a dermatologist in Bristol, England.
- (f) No steps had been taken to secure pre-school or nursery provision in Poland.
- (g) the situation in Poland was unsettled and unstable for N and had been for the duration of her stay. N's parents and grandparents were embroiled in ongoing, unresolved, heated disputes about her future. Her mother and primary carer was distressed and under emotional pressure. N's father spent little time with her. As Mr Perkins submitted, the reality for N during that period and as at the date and time when she left Poland, was that whatever was intended by her father, her situation was unstable, disruptive, and stressful.

Conclusion

- 32. I have considered all the representations, written and oral. I have reviewed the evidence, applying the relevant legal principles, which are not in dispute.
- 33. I have no difficulty in reaching the inevitable conclusion that N was not habitually resident in Poland immediately before her mother removed her on 8 December 2020. Accordingly, the father's application under the Hague Convention fails.
- 34. In light of that failure, I do not need to consider whether the mother's exception under 13(b) has been satisfied, nor do I need to exercise my discretion.

This judgment has been approved by HHJ Robertson.