OUTER HOUSE, COURT OF SESSION

[2018] CSOH 56

P448/18

OPINION OF LADY WISE

in the Petition of

DR NN

Petitioner

for orders under the Child Abduction and Custody Act 1985

against

HN

Respondent

Petitioner: Inglis; SKO Family Law
Respondent: Shewan; Drummond Miller LLP

1 June 2018

[1] The parties in this case are husband and wife having married on 5 February 2011. The petitioner, the husband, is German. The respondent, the wife, is Scottish. The case concerns their two children, a son, PRN born in July 2011 and a daughter, MFN born in January 2015. The children were born in Scotland and the parties lived in family in this jurisdiction until the middle of 2017 when they went to live in Germany. On 11 March 2018 during a short weekend trip to Scotland the respondent decided that her marriage to the petitioner was definitely at an end and she has retained the two children of the marriage in Scotland since then.

[2] It is not disputed that the parties share parental responsibilities and rights in respect of the two children or that the petitioner was exercising rights in relation to them at the time of the retention. The issue is whether their retention by the respondent in Scotland is wrongful. It is accepted by the respondent that the retention is wrongful if the children were habitually resident in Germany on 11 March 2018. She contends that they were not. Her position is that the children never lost their Scottish habitual residence. Her fall-back position is that, *esto* they lost their Scottish habitual residence at some point following the move to Germany in summer 2017 and acquired habitual residence in Germany, they lost that habitual residence when the parties went to stay in Austria in February 2018 in the circumstances that were discussed in evidence. On that basis, her fall-back position is that the children had no habitual residence at all on 11 March 2018.

[3] The affidavits and other documentary material lodged in the case indicated that there might be a stark dispute between the parties in relation to the circumstances of the move to Germany in 2017 and how the family came to be in Austria in 2018. Accordingly, in addition to the affidavits lodged, I permitted parole evidence, only from the petitioner and the respondent, primarily so that they could be cross-examined on the positions stated in their affidavits and other documentary material.

Undisputed facts

[4] While there was a considerable amount of material relating to the parties' departure from Scotland and the reasons for it, most of the essential facts of that were not in dispute. The parties are both dentists and had operated a business together in Aberdeen, comprising two practices. The petitioner is some 22 years older than the respondent. After the birth of the children the respondent worked part time. The parties agreed a plan to leave Scotland

and live in Germany, with the intention of moving to Austria in the longer term. The two dental practices in which the parties were partners were sold. An initial offer for those was made in about March 2017 and the sale settled in July 2017. By the time of settlement of the sale the petitioner had already moved to Germany ahead of the respondent and the children. He organised the rental of an apartment for the family in a town close to the German-Austrian border. The petitioner secured a dental practice in Austria and planned to commute each day from the family home in Germany. The location of the home was picked primarily because it was agreed that the parties' son PRN would attend a bilingual school (English and German) for the first year of his formal schooling so that he could become proficient in German and be schooled exclusively in that language thereafter. The chosen school was about a 30-40 minute drive from the town in Germany in which the parties lived (to which I will refer to as Town K) and the petitioner's practice in Austria was about 40 minutes' drive in the other direction.

[5] The parties duly moved to Germany in July 2017. The property they rented in Town K in Germany was unfurnished. Furniture was sent over from their previous home in Scotland to that property, although new items were also bought. I will return to that issue in discussing the disputed evidence. The petitioner took steps to explore selling or letting the property owned by the parties in Scotland but the market was not particularly favourable in the part of the country in which it is situated and no final decisions were taken about what to do with that property.

[6] After the move to Germany the parties lived in Town K in an apartment, the lease for which (number 6/35 of process in English translation) commenced on 1 June 2017 for an indefinite period. The earliest date on which the lease can be cancelled by the parties is 1 June 2018. In accordance with the requirements of local law, the children and the parties

were all registered as residing at that address as a sole residence. Documentation produced by the petitioner also illustrates that the children were enrolled in school and nursery respectively. PRN attended the international school where he was taught bilingually from 1 September 2017. The parties' daughter MN attended a local kindergarten from that time. The contract with PRN's school indicates that it is for a fixed period, namely for the school year ending 31 August 2018. A notice period of three months is required for cancellation of the contract (6/37/1 of process).

[7] Between 21 July 2017 and 20 February 2018 the parties lived in their family apartment in Town K. In mid-February 2018 the respondent confessed to her husband that she had been conducting an extramarital affair with a Syrian refugee that she had met at her German classes. The petitioner was extremely upset at this news. He wanted to do everything he could to save the parties marriage. He wanted to leave Town K to rehabilitate the parties' relationship and to place a distance between the respondent and the Syrian gentleman to whom she had given €5,000. Between about 13 and 20 February the parties discussed what they would do. On 16 February 2018 the respondent sent a message (by WhatsApp) to the petitioner stating:

> "Maybe you're right about Austria. Let's give it a try there. We will have to move anyway at some point x" (7/21 of process)

[8] The parties had no accommodation in Austria. Between 20 and 24 February they stayed in the holiday home of the person from whom the petitioner purchased the dental practice in Austria. Between 24 February and 9 March they stayed in the holiday home of another contact of the petitioner. That property is situated in the same town as the petitioner's dental practice. I will refer to that town as Town TH. A letter from the owner of the property there is lodged (the English translation being 6/31 of process), confirming that

his fully furnished home in Town TH was made available to the petitioner in the short term and temporarily. No steps were taken to change the registration of the parties' home from Town K in Germany. It is also a requirement in Austria to register a sole residence within three days of moving into an apartment. The petitioner was aware of that requirement. The parties did not register any residence in Austria.

[9] The parties' relationship was in considerable difficulty following the disclosure by the respondent of her extramarital affair. The trip to Scotland in March 2018 was intended to be for a short weekend only, from 9-11 March 2018. The petitioner had agreed to carry out some work for his old dental practice in Aberdeen which he had done from time to time following the parties' move to Germany. The respondent and the children were to stay for the weekend with the respondent's twin sister who lives in a town in the south of Scotland. Over the course of that weekend the parties communicated by WhatsApp messages. In the afternoon of Saturday 10 March the petitioner sent a message to the respondent in the following terms:

> "I love you driving in the rain is so boring vermisse dich"

The respondent replied to that message also on the Saturday afternoon in the following terms:

> "Hi darlin,
> I love you too we are at [named soft play venue]. Will be back in an hour x"

[10] On the morning of Sunday 11 March the respondent communicated to the petitioner that she and the children would be staying in Scotland and not returning to live with him in family.

Assessment of the disputed evidence

[11] The broad chronological background of events being agreed, the parties were in dispute about certain specific issues. The first related to whether their marriage had been in difficulties in 2017 just before the move to Germany. There had been a holiday in Rhodes in July 2017. The respondent's position was that the marriage was in difficulty at that time and she did not want to move to Germany but that following the petitioner flying out to Rhodes and discussing matters she had agreed to give the marriage another try. The petitioner's position in evidence was that there was no discussion of divorce at all at that time. He had been shocked to discover subsequently that his wife had consulted a solicitor. In any event, he accepted that his wife was at that time in doubt about moving away from Scotland permanently and that had been the tenor of the discussion. I do not consider that much turns on this dispute. I accept the petitioner's evidence that divorce was never mentioned, but there is no doubt that the respondent conveyed some unhappiness to him in relation to the proposed move. I conclude that she had more reservations about the marriage at that time than she perhaps conveyed to the petitioner and that she articulated those by reference to a reluctance to leave Scotland and settle in Germany and then Austria. The matter is relatively unimportant because the respondent accepts that she came round to the idea that the parties and their children should move to Germany as a family. The next issue in dispute is the parties' intentions in moving to Germany. In her affidavit and oral evidence the respondent maintained that the petitioner had told her in Rhodes that she had nothing to lose because she could go back to Scotland if things did not work out. There was an objection to this being put to the petitioner in evidence as it was a departure from the respondent's case in the answers which was that the move to Germany was a temporary one and that the ultimate intention was to live in Austria. There was no suggestion of the move

away from Scotland being temporary in the pleadings. In fact, there was again less between the parties on this point that it appeared initially. The petitioner accepted that there would always have been the possibility of moving back to Scotland as a family if things did not work out for them in Germany. He disputed any notion that the respondent could go back alone. I accept his evidence to the extent that any mention of things not working out in Germany would at the time of discussions in July 2017 mean not working out for the couple and their children, perhaps because of any anticipated language barrier for the respondent. I do not accept as true or accurate that the respondent's position in her affidavit that the move to Germany was somehow "very much a trial from my point of view and that I would return to Scotland with the children whenever I wanted if things were not to work out." (7/50 at paragraph 8). Had the possibility of things not working out in such a way that the parties would be separating been discussed in Rhodes, it seems inherently unlikely that the petitioner would have agreed in advance that the respondent could return on her own with the children. I conclude that at no point did the parties ever agree, even tentatively, that the situation that occurred on 11 March 2018 was an acceptable possibility.

[12] The parties were in dispute about whether the move to Germany was a permanent arrangement. The petitioner's position was that this was a pre-planned move as evidenced by the sale of the Scottish businesses and the transfer of the family home to Germany. The specific arrangement whereby the parties would live in Germany rather than on the other side of the border in Austria was in the petitioner's mind temporally open-ended as he did not know how long his wife would take to learn German. The respondent would require a qualification in that language to secure a licence to work either in Germany or Austria. The respondent's position was that the move to Germany was to be for no more than a year, coinciding with PRN's first year of formal schooling at the international school where he

would learn German but also be taught in English. In her oral evidence she sought to minimise the period during which the parties would have stayed in Germany. Equally, it seemed to me that the petitioner had that period rather more open-ended than had been discussed. I conclude that the primary reason to live on the German side of the border was so that the parties' child PRN could become bilingual and also so that the respondent could learn German. For someone such as the petitioner living either side of the border between Germany and Austria is a relatively minor issue as he explained in his evidence. People can live in Germany but work in Austria, attend school in Austria and so on. The language is the same. What is indisputable is that the parties made their home in Germany and lived there as a family from July 2017. There was a dispute about the extent to which the respondent integrated in Germany. The petitioner said in cross-examination that he found it difficult to respond to a suggestion that she struggled to integrate as that issue was all tied up with her extramarital affair. From what he had seen before the disclosure of the affair he thought his wife had really integrated very well. She had received social invitations including from his brother. The children had settled well at school after a short and unsurprising initial period of unsettlement following the move. The parties' son was very excited by the surroundings as the family lived near to a beautiful lake. The respondent's position was that the children did not settle well, that PRN struggled to learn German and to make friends. She did concede in evidence that the children had become more settled towards the end of their time in Germany and that PRN's German had become more proficient. I accept that it will have been a little difficult and confusing for PRN to settle in Germany and be schooled much of the time in a foreign language. However he is apparently able enough and it is universally known that at six years old the transition to a new language is far easier than for an adult. The documentary evidence tends to support

the petitioner's oral evidence that PRN was making good progress at school. On 2 February 2018 he received an award for "good listening" (number 6/9 of process) and his student performance feedback illustrates that he was showing significant progress even by November 2017 (6/20 of process). He participated in a drumming club at school. He was not involved in a large number of other extracurricular activities partly because of the commute to school each day.

[13] During the period July 2017 to 20 February 2018 the children were entirely reliant for their feeling of stability and security on their parents, the central people in their life. They were living in a situation where their mother did not work and their father was working full time and supporting the family financially. They had moved from an environment that was entirely English speaking to one that was predominately German speaking. In essence, they had moved from their mother's cultural environment to that of their father. I find that they had integrated well into that new environment both in terms of their daily activities such as school and kindergarten and their surroundings in which they had their clothes, toys and their furniture from Scotland.

[14] There was an illuminating dispute in oral evidence about the furniture from the parties' previous home in Scotland. The petitioner said in evidence that the home in Germany was furnished with the parties' furniture and belongings from their Scottish property which was now uninhabitable. The respondent's initial position in oral evidence was that the furniture from the Scottish property was not all removed and taken to Germany and that the petitioner had been removing that furniture bit by bit, recently and without her knowledge. Eventually she was constrained to accept that the furniture for the German flat did come from the Scottish property although she still maintained that it was taken in stages. She then explained that some furniture was taken at the time of the move to

Germany and then another lot taken in December. I found this to be an example of the respondent's tendency to try to emphasise only matters that she considered were of assistance to her case and to be reluctant to discuss issues that went against one of the two positions she was adopting. She was sometimes inconsistent. For example, she continued to attempt to maintain there was always a possibility of a return to Scotland and it was for that reason that the property in Aberdeenshire had not been given up and that she had not disposed of her car. On the other hand she stated in terms "I did want to move abroad. My intention was to make the marriage work and for Germany and then Austria".

[15] A significant area of dispute was related to the parties' intentions when they stayed in Austria between 20 February 2018 and 9 March 2018. The respondent claimed in evidence that the possibility of an earlier move to Austria had been discussed first in December 2017. She said that there was a discussion over the Christmas holidays about this. In any event, she accepted that there was no decision to move to Austria at that time. There was clear evidence that the impetus to effect a sudden, previously unplanned move to Austria was the crisis in the marriage following the disclosure of the respondent's extramarital affair. The petitioner remained desperate to salvage the marriage and his family life and was very keen to remove the family from the situation in which the affair had started in Town K. Interestingly, for her part, the respondent said in evidence that at the time she did not think it was necessary to uproot (her word) their son PRN in the middle of the school year and go to Austria and she would have preferred to stay in Germany in an attempt to save their marriage. She agreed that in February 2018 she was willing to give the marriage one last try. A message she sent to the petitioner on 16 February 2018 (number 7/21 of process) was put to her which states in terms that she was willing to give Austria a try. She claimed that this meant that she was giving the marriage a try. The context of that was that she maintained

that the move to Austria was to be a permanent one and not a trial period. In any event, the parties stayed in holiday accommodation in Austria between 20 February and 9 March. The children were enrolled in school and nursery respectively. The respondent contended that there was nothing by way of a trial in terms of PRN's attendance at the Austrian school. However, a letter (number 6/40 of process) from the school that PRN attended for a short period in Town TH confirms that his attendance there did not proceed "beyond a short trial period after the shadowing on 28 February". In a message to her sister on 22 February 2018 (No 7/37 of process) the respondent said of the proposed change of school "*[PRN} actually doesn't seem bothered at all about changing the school. I'll let them try it there. There's one teacher to 12 students."* This tends to support the information given in the letter no 6/40 of process.

[16] In essence, the area of dispute about the period in Austria centred on whether the move there was for a trial period or whether it was with a permanent intention to settle there. Neither party suggested that the children had become habitually resident in Austria. The contention of the respondent is that the parties had severed their ties with Germany with a view to residing permanently in Austria. The petitioner said that Austria was a trial period with all options kept open. In this context, the petitioner's position was that, while notice had been given to PRN's school in Germany, this was largely to do with the three month notice period and the requirement to pay fees if the contract was not cancelled. He produced documents that post-dated the retention of the children in Scotland confirming that places would still be open for PRN there and also for MN at a kindergarten in Town K. He also disputed that the lease of the property in which they lived had come to an end, although ultimately he acknowledged in evidence that he and his wife had attempted to cancel the tenancy but had been unsuccessful in doing so because the minimum period for the lease had not expired. There is a clear inconsistency between the petitioner's position in

his affidavit on this matter and the oral evidence he gave. He sought to explain that by stating that his affidavit had referred to an attempt by the respondent to make contact with these organisations by telephone after 11 March without his knowledge or consent as a separate matter from the letter they had written to attempt to cancel the tenancy and the school. This aspect of the petitioner's evidence was unsatisfactory. I conclude that the parties did take a number of steps in furtherance of their joint decision to try to save their marriage and to attempt a fresh start in Austria. However, they did not depart from Germany in the manner that they had from Scotland. They wanted to try Austria as part of an agreement to try again at their marriage. Any steps they took were incomplete and at an early stage. Their attempt to make a fresh start was thwarted by the respondent's decision to retain the children in Scotland on 11 March 2018 and to remain here herself.

[17] The circumstances in which the respondent remained in Scotland on 11 March were effectively not in dispute and I have already narrated them. The respondent said clearly in evidence that the final decision that she could not go on in her marriage was taken on 11 March. She associated the decision to end the marriage with a decision to retain the children in Scotland. She said that the state of the parties' marriage had been discussed constantly during the 16 days they were in Austria. She said she felt under suspicion having disclosed the extramarital affair and that she had no freedom. Her reasons for ending the marriage were related to that. She did not at any stage indicate that she ended the marriage because she thought it would be better for the children to live in a particular place. In relation to the message she had sent her husband on 10 March telling him that she loved him she said that just because the marriage was ending did not mean to say that she did not still love him. She specifically said that when she sent that message she had not made up her mind that she was not returning to him. On the evening of Saturday 10 March she and her

twin sister went to see her mother. She repeated that she realised then that she did not have any freedom in her life and that is why she thought her marriage was ultimately unsustainable.

[18] During the time that the respondent has been in Scotland she has stayed at her sister's home. She has no intention of returning to the property the parties previously lived in in the north of Scotland. She has enrolled PRN in a local school in the town in which her sister lives. Her position in relation to the parties' long term plan in Austria was that they had intended to move into a property that the petitioner had been sending her photographs of that would become available in June 2018 but that eventually they wanted to design a house and a swimming pool in Austria. The petitioner agreed that there was in February/March 2018 a suitable attractive property in Austria that he had sent photographs of to the respondent as part of the discussion about a possible fresh start there. He said that the property was probably no longer available and that any such plan had not been pursued after the respondent retained the children in Scotland.

[19] It will be apparent from the above narration that I did not find either party to be wholly credible and reliable in oral evidence. Each seemed well aware of the consequences of being completely open about the detail of events. I acknowledge that the personal stakes are high for both of them and some of the discrepancies in their accounts were explicable by each emphasising the matters that were important to the case being presented rather than any general dishonesty. Where their accounts differed I tended to prefer that of the petitioner, other than in relation to the issue of notice already referred to. However, in determining this matter I have placed particular emphasis on the undisputed facts and on documentary material that tends to support a particular conclusion to reflect that neither party's oral evidence could be accepted in full. I have placed little weight on the affidavit of

the respondent's sister. It illustrates that the sister, perhaps understandably, was entirely partisan in her support of her sister during the material period following the breakdown of the marriage. Both the respondent and her sister, in their affidavits, stray into a number of matters about the parties' marriage that are wholly irrelevant to the issue of where the children were habitually resident on 11 March 2018. They represent an unwarranted attack on the petitioner's character to which he has, quite properly, chosen not to respond. It may be that the respondent was keen to present a balanced picture of the problems in the parties' marriage as she saw them so that the focus was not centred on her affair. That ignores the obvious point that the court is not concerned with the morality of the affair, but only with its consequences for the parties' living arrangements in order to analyse the nature of the time spent in Austria in late February/ early March 2018.

The applicable law

[20] The Hague Convention on the Civil Aspects of International Child Abduction is incorporated into domestic law in this jurisdiction by the Child Abduction and Custody Act 1985. Article 3 provides as follows:

> "The removal or the retention of a child is to be considered wrongful where -
>
> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

Article 12 provides that where a child has been wrongfully removed or retained in terms of Article 3 and less than one year has elapsed from the date of the wrongful removal or retention the authority concerned shall order the return of the child forthwith. There are

certain limited defences to a return where wrongful removal or retention is established but none applies here. The sole issue is whether the children of the parties were habitually resident in Germany immediately before their retention in Scotland. Accordingly the only authorities to which mention was made by the parties related to the issue of habitual residence. There was effectively no dispute between the parties on how the law in relation to that issue in the context of international child abduction has evolved in recent years.

[21] In *A* v *A and Another (Children): Habitual Residence (Reunite International Child Abduction Centre and Others Intervening)* [2013] AC 1 the UK Supreme Court examined the traditional view of habitual residence as that had been interpreted in England and Wales against the European Court of Justice guidance and following the implementation of Council Regulation (EC) No 2201/2203 ("Brussels II *bis*"). At paragraph 48 of the judgment Baroness Hale of Richmond, citing the case of *Proceedings brought by A* [2010] Fam 42 decided by the Court of Justice of the European Union and other relevant authorities drew all of the threads of the previous case law, including European case law, together and made eight relevant points (at paragraph 54). These included that habitual residence is a question of fact and not a legal concept such as domicile (and so there is no legal rule akin to that whereby a child automatically takes the domicile of his parents); that the test adopted by the European court for habitual residence was "The place which reflects some degree of integration by the child in a social and family environment" in the country concerned; that it is unlikely that such a test produces different results from that previously adopted in the English courts. Baroness Hale specifically expressed the view that the test adopted by the European court was preferable to that earlier adopted by the English courts insofar as they had focused on the purposes and intentions of the parents rather than the situation of the child. Accordingly any test that preferred the purposes and intentions of the parents should

be abandoned in deciding the habitual residence of a child. Further, the social and family environment of an infant or young child is shared with those (whether parents or others) on whom he is dependent. In any case in which habitual residence is at issue 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 enquiry should not be glossed with legal concepts which would produce a different result from that which the factual enquiry would produce. Finally the court noted that it was possible that a child may have no country of habitual residence at a particular point in time. The reference to that possibility came from the Advocate General's opinion in the case of proceedings brought by *A*, cited above, at paragraph 45. The possibility of a child having no habitual residence at all during a transitional period was said to be "conceivable in exceptional cases".

[22] In the subsequent case of *In re B (a child)* [2016] AC 606 the UK Supreme Court expressed the following view on the way in which the loss of one habitual residence and the acquisition of another operates:

> "45 I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts *down* those first roots which represent the requisite degree of integration in the environment of the new state, *up* will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it.
>
> 46 One of the well-judged submissions of Mr Tyler QC on behalf of the respondent is that, were it minded to remove any gloss from the domestic concept of habitual residence (such as, I interpolate, Lord Brandon's third preliminary point in the *J* case), the court should strive not to introduce others. A gloss is a purported sub-rule which distorts application of the rule. The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him: (a) the deeper the child's integration in the old

> state, probably the less fast his achievement of the requisite degree of integration in the new state; (b) 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; and (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."

A recent example of a Scottish case heard by the UK Supreme Court on this issue can be found in *In re R (Children)* [2016] AC 76. There Lord Reed emphasised that it was the stability of the residence that was important, not whether it is of a permanent character. There is 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 (paragraph 16).

Application of the law to the facts

[23] As already indicated, it was not in dispute that, unless the children of the parties were habitually resident in Germany on 11 March 2018 the Convention is not engaged and their retention in Scotland by the respondent is not wrongful in terms of Article 3. The first issue then is whether the children lost their habitual residence in Scotland during 2017 and acquired a habitual residence in Germany. I have no hesitation in finding that they did. On the undisputed evidence, the move to Germany was pre-planned and with the intention of a permanent relocation of the family away from Scotland. The parties' dental practices were sold as part of the planning for that move. They were living together in family and chose to set up a new home in Germany for all the reasons explored in evidence. Only the petitioner was to be working at that time. The family's economic interest and physical location were transferred away from Scotland. Their personal property including furniture was taken to

Germany. Although the property they owned in Scotland was not sold or let out this was not connected with any intention to return to Scotland. Of course the parties' intentions are only a factor and not a central part of the test and an intention to be in Germany permanently is not required for a change of habitual residence. On any view of the evidence the parties intended to be in Germany for at least a year. The family integrated into Germany by living there, by the respondent attending German classes so that she could work and by the children attending school and nursery on a full year contract basis. There was no dispute that every aspect of the children's lives between July 2017 and late February 2018 took place in Germany. On the test of looking to see whether the place in question (Germany) reflects some degree of integration by the children in a social and family environment, I am in no doubt that these children became habitually resident in Germany shortly after they moved there. There is an apparent inconsistency between the respondent's primary position and her fall-back position in this case. She contends that after seven months in Germany following a pre-planned move and attendance at school and nursery the children did not lose their habitual residence in Scotland, yet as a fall-back position she contends that if they were habitually resident in Germany they lost that established habitual residence after a two week stay in Austria in late February 2018. Of course there is authority to support the proposition that the shallower the integration in a state the quicker the loss of habitual residence can be. I am of the view that the children's integration in Germany was not shallow at all. The children have dual nationality and their father is a German citizen. They were living in that country on an open ended basis and close to the border with Austria where their father was working. As young children, the whole focus of their lives was their parents, the home they shared with those parents and their immediate surroundings. Such evidence as there was about them being unsettled

initially does not lead to any conclusion that they did not become habitually resident in Germany. The respondent's own evidence was that latterly they had been more settled and that PRN in particular had become far more proficient in the German language. Any unhappiness on the part of the respondent in relation to living in Germany was inextricably linked with her unhappiness in the marriage. Her lack of progress in the German language appears to have been related to the time during which she conducted an extramarital affair and so attended fewer classes. The fact that the parties always planned to move to Austria in the longer term in no way precluded the children from acquiring a habitual residence in Germany. Until late February the parties had no concrete plans to move to Austria imminently and even then the context of bringing forward a plan to move there was the difficult emotional circumstances described in evidence. For these reasons, I reject the contention made on behalf of the respondent that the children did not lose their habitual residence in Scotland. I conclude that they acquired a habitual residence in Germany shortly after the parties moved there and settled into the home in Town K which the petitioner had organised and already moved into. It is not necessary to identify any particular date or time at which that the habitual residence in Germany might have been acquired. The parties moved to Germany after the summer holiday in Rhodes in July 2017 but the contract for PRN's school has a start date of 1 September 2017. It is sufficient for present purposes to conclude that the children had acquired habitual residence in Germany around the time PRN was settling in at school.

[24] The second question then becomes whether the children had lost that habitual residence by 11 March 2018 because of the time spent by the family in Austria in the circumstances analysed in evidence. Counsel for the petitioner described the chapter of evidence relating to Austria as a "red herring". I disagree with that proposition. The

evidence relating to that period requires to be analysed to see whether, exceptionally, this is a case where these children had no habitual residence at all on 11 March 2018 or whether they had not yet lost their habitual residence in Germany. Much was made by counsel for the respondent of the intention of the move to Austria being a permanent one. The significance of that was said to be that, albeit that no habitual residence in Austria had been acquired by 11 March, the relatively shallow integration in Germany meant that it was easier to lose. The respondent's position is that the family had severed ties with Germany and their status in Austria had not crystallised into habitual residence and so the children had no habitual residence at all and the country in which they are present (Scotland) would then have jurisdiction to determine any issues relating to their care and upbringing.

[25] I have already examined the disputed evidence in relation to the move to Austria. The circumstances in which the parties agreed in principle that they would accelerate a longer term aim of a move to Austria were those that arose following the respondent's disclosure of the extramarital affair. I consider that it is significant that the respondent herself said in evidence that she would have been content to stay in Germany at that time rather than accelerate any move. I consider that, somewhat unintentionally, this supported the deeper degree of settlement of the family in Germany that I have found existed. Set in context, it is apparent that the discussions about a move to Austria were in reality discussions about the parties trying to save their marriage rather than emanating from an intention to move their physical and social environment to a different country. A transition over the border from Germany to Austria was in principle not difficult. The children were already being schooled in German (or bi-lingually) and that would continue. The petitioner agreed that PRN could have a trial at the Montessori school in Town TH in Austria and that occurred. Notice of cancellation was sent to the school in Germany to ensure that no further

financial commitment would arise there in the event that PRN did not return. While it is noteworthy that relocation to Austria was given as the reason for giving notice in respect of PRN to the school, that is equally consistent with both the petitioner's evidence about a trial period in Austria and the respondent's claim that it was intended to be permanent. As already explained, it is understandable that each party now seeks to put a different complexion on what the long term plans were at that stage. What is absolutely clear is that the family was in a state of flux and crisis. The petitioner was unconcerned which side of the border the family lived on; his intention was straightforwardly to try to save his marriage. The respondent claims that the move to Austria was to be permanent, yet her evidence was that she and the petitioner were constantly discussing what to do between mid-February and 11 March.

[26] Two features in relation to the decision to move to Austria are noteworthy in the context of whether this resulted in a loss of the habitual residence in Germany. First, the parties and the children continue to be registered as having their sole residence in Germany. They have not been registered as residing in Austria. As a German national working in Austria the petitioner was well aware that if he and his family set up home in Austria they would require to register there. He had taken no steps to notify the authorities in Germany that the family were no longer resident there. He and the respondent had taken steps to try to cancel the lease in Germany but that was unsuccessful and so by 11 March 2018 the tenancy was still in place. On the basis of the authorities referred to it is important not to place too much emphasis on what the intentions of the parties were at this time. Just as the acquisition of habitual residence in Germany depended on the acquisition of a home and social environment there, so to the loss of habitual residence in Germany requires the actual severing of those physical and social ties. The children of this marriage had settled in a

home in Germany. Their furniture and belongings were there. They were taken to two separate holiday properties in Austria. The respondent states in her affidavit that they packed up a campervan to go to Austria but there is no suggestion of a permanent physical move to the two temporary holiday homes in Austria, both of which were fully furnished. The family home in Germany was not lost. The petitioner is currently living in it and the tenancy continues. Counsel for the respondent was critical of the petitioner's references to a "holiday" in relation to the time in Austria when the parties had taken steps to enrol the children in school there and had been sending messages to each other about a rental property in the Town of TH that was available from June 2018. However, from the point of view of settlement of a child, the period during which the parties were in Austria was for no longer than a holiday period and the parties stayed in holiday homes. In those circumstances, the short period of the time in Austria coupled with the state of flux that the parties were in militates against the loss of habitual residence in Germany in the way that the Scottish habitual residence was lost, as I have found, on the move to Germany. The parties had agreed to give Austria a try but that agreement was never implemented in a way meaningful to the children in terms of their home and social environment because of the respondent's decision to retain the children following the weekend trip to Scotland.

[27] This is not a case in which the children have returned to live in a home in which they were settled prior to their move to Germany. They are staying at the home of the respondent's sister in a different part of Scotland to that in which they previously lived. Accordingly, there is no family home in Scotland and none in Austria. There is a family home in Germany that the children lived in until the mid-term break in February 2018. Their retention in Scotland was less than three weeks after their departure from Germany. In those circumstances I conclude that the children's established habitual residence in

Germany was not lost by the time they were retained in Scotland on 11 March. They had been absent from their home in Germany for the equivalent of a holiday period. The parties were proceeding on the basis that they would attempt a reconciliation by moving to Austria but had not severed the tie of residence in the German town in which they had been settled since the summer of 2017. In the case of *In re B (a child)* [2016] AC 606 in paragraphs 45 and 46 cited earlier, Lord Wilson used the analogy of a seesaw to illustrate how habitual residence is lost in one state and acquired in another. Much depends on the level of integration in the old state and the nature of the move to the new state. The parties were agreed in this case that insufficient new roots were put down in Austria to amount to any integration there. It is part of the loss of one habitual residence and the acquisition of another that the child's roots in the old state (Germany) are removed. The reason why it is truly exceptional for a child to have no habitual residence at all is because in nearly all cases the roots in an old state are not entirely severed until new roots have been put down in a new state. Lord Wilson also emphasised the following in the case of *In re B* (at paragraph 42):

> "…if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former."

In this case I have concluded that the children had not lost their habitual residence in Germany by 11 March 2018. Had I concluded that it was equally possible that the children lacked any habitual residence on that date, I would have followed the path suggested by Lord Wilson, namely what I perceived was better to serve the interests of the children. I am in no doubt that such a path would have led to a conclusion that they retained their German habitual residence.

[28] This case involves a classic abduction of the type that the Hague Convention is directed to resolve by the swift return of children. The courts in Germany, where the family made their home from the summer of 2017, will, if the parties cannot resolve matters themselves, be able to determine what the arrangements for the care and upbringing of those children should be going forward. As I have concluded that the children were habitually resident in Germany at the time of their retention and as there are no other defences to a return put forward by the respondent, I intend to make an order for their return to Germany as sought by the petitioner. However, I consider it appropriate to give the parties a short period during which to discuss the arrangements for that return. The petitioner indicated that he could provide childcare for the children at the home in Germany if the respondent did not go back with the children. However, I formed the impression that the respondent would be unlikely to separate herself from the children. Assuming that to be the case, the necessary arrangements will require to be made, including consideration of whether the respondent and the children should return to the family home in Germany or find alternative accommodation in that country during any period in which future care arrangements are being discussed.

[29] Accordingly, I will not pronounce a final order until the parties have had an opportunity to discuss these matters. I will put the case out by order on 5 June 2018 for the making of a final order at that time.