ENGLAND AND WALES / JUDGMENT

X (Habitual Residence), Re

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MRS JUSTICE THEIS Approved Judgment RE X: (Habitual Residence) Neutral Citation Number: [2019] EWFC 84 (Fam) Case No: ZW19C00221 IN THE FAMILY COURT SITTING AT THE ROYAL COURTS OF JUSTICE Royal Courts of Justice Strand, London, WC2A 2LL Date: 7/11/2019 Before: MRS JUSTICE THEIS - - - - - - - - - - - - -

- - - - - - - Between: A Local Authority
- and - A
- and - B
- and - X (Through their Children's Guardian) Applicant 1st Respondent 2nd Respondent 3rd Respondent
- and - SSHD Proposed Intervener
- Ms Anne-Marie Glover (instructed by A Local Authority) for the Applicant Mr Jason Green (instructed by Dawson Cornwell) for the 1st Respondent Ms Gill Honeyman (instructed by Sweetman Burke & Sinker) for the 3rd Respondent Mr Alan Payne Q. C. (instructed by SSHD) for the Proposed Intervener The 2nd Respondent did not attend court Hearing dates: 30th October 2019; Judgment 7 November 2019
- Approved Judgment I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. ..... MRS JUSTICE THEIS Approved Judgment RE X: (Habitual Residence) MRS JUSTICE THEIS This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court. Mrs Justice Theis DBE:

Introduction

1. This matter is listed to determine the issue of the court's jurisdiction to deal with care proceedings issued by the Local Authority on a date in June 2019 relating to X, now a young adolescent. X's mother is a party to these proceedings, as is X through their Children's Guardian. The Local Authority have made extensive enquiries to find a way of contacting the father which, to date, have been unsuccessful. 2. 3. 4. 5. 6. 7. 8. Both the Local Authority and

the Children's Guardian support the court determining that X's habitual residence was here in June, when these proceedings commenced. Mr Green, on behalf of the mother, has limited instructions and does not oppose the submissions advanced by the other parties. The court has the benefit of detailed written skeleton arguments submitted by the Local Authority and the Children's Guardian, as well as skilled and focussed oral submissions for which the court is extremely grateful. I have concluded, for the reasons set out below, that X's habitual residence was established here at the time these proceedings commenced. Relevant background X is a national of Y a non EU country which is a signatory to the 1996 Hague Convention. X travelled to this jurisdiction in early 2019, on a holiday visa with their mother to stay with a relative who lived in this jurisdiction. In early 2019 X was effectively abandoned here, when their mother returned to Country Y without them, taking their passport. The child was left in the care of a relative without that person having been given any prior notice of the mother's actions. The mother is subsequently reported to have done this due to her fear of X self-harming if he/she returned to Country Y. Shortly after the mother left, the relative informed the Local Authority of the position, and shortly after that they took X to the Local Authority offices, informing them that they were unable to care for him/her. X was accommodated with a foster carer under s20 (1) (b) Children Act 1989 where he/she remains. Some weeks later the mother informed the Local Authority she did not intend to return to collect X and does not seek for him/her to be restored to her care. In communication with the mother over the following months she has remained consistent that she does not wish X to be returned to her care, although giving differing reasons for that position. MRS JUSTICE THEIS Approved Judgment RE X: (Habitual Residence) 9. 10. 11. 12. 13. 14. 15. 16. As there was no one who exercised parental responsibility in respect of X in this jurisdiction the Local Authority issued care proceedings in June 2019, and an interim care order was made shortly thereafter. There is limited information about X's life prior to their arrival here. X was born and brought up in Country Y, has one younger sibling and his/her parents separated when he/she was about 4 or 5. Following that X moved between the care of their parents and paternal grandmother. There is no reliable information about where X attended school. According to the visa application made by the mother in the two years prior to coming here X was cared for by their mother and stepfather. According to X he/she was living at different times with other members of their family. X alleges neglect, physical, emotional and sexual harm against a range of maternal and paternal family members. In addition, X has described to the social worker here issues concerning their gender identity, and their wish to explore what that means and the difficulties in doing this within their family and culture in Country Y. X says they want freedom to explore their identity, with access to support their emotions and thoughts and they are aware of the difficulties in doing that in Country Y. X has been with their current carers since March. Save for some difficulties when in respite care in August, X is reported to have settled well with their foster carers. They are matched in terms of language and culture, X takes part in family activities, attends a local school and other extra-curricular activities. During the majority of their time with the foster carers X has been consistent in stating that they did not wish to return to Country Y, asserting they will self harm if he/she is forced to return. More

recently there has been times when X has been more ambivalent, however the situation remains that no members of their family are able to care for X. Directions were made prior to this hearing to serve the Secretary of State for the Home Department ('SSHD') with this application and an agreed case summary. The SSHD responded that she wished to apply to intervene in these proceedings, the concern being that X had no right to remain in this jurisdiction and no application was pending, even though the Local Authority had sought independent legal advice for X as to his/her immigration position. Mr Payne Q. C. attended this hearing on behalf of the SSHD. Following assurances being given by the Local Authority to write to the SSHD to inform them of X's current circumstances, to keep the SSHD informed as to these proceedings and that an immigration application will be issued on behalf of X within 28 days the SSHD did not pursue the application to intervene and took no further part in the hearing.

Legal Framework

There is no significant issue between Ms Glover, on behalf of the Local Authority, and Ms Honeyman, on behalf of X, as to the relevant legal principles. The jurisdiction of the court is governed in England and Wales by Council Regulation (EC) No 2201/2003 ('BllR'). If X had acquired habitual residence in England and MRS JUSTICE THEIS Approved Judgment RE X: (Habitual Residence) Wales by June, when the court was seised of the current proceedings, this court has jurisdiction to determine the proceedings by virtue of Article 8 (1) and Article 16 BllR. 17. They submit if habitual residence is not established at that time the court may need to go on to consider the provisions in the 1996 Hague Convention on Parental Responsibility and Protection of Children ('1996 Convention'), which both the UK and Country Y are signatories. By virtue of Articles 1 and 3 habitual residence is the fundamental basis for establishing jurisdiction. Article 5 (2) reads 'Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of new habitual residence have jurisdiction.' Article 7 relates to wrongful removal or retention.

18. Ms Glover submits that unlike Article 16 BllR, which specifies the relevant time for determining habitual residence as being when the court is seised (in this case on issue of the care proceedings in June), the 1996 Convention does not specify the time at which habitual residence is to be determined. As a consequence, she submits, save in the circumstances of wrongful removal (when Article 7 applies) it can be inferred that in the absence of any specific time period being specified the 1996 Convention anticipates that a child's habitual residence may change during the course of proceedings. In Re NH (1996 Child Protection Convention: Habitual Residence)

[2015] EWHC 2299 (Fam) at paragraph 24 Cobb J suggested, obiter, that despite no reference to timing of habitual residence in the 1996 Convention the date at which the child's habitual residence determines jurisdiction under the 1996 Convention is the date of the hearing. 19. The relevant legal principles regarding habitual residence are established from a welltrodden judicial path, with a number of key cases that set out the relevant principles

(see Re A (Jurisdiction: Return of child) [2013] UKSC 60 paragraph 54; Re LC (Reunite: Child Abduction Centre Intervening) [2014] UKSC 1 paragraphs 57 – 64; and Re B(A Child) (Custody Rights; Habitual Residence) [2016] EWHC 2174 (Fam) paragraphs 17 and 18). It is a question of fact and the factors outlined by Hayden J in Re B paragraphs 17 and 18 provide a helpful framework against which the relevant factual considerations should be considered: '17.....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 (A v A, adopting the European test). 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 (A v A, Re KL). iii) In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': A v A (para 80(ii)); Re B (para 42) applying Mercredi v Chaffe at para 46). MRS JUSTICE THEIS Approved Judgment RE X: (Habitual Residence) iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (Re R);

v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (Re LC). 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 to the assessment, but not determinative (Re KL, Re R and Re B); vii) It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (Re B); (emphasis added); In assessing whether a child has lost a pre-existing habitual residence viii) and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (Re B – see in particular the guidance at para 46); 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 (Re R and earlier in Re KL and Mercredi);

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 (Re R) (emphasis added); xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (A v A; Re B). In the latter case Lord Wilson referred (para 45) those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move; xii)Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant

factors. It was the stability of the residence that was important, not whether it was of a permanent character. 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 (Re R). The structure of Brussels IIa, and particularly Recital 12 to the xiii) Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, "if interpretation of the concept of habitual MRS JUSTICE THEIS Approved Judgment RE X: (Habitual Residence) 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" (Re B supra);

18. If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): 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. The approach must always be child driven. I emphasis this because all too frequently and this case is no exception, the statements filed focus predominantly on the adult parties. It is all too common for the Court to have to drill deep for information about the child's life and routine. This should have been mined to the surface in the preparation of the case and regarded as the primary objective of the statements. I am bound to say that if the lawyers follow this approach more assiduously, I consider that the very discipline of the preparation is most likely to clarify where the child is habitually resident. I must also say that this exercise, if properly engaged with, should lead to a reduction in these enquiries in the courtroom. Habitual residence is essentially a factual issue, it ought therefore, in the overwhelming majority of cases, to be readily capable of identification by the parties....' Finally, if the court concludes that X remains habitually resident in Country Y this Court can assume jurisdiction to determine the proceedings on the basis of consent by the authorities of Country Y (see Articles 8 and 9 1996 Convention). Article 9 provides that where a Contracting State that falls within the definition of Article 8 (2) (for example where the child has a substantial connection under Article 8(2)(d)) it can request the State with originating jurisdiction to authorise the former to instead exercise jurisdiction 'to take measures of protection they consider necessary'. The basis of such a request is that they consider that they are 'better placed in the particular case to assess the child's best interests' (Article 9 (1)). The transfer of jurisdiction through this route requires the Contracting State to whom the request has been made to accept that request. The procedure where Article 9 is invoked is the Local Authority must make an application to the High Court and rule 12.65 Family Procedure Rules 2010 applies. Pending determination of issues of jurisdiction, both BllR (Article 20) and 1996 Convention (Article 11) provide interim jurisdiction to the authorities of any Contracting State in whose territory the child is present to take any necessary measures

of protection on grounds of urgency. In accordance with the guidance set out by the former President in Re E (Brussels ll Revised: Vienna Convention: Reporting Restrictions) [2014] EWHC 6 (Fam) the Consulate of Country Y have been informed of these proceedings and invited to attend hearings to observe the proceedings and offer such views as may be permitted by the court as to jurisdictional issues and the case generally. To date they have not attended any of the hearings. There have been communications by the Consulate with the Local Authority. At the time of this hearing a response from the Consulate was awaited to the Local Authority's recent correspondence. 20. 21. 22. MRS JUSTICE THEIS Approved Judgment RE X: (Habitual Residence) 23. 24. 25. 26. 27. 28. 29. 30. The parties agree that whilst recognising the need, as described by Munby P in Re E, for 'transparency and openness as between the English family courts and the consular and other authorities of the relevant foreign state' [para 46] this needs to be considered on a case by case basis.

Submissions

Both Ms Glover and Ms Honeyman submit on the facts of this case X's habitual residence was in this jurisdiction at the time these proceedings were commenced in June. They both recognise there are a number of factors that weigh against such a conclusion including the fact that the original purpose of the trip was temporary for the purposes of a holiday, there is no evidence of any plans being made for the trip to be longer term, all X's family (save for two relatives here) remain in Country Y where X had lived all their life, the lack of information the authorities have here regarding the father's role in X's life and the extent to which he was exercising rights of custody. The factors they submit that point to establishing habitual residence here include X's wish not to return to Country Y, the reasons that underpin those views (namely their concerns regarding neglect, physical assault and limitations on their ability to explore their gender identity) and that X's recent ambivalence about returning can be explained in the context of the loss of relationships within their family. In addition, X has settled into a family environment here with their current carers. Whilst there have been some recent difficulties with those relationships during a recent respite placement X has returned to the placement and continues to do well there. X attends school takes part in school related and other activities within the community and has established a degree of stability and integration in social and family life here. By remaining here, X has been able to continue to develop their relationship with the two family members who live here. They submit these factors, together with the evidence of X's unsettled existence in the care of various family members in Country Y whilst, according to X, being exposed to significant harm coupled with the fear X expresses regarding the responses X may receive if they were to be open about their gender identity exploration should lead the court to conclude that X was habitually resident at the time this court was seised. In the event the court is unable to conclude habitual residence was established then it was at the time of this hearing in accordance with the 1996 Convention. Discussion and decision There is no issue that the question of when habitual residence is established is a question of fact and as a result depends on the circumstances of each individual case. Prior to arriving here in early 2019 X's habitual residence was in Country Y. X has described their life there in recent years as being unsettled, with frequent moves of home and

carers. X is a young person whose habitual residence is not said to be entirely dependent on the physical presence of their main carer, their mother, or on her intentions for X. She MRS JUSTICE THEIS Approved Judgment RE X: (Habitual Residence) 31. 32. 33. 34. 35. is in Country Y and at some stage either prior to coming here (as X has recently suggested) or at least before she left decided X should remain here, as evidenced by taking their passport with her. In communications with her since she has not changed her position about this, although it has to be recognised she made no plans for X remaining here, in terms of their care or schooling. Even though X has limited family members here, X has settled relatively well. X has attended school, although the evidence demonstrates that has not always been easy for them. X has joined various extra-curricular activities which they have continued to attend, and their command of English has meant X does not require an interpreter to communicate with professionals within these proceedings. From an early stage during their time in the care of the Local Authority X has felt able to communicate their reasons for not wanting to return to Country Y and describe their concerns about the difficulties they would encounter there in relation to matters concerning their gender identity. Viewing the wide canvas of evidence available to the court I have reached the conclusion that X's habitual residence was here in June 2019. In doing so I have carefully balanced the factors that point away from such a determination. My conclusion is reached for the following reasons. First, X's wishes have remained consistent up until June that they did not wish to return to Country Y. X was able to rationalise those wishes with what they described as their experience of being cared for in Country Y which, according to them, placed them at risk of harm through the physical and emotional abuse X described by those who were caring for them. Additionally, X has felt able to discuss here factors relating to their gender identity that X is clear would not be open to them if they returned to Country Y. X was able to support that with a description of when X did the steps, X says, their mother took to seek to rid them of such explorative thoughts. Whilst there has, more recently, been some ambivalence about X's views on returning to Country Y that needs to be considered in the context of their age, the loss of their family relationships and on a wider evaluation of the evidence about their wishes which continue to demonstrate a wish to remain here. Bearing in mind X's age and circumstances the court can and should place some weight on their views. Second, whilst the majority of X's family members remain in Country Y and X was born and brought up there, X describes an unsettled life following their parents' separation and implicated many of the family members who would be available to care for them in Country Y in the mistreatment of X and their failure to protect X from such harm. In the circumstances of this case, the gravitational pull of X's prior habitual residence in Country Y is less in circumstances where they describe such a fragmented lifestyle there, their abandonment by their mother in this jurisdiction, together with their own views about where their social and family environment were in June, namely here. 36. Third, whilst it is right there is no evidence of the mother prior to their arrival in early 2019, or during her time here, making any plans for X to integrate into society, education and other aspects of day to day life here and by leaving in the way she did, without apparent notice and taking X's passport with her, she left X here with no MRS JUSTICE THEIS Approved Judgment RE X: (Habitual Residence) plans for their future care. Since then the evidence demonstrates X has settled into a family environment here, enjoying the support provided by their settled foster placement, attending school, improving his/

her English and attending a number of extra-curricular activities, as described in the evidence. The level of settlement X has experienced is supported by the way they have felt able to discuss on several occasions the issues that arise from their wish to explore their gender identity. Between March and June, the evidence demonstrates X's circumstances have established a degree of stability and integration in social and family life here. 37. For these reasons I find that X lost their habitual residence in Country Y and had acquired habitual residence here by the time this court was seised in June. Consequently, it is not necessary to go on and consider the submissions made MRS JUSTICE THEIS RE X: (Habitual Residence) Approved Judgment regarding the lack of any specified time for habitual residence to be established under the 1996 Convention.

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