4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

SR (A Child: Habitual Residence) [2015]

[2015] EWHC 742 (Fam)

19/03/2015

Barristers
Henry Setright KC
Sally Bradley
Chris Barnes

Court
High Court Family Division

Practice Areas
International Children Law
Public Children Law

Summary
Application to determine habitual residence of a child subject to care proceedings

Facts
The case concerned a 4 year old (SR) born to an American mother and a Moroccan father. The relationship between the parents was volatile with periods of separation and (as Hayden J found) domestic violence against the mother.The father spoke Arabic and some English and French. The mother was Anglophone, spoke almost no Arabic and described her command of French as 'risible'.

The parents had intended SR to be born in the UK but circumstances changed and her birth took place instead in Morocco.

Thereafter, although the birth was registered in Casablanca, the mother travelled to the UK and fraudulently registered her as born in Kent. Hayden J was satisfied that the father was complicit in this.

There followed a somewhat peripatetic period with stays in England, France, Switzerland, Morocco (for 16 months) and, finally a return to London in March 2013. The details of the parents' movements and of other events were difficult to ascertain as neither was found to be a reliable witness. (Although, in the mother's case, this was explained by virtue of two assessments conducted in the care proceedings that indicated that she had disordered personality traits which inclined her to "deceitfulness and impulsivity".)

In October 2013, following an admission to hospital occasioned by the mother having used (and admitted) inappropriate physical chastisement, SR was made subject to a police protection order. She then remained in foster care under s.20 for a protracted period. Once care proceedings were in train, the issue of jurisdiction was raised and the court transferred the case to the High Court of its own motion.

In his analysis, Hayden J specifically expressed disapproval of the use of lengthy periods under s.20 where the potential for jurisdiction to be at issue was obvious.

He noted the tension inherent in the care proceedings continuing (as they had, to fulfil the imperative to avoid delay) without the jurisdictional question having been decided. If the court did not have jurisdiction, there would be still further delay which would be inimical to the child's welfare. Those considerations could not, however, be allowed to impinge upon the task of determining habitual residence and, accordingly, Hayden J cautioned himself against succumbing to the "gravitational pull" of welfare to the family lawyer.

In dealing with the issue at hand, Hayden J first considered the position advanced by the maternal grandparents, who had been joined as parties and who argued that the forum conveniens was New York and that the English proceedings should be stayed.

Having cited the relevant case law recently reviewed in Re T (Brussels II Revised, Article 15) [2013] EWCA Civ 895 and identified that the grandparent's central submission was that, as SR had heritage from two jurisdictions that either did not recognise, or barely used, closed adoption, SR's case ought not be decided in a jurisdiction that did, Hayden J opined that the argument was misconceived and "threadbare". He did however, accede to an application for American Embassy staff to observe, commenting that the case involved four US citizens and that it was "inherently desirable" that proceedings with inter-jurisdictional elements should be "open and transparent".

Turning to the question of habitual residence itself, he quoted extensively from the cases of A v A (Children: Habitual Residence) [2013] UKSC60 and Re LC (Reunite: International Child Abduction Centre intervening) [2014] UKSC 1.

There were two key guides to determining habitual residence: it was not a legal concept like domicile, but a factual exercise identifying the degree of integration by the child into his environment, whatever that environment might be. It was not a matter of "intention", nor of the living standards in a particular country, but a multifaceted exercise in which many factors, both objective and subjective were relevant.

The approach was child centred and thus the factors might vary depending on the age and circumstances of the child: the environment of a baby would be made up of different elements to that of an older, school age child.

The correct definition and test to be applied was derived from the CJEU in the context of Brussels II revised:

– The test applies equally to intra and extra European cases
– The test is a question of fact not to be glossed with legal concepts that would produce a result different from that of the factual inquiry
– The concept involves the degree of integration, which depends on many factors
– There is no rule that a child automatically takes the habitual residence of its parents
– The social/family environment of an infant is shared with those upon whom he is dependent
– It is possible for a child to have periods where he has no habitual residence
– In undertaking the factual enquiry the factors relevant to article 8(1) must be considered and it is for the national court to establish the habitual residence taking account of all the circumstances specific to each individual case.

Also of relevance were the principles and practical applications of Moroccan law, details of which were obtained through instruction of an expert sanctioned to answer specific questions to assist the court.

Although all parties accepted the court's approach as to how to determine habitual residence, they differed widely as to the answer, with the father asserting that SR was and had always been habitually resident in Morocco, the mother and grandparents tending towards the UK and the LA positing a shift from Morocco to the UK.
The position of the guardian added what Hayden J described, as an "additional dimension." Broadly speaking, she contended that the court should find that, as at the date when the care proceedings commenced, SR was habitually resident in England and Wales.
As such, the court would have jurisdiction under Article 8 of the Brussels II regulations and Regulation 61 (which provides that "where the child concerned has his habitual residence on the territory of a member state" the Regulations prevail over the 1996 Hague convention) would apply. Were that to be the case, the Hague Convention would not be engaged and, accordingly, the father could not rely upon its provisions (specifically Article 7) to argue for jurisdiction continuing in Morocco.

In addition, the guardian contended that a literal interpretation of Article 7(1)(b) of the Hague Convention would run counter to the guidance that legal concepts should not be allowed to gloss matters so as to produce different results from those which a factual inquiry would produce. Hayden J did not think that the guidance (from Baroness Hale) undermined the Convention as suggested and noted that, were the submission correct, it would "erode" the comity fundamental to the Convention.

Turning back to the factual exercise, the learned Judge noted the lack of candour from the parents and the ease with which each departed from any focus on SR. The court was left with a "paucity of material" and the impression of a chaotic, peripatetic existence, which, combined with the linguistic issues, made the identification of SR's residence "challenging".

Although not raised by any party, the court had also considered the possibility that SR might never have acquired habitually residence anywhere.

Albeit that the inquiry was factual, it was important to avoid being deflected by concrete facts which could be misleading when the focus ought to be on the concept of "integration", in which both factual and emotional elements were fused.

The starting point was Article 8 of Brussels II Revised. The issue of when the court was seised of the matter was not complicated; it became so when and only when it became involved in the decision making process. Earlier periods of s.20 accommodation might not involve the court at all, which was the both the provision's strength and its weakness.

As to the mother, whatever her movements, she regarded the UK as her home and Hayden J had no sense of her having "integrated" into Moroccan life, despite the 16 month period when she and SR lived there. Although this period was crucial to the father's case, the state of the parental relationship at that point remained obscure and the father was unable to create a picture of SR's life in Morocco. The Judge formed the view that he was an inconsistent figure in her life.

Equally, the mother's evidence threw little light on matters save that she was unhappy and (having found staying in the US with her parents untenable) had returned to Morocco as the only remaining option. For her it was, as Hayden J found, merely a "temporary harbour."

Held

Ultimately, the court had to evaluate the evidence against the legal framework. The Supreme Court had identified the environment of an infant as being provided by those upon whom the child was dependent. It followed that it was necessary to assess the integration of that person (or persons) in the social

environment of the country concerned. In this case, the court was satisfied that the mother was only really integrated into the UK. SR's sense of well being was inextricably linked to her mother who had provided her social and emotional environment. Accordingly, SR's habitual residence throughout her life had been, like her mother's, the UK.