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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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RE S, N and C (NON-HAGUE CONVENTION ABDUCTION: HABITUAL RESIDENCE: CHILD'S VIEWS)

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GILLEN J

[1] Nothing must be reported in this case which would serve to identify the children who are the subject of this application or any member of their family. For that purpose the children and the applicant and respondent have been anonymised throughout the course of this judgment.

The application

[2] The children in this case, namely S who is now aged 13, N who is now aged 10 and C who is now aged 7 were made wards of court before Master Hall sitting in the High Court of Justice in Northern Ireland on 22 December 2004 and renewed periodically thereafter. At that time control was awarded to the respondent B, the mother of the children, with reasonable contact to the applicant M, the father of the children. The applicant has also applied before me for declaratory relief that the children are habitually resident in Bahrain and for an order for the immediate return of the children to Bahrain. The applicant has commenced proceedings in Bahrain seeking custody of the children and he asserts that the court in Bahrain should determine the substantive issues in this case and that the children should be returned to their habitual residence immediately. It should be noted at the outset that Bahrain is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) incorporated into our law by the Child Abduction and Custody Act 1985.

Background

[3] M was born in France. B was born in Northern Ireland. The parties met in Bahrain in 1986, married in Northern Ireland in 1988 and lived in the following locations thereafter:

(a) 1986-1990 – Bahrain.
(b) 1990-1991 – Paris.
(c) 1991-1992- Cyprus.
(d) 1992-1994 – Jeddah.
(e) 1994-1996 – Dubai.
(f) 1996-1998 – Jordan.
(g) 1998-2001 – Jeddah.

[4] S was born in 1991, N was born in 1994 and C born in 1998. In August 2001 the parents and children moved to Bahrain. In September 2001 the children began school there. In July 2003 they moved to a new address within Bahrain. The parties had experienced marital problems and were living in separate rooms in Bahrain from February 2003 onwards. In late August 2003 the respondent and the children returned to Northern Ireland. S returned to Bahrain ten days later and went back to school. N, C and the respondent stayed in Northern Ireland and the children attended school there. N returned to Bahrain in December 2003 and went back to school, save for a ten day visit to Northern Ireland for medical treatment. C stayed with the respondent in Northern Ireland and attended school there. In April 2004 all the children and the respondent returned to Bahrain and re-commenced school there where they lived until December 2004. In December 2004 the respondent and the children moved to Northern Ireland without the consent or knowledge of the applicant. From August 2001 until August 2003 the children had residence permits for Bahrain. From August 2003 onwards they had visit visas for Bahrain.

Habitual residence

[5] The first matter to be determined in this case was the habitual residence of the children. I consider that the following are the principles which should determine a court's approach on the issue of habitual residence.

(i) The question of whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. (see Re J (a minor) (abduction: custody rights) 1990 2 AC 562. The concept of habitual residence if widely accepted in family law cases throughout the Hague Convention countries and beyond principally because of the flexibility of the notion and its ability to respondent to the demands of a modern mobile society which to some extent serves to trump the notion of domicile or nationality. It is worthy of note that in order to preserve that notion of flexibility, no definition has ever been embraced within the Hague Convention or any of the subsequent Hague conferences.

(ii) The court should normally stand back from the evidence and take a general view rather than conducting a microscopic search. Rules concerning the burden of proof or inapposite to the approach of the court which is never adversarial, nor inquisitorial, but sui geners (see Re N (child abduction: habitual residence) 1993 2 FLR 124.

(iii) There is general agreement on a theoretical level that because of the factual basis of the concept there is no place for an habitual residence of dependence (see Veaumont and McEleavey "The Hague Convention on International Child Abduction" at page 91). The reality is however that in practice it is often not possible to distinguish between the habitual residence of a child and that of its custodians. In Re F (a minor) (child abduction) Butler-Sloss LJ (as she then was) stated:

> "A young child cannot acquire habitual residence in isolation from those who care for him. While 'A' lived with both parents, he shared their common habitual residence or lack of it."

(iv) I do not consider it is possible for one parent unilaterally to terminate the habitual residence of a child by removing the child from the jurisdiction wrongfully in breach of another parent's rights (see Re J (a minor) (abduction: custody rights) (1990) 2 AC 562. In my view one parent may not unilaterally change a child's habitual residence without the agreement of the other parent, unless quite independent circumstances have arisen pointing to a change. (see Re A (wardship: jurisdiction) (1995) 1 FLR 767. In substance therefore, it is my view that both in Hague Convention cases and, as in this instance, non-Hague Convention cases, a wrongful removal or retention must not be allowed to bring about a change in habitual residence of the child involved because to allow otherwise would legitimise the abductor act unless wholly exceptional and particular circumstances obtained. In Re J (a minor) (abduction: custody rights) 1990 2 AC 562, in the course of a Hague Convention case, Lord Donaldson said:

> "In the ordinary case of a married couple, in my judgment it would not be possible for one parent unilaterally to terminate the habitual residence of the child by removing the child from the jurisdiction wrongfully and in breach of the other parent's rights."

The rationale is derived from the view that an habitual residence can only be acquired voluntarily and cannot therefore result from a wrongful act. Obviously the passage of time maybe the exceptional circumstances that will override that principle eg. if the child has resided in the particular country for

many months and is well integrated into the local environment. An interesting case in this context is Re HB (abduction: children's objections) 1997 1 FLR 293 where is was conceded by an abducting respondent that a child who had originally come to England as part of an open ended stay, would not be returning, still retained his habitual residence in the country of origin in Denmark. Certain academic concern has been raised as to whether in fact the boy may have lost his habitual residence by the time the return petition was initiated, particularly where the views of older children are sought, but I remain unconvinced that such a short period of time would be likely in most circumstances to bring about such a change.

(v) It is possible that a family, or part of a family, may have severed all ties with their habitual residence without necessarily relocating to a particular destination. Thus one parent theoretically might tire of a peripatetic existence and return with children to the former home country. In the meantime the other parent may continue to settle in the state from which the children were removed. In such circumstances potentially a gap may exist during which, on an objective assessment, the child may not be said to be habitually resident in either place. However, the courts do strain to avoid finding a lack of habitual residence especially where, on a broad canvas, the child has settled in a particular country (see Re F (a minor) (child abduction) 1992 1 FLR 548.

[6] Applying those principles to this case, I have come to the conclusion that all three of these children remain habitually residence in Bahrain. I have come to this conclusion for the following reasons:

(i) For at least the last four years all of these children have been not only essentially resident in Bahrain but have been integrated into the local environment. There they had their primary home, their school, their friends and their established way of life. Visits to Northern Ireland have been sporadic and usually for defined purposes for a short finite period.

(ii) I believe that the respondent in this case recognised this as recently as a short time prior to her departure from Bahrain to Northern Ireland. Attempts had been made to draw up an agreement between the parties to settle their matrimonial family affairs and whilst such an agreement was never finalised, it is clear from the drafts put before me that the mother never seriously suggested that the children had an habitual residence in Northern Ireland or that they should live anywhere other than Bahrain. I believe that this is indicative of the mother's recognition that Bahrain was their habitual residence.

(iii) I recognise that presently all three children are enrolled and attending at schools in Northern Ireland as well as having been registered with the local general practitioner and dentist. They are also significant family ties in

Northern Ireland with the respondent's immediate family residing in Northern Ireland. However, I do not believe that the mother or these children have yet been settled in Northern Ireland sufficiently long to have formed a settled intention to take up long term residence here so as to expunge the habitual residence in Bahrain. That is particularly so when as in this instance the children have been abducted. The decision of Sir George Baker P in Puttick v Attorney General and Another (1980) Fam 1 clearly establishes that a fugitive from foreign justice will not acquire habitual residence in this jurisdiction simply by reliance on a temporal period during which the claimant has outwitted authority. In a very different context, dealing with the concept of settlement within the Hague Convention, Thorpe LJ said in Cannon v Cannon (2005) 1 FLR 187:

> "This brings me to the second factor, namely the impact of concealment or subterfuge on an assertion of settlement within the new environment. The fugitive from justice is always alert for any sign that the pursuers are closing in and equally in a state of mental and physical readiness to move on before the approaching arrests. … To consider only the physical element is to ignore the emotional and psychological elements which in combination comprise the whole child. A very young child must take its emotional and psychological state in large measure from that of the sole carer. An older child will be consciously or unconsciously enmeshed in the sole carers web of deceit and subterfuge."

I think these broad general principles apply equally well to the question of acquiring habitual residence with the necessary sole intention when, as in this instance, children have been wrongfully taken from one jurisdiction to another. Accordingly I do not consider that habitual residence has been established in this instance.

Recovery of a child from Northern Ireland in a Non-Convention case

[7] There clearly is jurisdiction to make orders with respect to children physically present within Northern Ireland either under the inherent jurisdiction or on application under the Children Order (Northern Ireland) 1995. Clearly the Master acted entirely appropriately in making a wardship order as a holding operation in this instance.

[8] Thereafter however, it is usual for a court in Northern Ireland to decline jurisdiction with respect to a child who is habitually resident in another jurisdiction, even if the Hague Convention does not apply, on the

basis that those matters should more conveniently be considered within the country from which the child came. Ms McGrenera QC, who appeared on behalf of the applicant, properly drew my attention to this principle set out in Re M (abduction: Non-Convention country) 1995 1 FLR 89. The principles which the court will normally operate are as follows:

(a) So long as the country from which the child came applies principles acceptable to the English courts, subject to contra-indications such as those in Article 13 of the Hague Convention, or risk of persecution or discrimination, then the questions as to the child's future must be decided by the courts of the court of the child's habitual residence.

(b) (See Re F 1991 1 FLR 1).

(c) Normally the best interests of children are best secured by having their future determined in the jurisdiction of their habitual residence.

(d) The court will take account of those matters which it would be relevant to consider under Article 13 of the Hague Convention.

[9] I pause to observe therefore that the welfare of the child in non-Convention cases is the paramount consideration and the courts must be careful not to elevate consideration of Article 13 matters into a form of test in non-Convention cases. (See Re P (abduction: Non-Convention country) (1997) 1 FLR 780.

[10] I wish to make it clear at this stage that I have found absolutely nothing in the evidence in this case which would lead me to the conclusion that the courts in Bahrain would deal with this matter in other than an exemplary and appropriate fashion. The only criticism presented to me was that a custody hearing might take between 6 and 12 months before determination but delay is a factor which bedevils courts throughout the world not the least in the United Kingdom. I had the benefit of an assessment of the legal situation in Bahrain from a number of lawyers from Bahrain and I remain unconvinced that a full hearing of custody issues could not be heard in Bahrain and I have not taken into account the question of delay in the hearing of cases in that country.

[11] In essence therefore, I approach this case on the basis that the governing principle is the welfare of these three children and I adopt the general presumption that, in the absence of good reasons to the contrary, it is in the interests of abducted children for questions about their future to be determined by the courts in the country of their habitual residence (see Re Z (abduction: non-Convention country) 1999 1 FLR 1270). Mr O'Hara QC essentially raised two points which he said amounted to good reason why they should not be returned and which coincidentally would have been

relevant to consider under Article 13 of the Hague Convention had this been a Hague Convention case. I shall deal with them in turn:

[12] Under the Hague Convention, the judicial or administrative authority may refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views. I am satisfied that consideration of this proposition accords with the gathering momentum of the importance of listening to children and taking account of their perspectives when decisions are being taken about them which is been increasing recognised throughout the western world. One important yardstick against which the family justice system in Northern Ireland must be evaluated is Article 12 of the UN Convention of the Rights of the Child. This provides that:

> "12.(i) States parties shall assure to the child who is capable of forming his or her views the right to express these views freely in all matters affecting the child, the views of the child being given due weight and accordance with the age and maturity of the child.
>
> 12.(ii) For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

It must be remembered that a child is a person with human dignity and not merely the object of a parental dispute. A child's fundamental rights, including the right to be heard, must be respected in all forums including the confounds of the Hague Convention and non-Convention case. A child therefore possesses the right to self-expression.

[13] Equally a court must be wary not to give undue weight to the views of children particularly when they are very young. Indeed in order to ensure that such a defence is not mobilised as a tool to trigger further delay, the views of children in abduction cases requires particular scrutiny. Only in those cases where there is some evidence before the court that the child is capable of giving his or her own view is such an investigation warranted in the particular circumstances of each case. In other words in my view a prima facie case must be established that there is a valid ground for considering taking such a step given the nature of any evidence before the court and the age and maturity of the child. In other words there must be some "gateway findings" as indicated by Waite LJ in Re S (a minor) (abduction: acquiescence) 1994 1 FLR 819 at 826.

[14] Moreover, the court must mindful of the danger of being the instrument of further abuse to the child by laying on their inadequate and frail shoulders the burden of the ultimate decision in a case where they may already be emotionally torn, together with the ever present danger of a child being coached by one of the parents, most probably the resident parent.

[15] Moreover, where a child is in fact conveying simply a preference between one or other of his parents, this is a matter which must ordinarily be regulated during a substantive hearing in the state of habitual residence. In Re R (child abduction: acquiescence) 1995 1 FLR 716, Balcombe LJ said:

> "(If) the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views. Any other approach would be to drive a coach and horses through the primary scheme of the Hague Convention."

[16] Whilst undoubtedly in some instances a child conceptually will have difficulty distinguishing between the place to which he objects to return and the person to whom he will be returned, and the court must act sensitively and purposefully in looking at the overall circumstances of his objection to return.

[17] I do not believe it is helpful or appropriate for me to set in stone the age at which a child is likely to be of sufficient maturity to give informed views. That will undoubtedly vary according to the individual intelligence and maturity of the individual child and the circumstances of the case. Nor do I believe there is any fixed method for obtaining those views. As I will shortly indicate, in this case I had the benefit of a swift and full analysis of the views of the two older children (aged 13 and 10) by a distinguished and independent child and adolescent psychiatrist who was able to perform the assessment within a few days of it being requested. That will not always be available to a court and I can envisage circumstances where interviews by a social worker, welfare officer in an independent setting, by the judge, or even the views of a local priest or neighbour may suffice.

[18] In this case it was agreed that Dr Fionnuala Leddy, consultant child and adolescence psychiatrist at the Royal Belfast Hospital for Sick Children should interview S and N to provide a report on their wishes and feelings in this matter. I decided that the youngest child was too young and immature to benefit from such a procedure and her views were not sought, other than incidentally through the interviews with S and N. Having conducted those interviews, Dr Leddy's conclusions were as follows:

(i) S

Dr Leddy was satisfied that S was well aware of his situation and discussed the alternative possibilities with intelligence. She regarded him as a very mature boy. She felt that throughout their discussion it was clear he was able to distinguish between realistic and unrealistic solutions. He has had the experience of spending time in Northern Ireland and in Bahrain and is well aware of the differences between the two countries. She found absolutely no evidence of undue pressure being exerted upon S by his parents and he showed no evidence being burdened with the emotional responses of his parents. She felt that he was in tune with his own needs in relation to his day to day life in the next few years. She was satisfied that there was no indication that he was likely to receive hostility from the extended family nor was there any indication that S has had to promise somebody what he will say.

(ii) It was her view that S clearly wishes to stay in Northern Ireland and to have regular contact both direct and indirect with his father. He would like his father to move to live in London but realises that this may not be possible.

(iii) He was able to appreciate that his mother had done something which was not right in taking them back to Northern Ireland without telling the father but had not come to terms with that. He is currently attending school in Northern Ireland and this is going well. He has begun to make friends, denies any worries, and told Dr Leddy that if his brother and sister wanted to go back to Bahrain to live with their father, he would still want to stay in Northern Ireland.

(iv) The boy indicated that he would not like to move to Bahrain because he did not like being on his own. He said he had had previous experience of living with his father and spending substantial periods on his own because his father was working. He said that his father would come home for his lunch at the time that he got home from school and he would spend an hour or more with him before going back to work. He also was not disposed to return to Bahrain because his mother had told him that she would not return. When asked how he thought it would be if she decided that she would return, S said that this would not be a good solution because it would be like it was before, with his mother being unhappy and crying. He told me that she is happy in Northern Ireland because she has her parents and he mentioned several other family members who are also here. He added that he was pleased to be starting school in Northern Ireland and he knew that he would only have one school for the rest of his school life and this made him feel happy. He told Dr Leddy that if he stayed in Bahrain, he did not know when he might get moved because of his father's job and with the consequence of having to change school.

[19] This all has to be seen against the background of a boy who is clearly manifesting psychological problems whilst in Bahrain. I have been provided with a report from Dr Bouzrara, clinical psychologist, in Jeddah and Dr Elgezery psychiatrist in Bahrain. The former, dated 15 May 2001, describes the boy as lacking in self-confidence and self-esteem with a poor self-image and negative view towards himself. He indicates that his inter-personal skills are disturbed and he does not fit in his peer group feeling unaccepted by them. At that stage he manifested in his personality testing features of loose associations and bizarre thinking. At school he was showing poor academic performance and behavioural disturbance albeit his cognitive assessment showed him below average overall intelligence and ……. overall memory. Counselling was recommended at that stage to improve his feelings of security, judgment and interpersonal skills. The report from Dr Elgezery was more up to date. This report explained that the boy had been disturbed by the marital breakdown of his mother and father which had been occasioned as a result of his father having an adulterous affair and leaving the matrimonial home to live with his mistress. Extracts from that report included:

> "In Bahrain S went to an English private school, and as it seems, was bullied by his peers for the last two years, both physically and psychologically. Children called him names, knocked him about in corridors and ganged up to hit him in confined spaces. This forced S in loneliness to avoid the bullies. This was up until an incident occurred at school, when S typed rude words on a PC about one of the bullies and printed them out. This was brought to the families attention, who also learned about the bullying that was going on for the past two years."
>
> His thought content revealed anger and ambivalence about 'having two homes, mums and dads', 'dad is going out with another lady', 'why? Will this lady's kids take out place in dad's heart?.' He has a low self-esteem, cannot stand up for himself and cannot speak up his anger. He feels helpless about the bullying and 'learn to accept it'."

The conclusion of the report although presented in two varying forms, included the follows:

> "S is a young man with significant issues of anxiety and low self-esteem. At present the situation between mum and dad is contributing directly to his insecurities and unrevealed anger. He has also

> developed learn helplessness from being bullied over the years. S, no doubt will need formal counselling and CBT, to let him accept the present situation between his parents, to ventilate his anger, and to boost his self-esteem and image. Because of the severe anxiety that mounts often to panic attacks when he is speechless and frozen, S needs to be seen by a child psychiatrist."

[20] I also had school reports on the boy from his form tutor in December 2004 indicating a somewhat contrary view that the boy was well liked by his peers and although he found it difficult to make friends initially, those friends value and cherish his friendship. The head of the senior school at which he attended also had presented a report before me indicating that the boy had experienced verbal bullying from a student in his year since year six in the junior school and his experience of physical bullying only once when the matter came to the attention of the staff.

[21] It was Dr Leddy's view, that this was a mature boy with the ability to express his views on influence by his mother and father. She was satisfied that he genuinely did not wish to go back to Bahrain irrespective of whether the other children went back or not, and, ominously, she felt that to return this boy against his wishes, particularly is his mother chose to stay in Northern Ireland, would be emotionally and psychologically damaging to him. Even if his mother did return, the boy was mature enough to recognise that he would be returning to an unhappy setting as outlined by him and in her view the emotional damage was again likely to occur.

[22] N

(i) This was the middle child in the family of three. Dr Leddy concluded that this child's most profound wish is that the parents should be able to live within the same country so that she can have contact with both of them. This has been a driving force of her since the time of her parents separation and she is pre-occupied with grief over their current circumstances.

(ii) This child did not wish to chose between her parents. Again Dr Leddy was satisfied she was not under any pressure from either of the parents but she concluded that the child felt making a choice would result in a worsening of guilt feeling. She will feel guilt in respect of whichever parent she is living with. N therefore in her opinion had not been unduly influenced by anybody and had a good understanding of the alternatives open to her.

(iii) This child manifested a strong belief that whatever decision the court makes, it should be the same for all three of the children. She is happy about

being in Northern Ireland although again she equally saw advantages in Bahrain.

(iv) Dr Leddy's view was that this was a very mature well balanced child, one of whose primary concerns was that the children, having been split up enough times already, should now be together. Referring to her younger brother C, she thought that he wanted to stay in Northern Ireland but he was okay as long as he food and a Play Station. This also indicated to me the maturity of this child for one so young.

[23] I am of course conscious that the courts must be careful not to draw conclusions which would endorse the objectionable outcome of an abducting parent taking advantage of a wrongful act to defeat international determination to avoid child abduction. I must be conscious that the current of domestic authority is well established, well recognised and generally followed to the effect that normally the best interests of the child are best secured by having their future determined in the jurisdiction of their habitual residence. On the other hand it is pointless to temper that general proposition by indicating that the court will take account of those matters eg. the wishes of the child which it would be relevant to consider under Article 13 of the Hague Convention and then refuse to do so. I consider that this is a clear case where a mature child according to a distinguished expert has unequivocally made his views clear, particularly when it is set in the context of a demonstrable unhappy period for him whilst living in the country of his habitual residence. I consider that this child is of sufficient age and maturity to merit giving weight to his objection to be returned to the country of origin. If this court is to pay more than vacuous lip service to the contents of Article 12 of the United Nations Convention on the Rights of the Child then I must take this child's views firmly into account when reaching my decision. He is old enough and mature enough to merit being accorded the fundamental right of being heard and respected in this forum. This child's problems have been exacerbated by the consequences of his father's infidelity and his lack of self-esteem and self-confidence given a new depth. I believe that the views that he has expressed are rational, understandable and cogent. I believe it is in his best interests both psychologically and emotionally to remain in Northern Ireland with his mother in the knowledge that of course he must be afforded substantial access to his father at appropriate times. I further consider that it is in the interests of all these children that they should be together as evidenced by the strong feelings of N. I have therefore come to the conclusion that this is one of the rare cases where the best interests of these children are not best secured by having their future determined in the jurisdiction of their habitual residence and I therefore refuse the application to order their return to Bahrain.

[24] The second ground that Mr O'Hara advanced on this matter was that irrespective of the views of this child S, there is a grave risk that his return

would expose this child to physical or psychological harm or otherwise place him in an intolerable situation. My conclusion as to the views of this child rendered it unnecessary for me to draw a conclusion on that matter. However, had it been necessary for me to so determine, I would have come to the conclusion that this defence was also made out on the basis of the evidence of Dr Leddy. I consider that her evidence is sufficient to persuade me that the risk of harm is a weighty risk of substantial harm recognising as I do that a very high standard would be required to demonstrate that risk. I consider that her evidence was clear and compelling given as it was from an informed and expert stance. This court is entitled to weigh the risk of psychological harm of return against the psychological consequences of refusing return. Having done that I would have stood back and reflected whether the risk of harm was established to an extent which would have led me to say that the child would have been placed in an intolerable situation of return. It is my view that that is the conclusion to which I would have come in the case of S given the views he has already expressed to psychiatrists in Bahrain and the damage that Dr Leddy concludes he would suffer if now returned. I also consider that it could not be in the best interests of this child for him to suffer in this way and it would be in the best interests of all the children that they should be together as a family. Had I been obliged to consider the matter therefore, I would have concluded that there should be a refusal to return these children taking into account the kind of defence that would have been raised under Article 31 of the Hague Convention had it been a Hague Convention case.

[25] In all the circumstances therefore I refuse the application in this matter.