Neutral Citation Number: [**2015] EWHC 514 (Fam)**

Case No. BT05D00020

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Date: Thursday, 22nd January 2015

Before:

MR. JUSTICE BODEY

- -

B E T W E E N :

N — Appellant

- and -

N — Respondent

- -

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MR. B. JAMES (instructed by Bottrill & Co.) appeared on behalf of the Appellant.

MR. D. EVANS (instructed by Hopkin Murray Beskine) appeared on behalf of the Respondent.

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J U D G M E N T

MR. JUSTICE BODEY:

I start this *extempore* judgment at five past five, having risen at 3pm after hearing the case during the course of today. I do so because the parties are self-funding and I do not wish to bring them back on another day.

A. INTRODUCTORY

1 This is an appeal by Mrs N (whom I shall call for convenience "the wife") brought with the permission of Mr. Justice Coleridge, granted on 11th April 2014 against an order of District Judge Marin at what was then the Barnet County Court on 12th February 2014. The respondent to the appeal is Mr N (whom for convenience I shall call "the husband").

2 The order of the District Judge dismissed the wife's applications for the determination and enforcement of alleged arrears of child maintenance and for variation of a previous child maintenance order. The basis for the dismissal of enforcement of the alleged arrears of child maintenance was that this issue had been decided against the wife in the Courts of Illinois, USA, and that, for the wife to seek to re-litigate them in this jurisdiction offended the principal of *res judicata* and/or amounted to an abuse of the process of this court. The dismissal of the application for a variation of child maintenance was on the basis that the application was an abuse and should be struck out under Part 4 of the Family Procedure Rules 2010.

3 The wife has been represented at this hearing by Mr. James and the husband by Mr. Evans. I am grateful to them both for the polite way in which they have placed their submissions before me. I have received from them both quite extensive written submissions and oral submissions. I have read a court bundle of documentation comprising essentially judgments and orders in both jurisdictions. The hearing has, of course, proceeded on submissions.

4 Before I allow an appeal I have to be satisfied that the decision of the lower court was "wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court" (Rule 30.12.3 FPR 2010).

B. BACKGROUND.

5 The case has an extremely unhappy background. The parties were married in 1996 and separated in or before December 2004. Divorce proceedings followed in this jurisdiction. Both parties are now in or about their late forties. There are two children of the family who are now aged seventeen and twelve respectively. The wife lives with the children in this country and the husband lives in the United States. The wife is now working part time as a teacher. The husband is a

computer software engineer whose income fluctuates a good deal from year to year.

6 On 13th June 2007 the matter of ancillary relief (as it then was) came before District Judge Marin at the Barnet County Court. The wife was in person and the husband was represented by counsel. The District Judge was highly critical of the wife. He dismissed her claim for a lump sum of £160,000, which he regarded as absurd and unrealistic. He spoke of her having pursued "a single minded litigation crusade against the husband" and "of putting forward convoluted calculations which made no sense, misusing the figures to produce calculations far removed from financial reality". He accepted all of the husband's evidence about his means. He found there were no assets to speak of. He rejected the wife's wish to withdraw her application for ongoing maintenance for herself and the children and accepted the husband's submission that those matters should be dealt with there and then in this jurisdiction. He referred to the wife having issued proceedings for those reliefs in America the previous year, which he spoke of as "forum shopping". He said that the only reason he could see for her wishing to pursue those aspects in America was "…to prolong the litigation with the husband in circumstances where she is constantly forcing him to instruct lawyers in two jurisdictions and incur heavy costs". He dismissed her capital claims. He ordered a nominal order for her maintenance and imposed a condition on her making any application to vary it that: (a) there must have been a substantial change in the husband's financial circumstances; (b) that a District Judge must have given her permission to make a variation application; and (c) that there would have to be no similar proceedings on foot in the United States of America.

7 Pausing there, the wife has now applied for such permission to commence variation proceedings regarding her nominal maintenance and, whatever the outcome of this appeal, that will be dealt with by a District Judge who will decide whether the wife should have leave, as required of her by District Judge Marin in 2007.

8 As to child maintenance, the District Judge (on 13th June 2007) made an order in terms which need to be set out in full:

> "The respondent do forthwith pay or cause to be paid to the applicant for the benefit of the children of the marriage periodical payments at the same rate as that indicated by the Child Support Agency, or its successor agency, until each child shall respectively attain the age of eighteen or cease full time education. Such payments shall be made at the rate of 20% of the respondent's net annual income while payment is being made for both children and shall reduce to 15% of his net income when payment is for just one child. The payments are to be made monthly commencing forthwith and are currently to be made at the rate of £160 per month per

child. In the event that the applicant obtains an order for child maintenance in the USA, the amount the respondent must pay in accordance with this order is to be reduced on a pound for pound basis by the amount he is bound to pay by the USA order."

Before parting with the case in 2007, District Judge Marin referred to the wife's having made clear to him that she intended to appeal every order which he might make and he stated that "the litigation prospects of this case are therefore bleak".

9 Coming up to date for a moment: the parties have put their heads together to compute whether there are arrears under that order calculated as the appropriate percentage of the husband's net income and, if so, how much those arrears are. The answer is now agreed, namely that there are arrears of child maintenance. The husband puts them at £11,500. The wife puts them at £22,500, a difference of £11,000. That difference depends on what deductions from the husband's gross pay in America are to be made to get to the net. A candidate for disagreement is medical healthcare insurance and there are others.

10 The wife applied for permission to appeal those orders of 13th June 2007. On 2nd August 2007 her application came before Her Honour Judge Pearl sitting at the Barnet County Court. The wife abandoned all aspects of her appeal, save for her appeal against the costs order which had been made by District Judge Marin against her. Judge Pearl dismissed that appeal stating that there were no grounds for it. She referred to the wife's "relentless and pointless pursuit of this litigation". She ordered the wife to pay the husband's costs again. I take account of the fact that the wife has not paid such costs.

11 In October 2007 Lord Justice Wilson (as he then was) heard an application by the wife to appeal that decision up to the Court of Appeal. The wife was still acting in person as she had been before Judge Pearl. He dismissed her application describing it as "entirely misconceived".

12 Thereafter the wife issued proceedings in Georgia, USA, where the husband (an American Citizen) was then living, asserting that there were then arrears. She sought to register the June 2007 order in Georgia; to commit the husband for contempt (it is not clear in what particular respect, but I imagine concerning the provision by him of certificated tax returns); and to vary the maintenance order of June 2007 in favour of herself and the children.

13 On 24th March 2008 the Superior Court of Fulton County, Georgia, observed that the wife's application was:

"…a mere four months after the entry of the English Court's final judgment of divorce and approximately two months after she exhausted her appellate

> avenues under English law. The court finds and concludes that her petition to modify was merely an attempt to re-litigate an outcome which the English Court rendered as to child support and which she did not like…and…that her petition to modify was frivolous, vexatious, lacked substantial justification and was merely interposed for harassment and to obtain a better outcome utilising a different forum."

That court dismissed her applications.

14 On 22nd April 2010, by which time the husband had moved from Georgia to Illinois, the wife procured an order from the Court of Du Page, Illinois, registering the English court order of 13th June 2007:

> "…The English order shall be given full force and effect by the Courts of Illinois."

15 On 21st July 2010, the wife brought proceedings in Illinois for modification of the child support and for an order to compel the husband to provide certified tax certificates, which he had been ordered to do by DJ Marin's order of 13th June 2007. Subsequently, that application by the wife for a variation of child maintenance was withdrawn. On 25th November 2011, the wife amended her petition to the Court in Illinois to allege that there were arrears of $10,318.

16 On 23rd May 2013, the Honourable Judge T in Illinois heard applications by the husband to strike out the wife's applications to enforce the 2007 English child maintenance order and to enforce the requirement that he do produce certified tax returns. The decision of the learned Judge was to strike out the wife's enforcement application, but not to strike out her application concerning certified tax returns which was to be further considered later in 2013. The gravamen of the decision of Judge T was to express himself as entirely satisfied that the English child maintenance order of 13th June 2007 was an order for a set specified amount, namely £160 per month per child, and was not a percentage order. He regarded the English order as absolutely clear in that respect stating that the English Court had ordered it "very specifically" and that, if it had been an Illinois order, then there would have been "absolutely zero doubt in my mind that this is not a percentage order". He said that if one pretended that it was a percentage order then in those circumstances there would be arrearage (arrears) of about $10,000; but as it was not a percentage order, there was no arrearage. The wife did not appeal that decision, although she had been represented at the hearing.

17 On 14th June 2013, just under a month later, the wife issued a notice of application in the Barnet County Court to enforce the arrears of child maintenance and to

seek a variation of maintenance, both in respect of herself (the nominal order of five pence per annum made in 2007) and the children. It came on for hearing on 2nd October 2013; but it had been time estimated for only one hour and so the District Judge adjourned the matter over to a date in early 2014. His order stated specifically (and this is quite important for a reason I will come to) that he would then consider "whether any issue of *res judicata* or jurisdiction exists; what issues need to be determined at a final hearing; and what directions are required".

18 On 15th October 2013 the case was back before Judge T in Du Page, Illinois. The issue was the question of the husband's providing the wife with certified copies of his tax returns. The court's decision was to deny the wife such an order on the basis that, on the evidence then presented, there appeared to be no way in the United States by which the husband could actually get his tax returns certified by anyone. Further enquiries established that there was in fact some sort of certification procedure and, on 10th January 2014, the court in Illinois made an agreed order that the husband must provide certified copies on a yearly basis.

19 On 12th February 2014 District Judge Marin heard the wife's applications for variation of her and the children's child maintenance and for a determination and enforcement of the alleged arrears of maintenance. As regards the wife's own maintenance he referred back to his own order of 13th June 2007 and required the wife to seek leave, which she had not done at that time but which (as I have said) she has now done. He dismissed with costs the applications to vary child maintenance and the application to enforce the arrears. He found that the wife's application offended the *res judicata* principle and/or that it represented an abuse of the court process under Part 4 of the Family Procedure Rules 2010. He amended the problematic area of certified tax returns in his 2007 order by "retrospectively" removing that direction (that the husband must disclose certified copies of his tax returns annually). He replaced it with a provision that he (the husband) should provide a copy of each tax return as filed, vouched by him in a sworn statement that it represented an exact copy of that which he had filed with the US Revenue.

20 As regards enforcement of the children's maintenance arrears, DJ Marin acknowledged expressly that the interpretation by Judge T in Illinois on 23rd May 2013 (above) was incorrect. He said in terms: "The order is a percentage order, namely that the husband has to pay 20% of his net annual income as child maintenance". However, he found that the wife had had a fair hearing in that jurisdiction (Illinois). He noted that she had had the opportunity to ask Judge T to refer the interpretation of the order back to himself, which she had not done and that the Judge had based his conclusion "on a foundation of proper and fair reasoning". He (District Judge Marin) concluded that the wife had to suffer the consequences of Judge T's decision, just as she would have enjoyed the fruits of

success. He also, in the alternative, struck out the wife's enforcement application under Part 4 of the Family Proceedings Rules 2010. He said that:

> "The wife chose to litigate in the USA and more recently in Illinois. The application [for enforcement] has been fully considered there and to allow her to litigate the same matter here would amount to an abuse of process. Given the wife's proven appetite for litigation and appealing, it would be wrong of the court to allocate its hard pressed and much needed resources to a litigant whom I have no doubt will carry on her litigation in Illinois or elsewhere in the USA if no court here will provide her with the result she desires. I believe this court has to take a firm hand and to put a stop to her unacceptable and harassing litigation conduct."

21 As well as the enforcement application in respect of the children's maintenance just mentioned, the District Judge struck out the wife's application for an upward variation of child maintenance since, as he said in paragraph 102, she had asked the Illinois Court to deal with that issue. That, however, was in error. As Mr. James explained to me and Mr. Evans has not challenged on the facts, she had withdrawn her variation of child maintenance application of 21st July 2010 a long time previously (paragraph 15 above). The District Judge also said in paragraph 102 that the wife was still continuing litigation in Illinois and merely "using this court (the English Court) as a convenient tool to carry on the litigation crusade that I referred to in 2007". That too was in error, since I am assured by Mr. James, who I have required to take specific instructions, that the wife is not litigating in the United States. He tells me that he told the District Judge the same at the hearing in February 2014, which was not gainsaid on behalf of the husband.

C. RES JUDICATA

22 I deal first with *res judicata*, which presently under the District Judge's order denies the wife the ability to enforce the arrears in England. It is established that a foreign judgment will give rise to an issue estoppel, i.e. will prevent a party from denying any matter of fact or law necessarily decided by the foreign court, if these three requirements are satisfied: (1) the judgment of the foreign court must be of a court of competent jurisdiction in relation to the party who is to be estopped and it must be final and conclusive and on the merits; (2) the parties to the English litigation must be the same parties; (3) the issue must be identical in the two sets of proceedings. However it makes sense to say that caution needs to be exercised when considering the application of a foreign judgment, as per Lord Reid in *Carl Zeiss Stiftung v Rayner and Keeler Ltd No 2* [1967} IAC853 at 918C, where he spoke of "… at least three reasons for being cautious".

23 The question here is as to Judge T's interpretation dated 23rd May 2013 (paragraph 16 above) to the effect that the 2007 order was not a percentage order,

but a fixed order at £160 per child per month. As I have said, District Judge Marin held that this was wrong. With great respect to Judge T I find it difficult to see how the order could have been read by its terms as being anything other than a percentage order, albeit a percentage order which for the record stated the then current payment rate at £160 per child per month. I cannot imagine it being construed in any other way in this jurisdiction. The question is whether the wife should be barred from bringing an enforcement claim to the English Court on the basis of what everyone accepts was a mistaken interpretation of the English Court's order? Mr. Evans submits she should be so barred: the District Judge was right. He (Mr Evans) submits in particular that a mistaken order is a binding order unless appealed. In so saying, he relies on *Mulkerrins v. Pricewaterhouse Coopers* [2003] 1 WLR 1937 at paragraph 10 of the Speech of Lord Millet, who said:

> "…as between the parties to a judicial decision, however, it does not matter whether the decision is right or wrong. As I observed in *Crown Estates Commissioners v. Dorset County Council* [1990] Ch. 305, *res judicata* (or to give it its full name *estoppel per rem judicatam*) is a form of estoppel which gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to re-litigate the same question, even though the decision may be wrong. If it is wrong it must be challenged by appeal or not at all. As between themselves, the parties are bound by the decision and may neither re-litigate the same cause of action nor re-open any issue which was an essential part of the decision. The doctrine comes into its own only when the decision is wrong; if it is right, it merely serves to save time and costs."

24 In response, Mr. James says that Judge T's interpretation had the effect in its result of varying the English order. By interpreting it not as a percentage order going up (or down) with the husband's income, but rather as a fixed sum order fixed at the 2007 rate of £160 per child per month, the Judge reduced in the result the sums which the children should have received. That was not just a mistake, says Mr James: it was actually outwith the jurisdiction of the Illinois Court. Although neither the wife nor the husband had sought a variation of the order for the children's maintenance, the effect of Judge T's order was to 're-write' the order (to use the wording of Mr James' submission). He, Judge T, did so unwittingly, but he did so in such a way as to span the full six years back to 2007.

25 Mr. James supports his submission by referring me to the Uniform Interstate Family Support Act 2008, which applies as between this jurisdiction and the jurisdiction of Illinois. Sections 601 and 603 in particular demonstrate, in essence, that the enforcing court (Illinois) may enforce, but (with certain specified

exceptions which do not apply) "…may not modify" the order brought in from the other jurisdiction (England). So Mr. James submits that an order of a foreign court (Illinois) which is wrong (as held by the very English Judge who made the original order) and which in its result was beyond that court's power, should not bind the party disadvantaged by the mistaken interpretation. He says that this is particularly so where it concerns periodical payments for children and where the existence of arrears is admitted. It comes to the husband, says Mr. James, taking advantage of the error, which is not just. Mr. Evans responds that the husband is quite entitled to do so and that all these points were well known to the District Judge who had very great experience of this case.

26 Just before lunch I raised with the parties a case of which I had had previous experience, namely *Arnold v. NWB* [1991] 2 AC 93, because I recalled that the question of mistake featured in it. The facts were entirely different from the facts of this case and indeed the mistake there had been positively overtaken by a change in the law. However, Mr. James relies on certain dicta in that case. He refers particularly to what was said by Lord Keith of Kinkel at H on p.107:

> "In the same case [*Carl Zeiss Stiftung v. Rayner and Keeler Limited* (No.2) [1967] 1 AC 853] Lord Upjohn said at p.947:
>
> > '…all estoppels are not odious, but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.'"

Later in his judgment in *Arnold* Lord Keith, having reviewed other decisions, stated:

> "One of the purposes of estoppel being to work justice between the parties it is open to courts to recognise that, in special circumstances, inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl Zeiss* case."

Lord Keith also cited the judgment of Sir Nicholas Browne-Wilkinson in the Court of Appeal report of that case of *Arnold* at [1989] Ch. 63, 70-71, where Sir Nicholas had said:

> "In my judgment, a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel. If, as I think, the yardstick of whether issue estoppel should be held to apply is the justice to the parties, injustice can flow as much from a subsequent change in the law as from the subsequent discovery of new facts. In both cases the

> injustice lies in a successful party to the first action being held to have rights which in fact he does not possess…"

Pausing there, I stress that I am not suggesting that this case hinges on a change of law or on a subsequent discovery of any new facts, for clearly it does not. Lord Lowry in *Arnold* cited from *Fidelitas Shipping* [1966] 1 QB 630, where Lord Denning had said:

> "The rule then is that, once an issue has been raised and distinctly determined between the parties, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances."

Then he, Lord Lowry, went on to say:

> "My noble and learned friend, Lord Keith, has already drawn attention to the important statements of Lord Reid and Lord Upjohn in *Carl Zeiss Stiftung*, which effectively encouraged the proposition that the doctrine of issue estoppel is not inflexible. Once the possibility of relying on special circumstances is established as a legal proposition, I have no hesitation in agreeing that the circumstances of this case are special and indeed exceptional."

Mr. Evans found over the short adjournment on his i-pad that *Arnold* has been considered by the Supreme Court in *Virgin Atlantic v. Zodiac Seats* [2013] UKSC 46. That case, on brief reference to the i-pad, seems to confirm the possibility of special circumstances very occasionally arising where an issue estoppel need not be applied, if it would cause clear injustice.

27 The court has to guard very carefully indeed against using "justice" as a "get out of jail free card" in this sphere. *Res judicata* is a concept carefully honed over many years, based on the Latin maxims: *Nemo debet bis vexari pro una et eadem causa* and *Interest rei publicae ut finis sit litium,* 'no-one should be vexed twice in the same matter and there should be finality in litigation'. It applies if all the conditions for it are in place and one cannot contemplate some airy-fairy discretion to dis-apply it. The assertion and exercise of such a general discretion would lead to uncertainty and forensic chaos, together with much unnecessary expense. But there is, as it seems to me, a highly unusual set of facts here. There is an order for children's maintenance. There is difficulty about the provision of required certified tax returns, which is not the fault of the wife. The husband lives in the United States. There are arrears. The wife, acting in person, wishes to enforce them. She applies in the States to do so, because the husband lives there. In 2013 the English order is interpreted in Illinois in a way which was not

intended and which had the practical effect of reducing that substantive order. The husband admits a minimum of £11,500 of arrears if the order is interpreted on a percentage basis, as was intended. However, as things stand, the wife is debarred by the husband's successful reliance on a principle the intention of which is to produce justice between the parties.

28 In the result, I accept the argument that Judge T's decision unintentionally reduced the value of the 2007 order and that this was outside his jurisdiction or remit. That is beyond being a mere mistake of construction. It affects the parties' rights and duties and the proper provision for their children. I accept that the wife did not appeal in Illinois and that *Mulkerrins* says that that is what should happen; but I do not consider, where the objective is the achievement of justice between the parties that, on the very particular facts of his case, such failure should be seen as fatal to her resisting the full rigours of *res judicata*. In my view, one has to look at practicalities. She does not have resources or any significant resources. She is pursuing arrears which would not exist if the husband had paid in accordance with the intent of the order and she was having to do so as a litigant in person in a foreign country. It is just not reasonable here to require that, as a necessary precondition of her being able to defend herself from the application of *res judicata*, she should have appealed this foreign decision which in my judgment exceeded that court's remit.

29 Accordingly, I am persuaded that the particular and unusual facts here are such as to bring this case into a truly exceptional category where overall justice between the parties would not be served by allowing the District Judge's decision to stand. On the contrary, to my mind it would permit an unacceptable injustice to the wife and the children, by denying enforcement of admittedly existing arrears. Therefore, on enforcement I shall allow the appeal and permit the wife's claim to enforce to continue.

30 In passing I have mentioned to the parties section 32 of the Matrimonial Causes Act 1973, which they tell me they have well in mind. That section states that:

> "A person shall not be entitled to enforce…the payment of any arrears due under…any financial provision order without the leave of the court if those arrears became due more than twelve months before proceedings to enforce the payment of them began."

It is trite law that arrears becoming due more than one year before the commencement of the enforcement proceedings are not enforced unless there are special circumstances (*R v. Cardiff Magistrates' ex parte Czech* [1999] 1 FLR 95 at page 99G per Connell J.). It may be that the District Judge will consider that allowing enforcement back over the full seven years to 2007 would be excessive. That is a matter for him when this case reverts to District Judge level, and the

decision may be influenced by the explanations for the non-payment, the steps that the wife was taking to enforce and perhaps the parties' respective means.

D. STRIKE OUT.

31 The District Judge also dismissed the wife's application for an upward variation of child maintenance. Mr. James appeals this on two bases: one is procedural and the other substantive.

On the procedural aspect, he points out that there was no application by the husband for a Part 4 strike out. Part 4 allows the court to strike out a case if, for example, it shows no reasonable grounds or is an abuse of the court's process. Mr. Evans fairly accepts that there had been no formal application by the husband under Part 18 and that the first notification of a suggested strike out came in his Skeleton Argument given to Mr. James on the morning of the hearing on 12th February 2014. The court may nevertheless make an order of its own initiative. But if it is to do so and if it is to hold a hearing to decide whether to make such an order (as here) then, pursuant to Rule 4.3.3, it must give each party likely to affected by the order at least five days' notice of the hearing. No such notice was sufficiently given in my Judgment by the DJ's order of 2nd October 2013 (para 17 above). When it became clear that the District Judge was thinking of striking out the wife's variation application, Mr. James brought this to the District Judge's attention and complained about the lack of procedural formality. It is right to say that there are many occasions in the Family Division where strict adherence to the rules is not always required. However, the 'striking out' of a variation application for child maintenance is a serious matter.

On the substantive aspect of the striking out of the wife's variation of children maintenance application, Mr James' complaint is on the basis of the errors in the judgment which I have identified at paragraph 21 above, for example that at paragraph 102 of his Judgment the District Judge stated in error:

> "The wife asked the Illinois Court to deal with this issue [variation of children's maintenance]; she is still continuing litigation there …..".

32 Whilst *res judicata* and strike out are of course not the same and have their own distinct requirements, it is difficult to see how, if the wife is not to be barred by res judicata from seeking enforcement, she could fairly be struck out under Part 4 whether regarding enforcement or a variation application. How could it be that her applications would be an abuse, if the finding in Illinois is not such as to estop her from proceeding here?

33 In all the circumstances, I consider that Mr. James has made out his case that the District Judge, on this occasion, was in error, both on the substance of the striking

out and on the procedural aspect of what happened. I will allow the appeal in respect of the striking out of the variation of children's maintenance. The wife may proceed with that on its merits, along with her application in respect of her own maintenance if the District Judge gives her leave in that latter respect.

34 That said, I very strongly urge the parties, while they have the benefit of their lawyers, to use their utmost endeavours to find some financial accommodation between them, not only in respect of whatever arrears of child maintenance the wife is allowed to enforce, but also in respect of her ongoing claims for financial support. It will be for the District Judge at the Central Family court, where I will remit this matter, to decide whether financial mediation is practical in the particular circumstance of the husband's living abroad.