GREENWICH LONDON BOROUGH COUNCIL v S [2007] EWHC 820 (Fam)

Family Division

Sumner J

4 April 2007

Adoption – Convention Adoption Order – Hague Inter Country Adoption Convention 1993 – Children's habitual residence while in local authority care but living in Canada

The three oldest children, aged between 10 and 5, had been in care for 5 years; the youngest aged 4, born during proceedings, had been in care all her life. The father of the oldest child separated from the mother during the pregnancy. Although he had parental responsibility via marriage, he did not engage in the proceedings. The father of the younger three children also married the mother and engaged in proceedings. The parents were originally from Somalia. The marriage was violent, causing physical and emotional harm to the children and there were other issues of neglect. Assessments showed that the parents could not make the necessary changes within the children's timescales and a care plan for adoption was approved. Shortly afterwards it became apparent that the children had a maternal great aunt in Canada. She was positively assessed through a home study, compliant with the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993 (the Convention), in Toronto and after over 2 years of research, immigration advice and contact between the children and the aunt, the children were placed with her in Canada for what was regarded as an extended holiday. Contact was also maintained with the parents by visits to the UK. The local authority planned to apply for a Convention adoption order to secure the children's long term placement in Canada. By reg 50 of the Adoptions with a Foreign Element Regulations 2005, 'An adoption order shall not be made as a Convention adoption order unless … (b) the child to be adopted was, on the date on which the agreement under Article 17(c) of the Convention was made, habitually resident in any part of the British Islands'. As they had lived in Canada for a year, the issue arose as to whether the children were habitually resident in Britain and thus whether it was competent for the English courts to make a Convention adoption order.

Held – finding that the children were habitually resident in England –

(1) The words 'ordinarily resident' in s 31(8) and s 105(6) Children Act 1989 (the 1989 Act) and 'habitually resident' have the same meaning (see paras [20], [21]).

(2) Whilst they were in foster care prior to placement with the aunt, the children were habitually resident in England by virtue of the disregard in s 105 (6) of the 1989 Act, which prevents change of residence whilst accommodation is provided by the local authority (see paras [22], [23]).

(3) The period of disregard comes to an end where children are placed under s 23(6) of the 1989 Act with a relative, following *Re H (Care Order: Appropriate Local Authority)* [2003] EWCA Civ 1629 (see paras [24], [25]).

(4) Children's ordinary residence is dependent on parental residence or those exercising parental responsibility, including a local authority with parental responsibility under a care order (see para [26]).

(5) Habitual residence in a country can be lost in a single day if left with a settled intention not to return to it but take up residence elsewhere. However, it is not possible to become habitually resident in a new country in a single day as an appreciable period of time and settled intention are required (see para [26]).

(6) The children never acquired habitual residence in Canada as the aunt did not have parental responsibility for them and provided a home at the behest of the local

authority. The children were dependent on the local authority to determine their residence, not the aunt, and that was determinative (see para [27]).

(7) Habitual residence had not come to an end in England; there was no settled intention on the part of the local authority for the children to live in Canada, as the placement in Canada was described as an extended holiday. There was a hope that one day it might become a settled home for the children but it could never be more than a hope so long as the right to stay in Canada remained dependent on the local authority and the court (see para [28]).

(8) The children had been in Canada for what might in ordinary circumstances be an appreciable time but that did not carry weight in this case (see para [29]). There were problems yet to be resolved which might require the local authority to ask the aunt to return the children to England. A placement of children overseas by a local authority in the absence of any final plan for them should not run the risk that the children will lose their habitual residence after a year or 2 unless there is compelling evidence leading to that conclusion (see para [31]). There was no compelling evidence in this case. There was strong evidence of dependence and the children's habitual residence remains in England where the local authority and the children's parents are (see para [32]).

(9) In the absence of exceptional factors the children's present habitual residence would continue pending a Convention adoption; a declaration was made as to the children's current habitual residence and it was indicated that, in all probability, a similar declaration would be made when the matter returned to court for the Convention adoption (see paras [33], [34]).

Statutory provisions considered

Children Act 1989, ss 23, 31(1)(a), (8), 38(3), 105(6)
Adoptions with a Foreign Element Regulations 2005 (SI 2005/392), reg 50
Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993, Art 17(c)

Cases referred to in judgment

H (Care Order: Appropriate Local Authority), Re [2003] EWCA Civ 1629, [2004] Fam 89, [2004] 2 WLR 419, [2004] 1 FLR 534, CA
J (A Minor) (Abduction: Custody Rights), Re [1990] 2 AC 562, [1990] 3 WLR 492, sub nom *C v S (A Minor) (Abduction)* [1990] 2 FLR 442, [1990] 2 All ER 961, HL
Nessa v Chief Adjudication Officer [1999] 1 WLR 1937, [1999] 2 FLR 1116, [1999] 4 All ER 677, HL
Northamptonshire County Council v Islington London Borough Council and Others [2001] Fam 364, [2000] 2 WLR 193, [1999] 2 FLR 881, CA
P (GE) (An Infant), Re [1965] Ch 568, [1965] 2 WLR 1, [1964] 3 All ER 977, CA

Dafydd Griffiths for the applicant
Caroline Sinclair for the first and second respondents
Barbara Slomnicka for the third and sixth respondents
Malcolm Chisholm for the seventh respondent

Cur adv vult

SUMNER J:

Introduction

[1] This application concerns four siblings who have been in care for 5 years. Since March 2006 they have lived with their maternal great-aunt in Canada, Z (the aunt). All parties wish for the children's future to be secured

with the aunt. After much investigation it is agreed that the best method to secure this is by a Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993 adoption order in England. That cannot be achieved if, at a time of the order, they are no longer habitually resident in England. I am asked to rule on whether they are or are not so habitually resident.

The background

[2] The four children are B, born in February 1997, who is 10, C, born in December 2000, who is 6, D, born in February 2002, who is 5, and E, born 1 March 2003 who is 4. The mother of all four children is Ms S who is 28 years old. The father of B is Mr M. His whereabouts are unknown. The father of the younger three children is Mr A, who is 29 years old. I shall refer to him as the father. Both the mother and the father were originally from Somalia.

[3] The mother was first married to Mr M. The mother separated from him when she was pregnant with B. The father came to the UK in 1990, the mother in 1994. The mother married him in 1999 when B was 2 years old.

[4] As a result of a visit by the local authority, the London Borough of Greenwich, in January 2002, an emergency protection order was made in respect of the elder 3 children. At a hearing in July 2003 His Honour Judge Sleeman found that B and C had witnessed scenes of domestic violence and been hit themselves. They had been exposed to an emotionally abusive environment, and both were likely to suffer both physical and emotional harm if they had not been removed.

[5] B had suffered significant physical harm due to tooth decay as a result of her poor diet. She had also suffered developmental harm resulting from a failure to send her to school.

[6] He found that B was expected to be self-sufficient, and to assist the mother with her brothers. The mother was unable properly and consistently to nurture and care for the children (which now included E) or meet their needs in a sustained way. Her own needs dominated at the expense of those of the children. There was no real acknowledgement by either parent that they needed to address any problems in their marriage or their parenting skills.

[7] He held that the children could not wait for any further assessment. This was in part because it was unlikely that the parents would change in the near future. He approved the placement of the children for adoption. He gave the local authority permission to terminate contact upon an adoptive placement being identified.

[8] There was contact with the aunt soon afterwards. In September 2003 she arranged for a home study in Toronto. It was not completed until April 2004 when the Toronto Children's Adoption Aid Society gave conditional approval to her as an adopter. Final approval was given in August 2004. The children were approved by the panel for freeing for adoption in November 2004.

[9] Difficulties arose when it was learned that the aunt could not sponsor the children for their entry into Canada. Advice from a Canadian lawyer had to be obtained. There were lengthy discussions about how the children's placement with the aunt could best be arranged.

[10] The aunt came to the UK in November 2005 for an intensive introduction to the children. They went to live with her the following month. Soon afterwards they went with her to Canada, returning a month later. On 1 March 2006 the local authority was given permission to withdraw their application for a freeing order. On 17 March the local authority approved the aunt as a long-term foster carer for the children. On 26 March the children went to Canada again for what was regarded as an extended holiday where they have remained.

[11] In August 2006 the aunt brought the children to England for the purposes of contact with the mother and father. They returned to Canada after a month. They also came to England on 20 December 2006, going back to Canada on 5 January 2007.

The parties' position

[12] The local authority seeks an adoption order made on an intercountry basis in the UK. They have carried out quite extensive research. They have concluded that it provides the only sure way of securing the children's' placement with the aunt. I am satisfied they are correct in this, given the lack of recognition in Canada of special guardianship orders.

[13] The mother and the father accept with great sadness that the children will not be returned to their care. They support the adoption plans as set out by the local authority. It is, however, conditional upon the children's welfare being paramount.

[14] They reserve the right to change their position should the placement with the aunt come to an end. They feel that it would be a disaster for the children if their present placement was jeopardised. They also wish the court to find that the children are habitually resident in England.

[15] The aunt supports the local authority. In this she also has the agreement of the guardian. The question is therefore whether the year the children have spent in Canada (less the two visits to England) mean that they have lost their habitual residence in England and acquired a new one in Canada.

The law

[16] Under the local authority plans, they propose in the next month or two to apply for what is called a Convention adoption order in the High Court. It is brought under the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993 (the Convention) which has been in force in England and Wales since June 2003. The Convention is a framework setting out minimum standards for the control and regulation of the flow of children between the signatory states in relation to adoption.

[17] Its use in England is governed by the Adoptions with a Foreign Element Regulations 2005 . Regulation 50 provides:

> 'An adoption order shall not been made as a Convention adoption order unless—
>
> …
>
> (b) the child to be adopted was, on the date on which the

> agreement under Article 17(c) of the Convention was made, habitually resident in any part of the British Islands; …'

[18] The question is, therefore, where the children are now habitually resident and also at the time it is envisaged the Convention adoption will be considered. The children have been in Canada, save for 2 breaks, for a year. It is highly improbable that anything will happen in the next 2 months to alter the position as I find it to be today.

[19] The children have also been in care for 5 years for the elder three and 4 years for E. Until March 2006 they were in England. During that time or at least until March 2006, the local authority shared parental responsibility with the mother for B with her and the father for the other three children.

[20] Under s 31(1) of the Children Act 1989 (the 1989 Act):

> 'On application of any local authority or authorised person, the court may make an order—
>
> (1)(a) placing the child with respect to whom the application is made in the care of a designated local authority; …'

Under s 31(8):

> 'The local authority designated in any care order must be—
>
> (a) the authority within whose area the child is ordinarily resident; …'

By s 105(6) it is provided:

> '(6) In determining the 'ordinary residence' of a child for any purpose of this act, there shall be disregarded any period in which he lives in any place –
>
> (a) which it is a school or other institution;
> (b) are in accordance with the requirements of a supervision order …
> (c) while he is being provided with accommodation by or on a half of a local authority.'

[21] It is not in dispute that the words 'ordinarily resident' and 'habitually resident' have the same meaning. It has been held that the two subsections, in combination, provide a simple test to enable the court to make a rapid designation of the authority responsible for the care order.

[22] Simplicity is to be achieved by deeming that the ordinary residence immediately preceding the commencement of the period of disregard to continue uninterrupted. Developments affecting the family were not to be disregarded, but such cases should be exceptional (*Northamptonshire County Council v Islington London Borough Council and Others* [2001] Fam 364, [1999] 2 FLR 881 and *Re H (Care Order: Appropriate Local Authority)* [2003] EWCA Civ 1629, [2004] Fam 89, [2004] 1 FLR 534).

[23] On that basis I am satisfied that for the time that the children were in foster care in England they were habitually resident here. Was this altered by the placement with the aunt in March 2006?

[24] By s 23(3) and (4) of the 1989 Act:

> '(3) any person with whom a child has been placed under subsection (2)(a) is referred to in this Act as a local authority foster parent, unless he falls within subsection (4).
> (4) A person falls within this subsection if he is—
>
> (a) a parent of a child;
> (b) a person who is not a parent of the child but who has parental responsibility for him; …'

By s 23(6):

'Subject to any regulations made by the Secretary of State for the purposes of this subsection, any local authority looking after a child shall make arrangements to enable him to live with—

> any person falling within subsection (4); or
> a relative, friend or other of the person connected with him,
> unless that would not be reasonably practicable or consistent with his welfare.'

'[17] The effect of s 23(6) is to cast upon the local authority a duty to make arrangements to enable a looked-after child to live with a personal or family to whom he is closely related, or with whom he is closely connected. Once that is achieved, the looked-after child ceases to be provided with accommodation within the meaning of s 105(6) and begins to live with the relative or family arranged by the local authority pursuant to its duty under s 23(6)' (Thorpe LJ in *Re H*, cited above).

[25] Thus the period of disregard comes to an end where the children are placed with a relation. The next question is therefore whether the children lost their habitual residence when they went to Canada in March 2006 or later. If so, I then have to determine whether they acquired a habitual residence in Canada either then or at any event by this time.

[26] I start from the basic proposition that, any child who cannot decide for himself where to live, is ordinarily resident in his parents' home (*Re P (GE) (An Infant)* [1965] Ch 568). Where a child is in care, the local authority has parental responsibility for the child. It also has the power to determine which parent shall share their responsibility (s 38(3)). But ordinary residence comes to an end where as here the child is placed with a relative. The question is how that impacts on habitual residence. In *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, sub nom *C v S (A Minor) (Abduction)* [1990] 2 FLR 442, Lord Brandon of Oakbrook stated, at 578 and 454 respectively:

> 'A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up the long-term residents in country B instead. Such a person cannot, however, become habitually resident in country B in a single

day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so …

where the habitual residence of a young person is in question, the element of volition will usually be that of the person or persons, who has or have parental responsibility for that child.'

[27] I am satisfied the four children have never acquired habitual residence in Canada. First, the aunt has never had parental responsibility for them. Whilst she provides them with a home, their time in Canada has always been at the behest of the local authority. It alone determined when it began, for how long it continues, and when it comes to an end. The children are dependent, not on the aunt to determine their residence, but upon the local authority. That, in my view, is determinative.

[28] It follows that the habitual residence in England never came to and end. There was no settled intention on the part of the local authority for the children to live in Canada. It was described at the time as an extended holiday. It was at best a hope that one day it might become a settled home for the children. But it could never be more than a hope as long as the right to stay in Canada remained and remains dependent on both the local authority and the court.

[29] Whilst the children have been in Canada for what might in ordinary circumstances be considered an appreciable time, that does not carry weight here. In cases where there are problems, the time may, in any event, have to be longer (*Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937, [1999] 2 FLR 1116).

[30] Here there are problems, namely whether a proper frame work can be established which will assure their future with their aunt. That has yet to be resolved. Until it is, there is always the prospect that the local authority might have to require the aunt to bring them back permanently, as she has done temporarily on two occasions.

[31] I accept there may come a date when the sheer passage of time may make any problems too remote, and the residence settled and habitual, but that has not yet happened. A placement of children overseas by a local authority, in the absence of any final plan for them, should not run the risk that children will lose their habitual residence after a year or 2 unless there is compelling evidence leading to this conclusion.

[32] There is no such compelling evidence here. There is strong evidence of dependence. Whilst I have not heard contrary arguments, I am in no doubt that the habitual residence of these four children remains in England where the local authority and their parents are.

[33] In the absence of exceptional factors, their present habitual residence in England will continue pending a Convention adoption within the next few months. For the sake of this judgment, I do not consider that I should make a prospective declaration.

[34] It is sufficient if I make a declaration in relation to the children's present habitual residence and indicate that I will, in all probability, make a similar declaration when the matter returns without the need for further argument. I am grateful for the oral and written submissions which have rightly covered wider ground than is indicated by this judgment. I will leave the local authority to draw the resulting order.

Declaration accordingly.

Solicitors: *Head of Law and Governance of the London Borough of Greenwich* for the applicant
H E Thomas for the first and second respondents
Peter Bonner & Co for the third and sixth respondents
White & Sherwin for the seventh respondent

CATHERINE SHELLEY
Law Reporter