Z v Z (DIVORCE: JURISDICTION) [2009] EWHC 2626 (Fam)

[2010] 1 FLR 694

Family Division

Ryder J

22 October 2009

Divorce – Jurisdiction – Habitual residence – Brussels II Revised – Centre of interests test – Relevance of intention – Whether stay intended to be temporary was sufficient

After about 6 months during which the French husband divided his time between the family home in Paris and his work headquarters in London, the husband, the wife and all three children relocated to London on the basis of an open-ended contract, taking advantage of a relocation package offered by the husband's employer. The eldest child began to attend a French school in London, and the two younger children attended a London school with a strong French curriculum. The family home in Paris remained available for use, as it was not let. The marriage had been in difficulties before the move from France to England, and within a few months of arriving in London the husband and wife were discussing a trial separation; within 12 months of the move to England the husband announced the separation to the children. The wife immediately petitioned for divorce in England; some weeks later the husband petitioned for divorce in France. The French court stayed the divorce process pursuant to Art 19 of Brussels II Revised. Shortly after the French stay was announced the husband received a request from his office that he return permanently to France within the year. In the English proceedings the wife asserted that both parties had been habitually resident in England and Wales at the date of the divorce petition; the husband disputed this, arguing in particular that the relocation was temporary, and that his centre of interests had remained France. Only if the husband, as the respondent, were habitually resident in England would the English court have jurisdiction to determine the divorce proceedings under Art 3 of Brussels II Revised.

Held – determining as a preliminary issue that the English court had jurisdiction –

(1) The autonomous European Community interpretation of habitual residence, in contrast to the domestic interpretation, did not accord determinative significance to the length of time a person spent in or out of a country, whether initially to acquire or to lose habitual residence. The focus was on the centre of interests. A centre of interests could be established quickly or slowly, depending on the circumstances, and habitual residence in one country might not be lost despite a lengthy period in another country. All relevant factors had to be taken into account, including both intention and objective connecting factors. There was no requirement that the centre of interests must be permanent, it need only be habitual; however, it must have a stable character. A person could have only one habitual residence at a given date. Because intention formed part of the court's overall assessment, a time-limited residence that otherwise satisfied all the character of a centre of interests with a stable character was not automatically established if the parties intended that their stay be temporary, however, each case must be decided on its facts (see paras [40], [41], [44]).

(2) On the facts the wife had established a centre of interests of a stable character in England, and her habitual residence had been in England and Wales from the time of her removal to England. The husband's intention at the time of the family's move to England had been to reside in London with the wife and children, but shortly after the family's arrival he had decided on a trial separation, and thereafter, but not before, he had formed the intention to remain in England for a time-limited period only. However, he had neither communicated nor acted on this change of intention. The husband had established a habitual residence, ie a centre of interests of a stable

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character, in England and Wales by the time of the family's removal to England and the fact that he had subsequently changed his intention had not, on all the facts of the case, changed that habitual residence (see paras [45]–[49]).

Statutory provisions considered

Council Regulation (EC) No 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses (Brussels II) (2000) OJ L 160/19

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, Arts 3, 6, 8, 19

Cases referred to in judgment

A (Area of Freedom, Security and Justice), Re (Case C-523/07), [2009] 2 FLR 1, ECJ
B (Care Proceedings: Standard of Proof), Re [2008] UKHL 35, [2009] 1 AC 11, [2008] 3 WLR 1, [2008] 2 FLR 141, HL
Fernandez v Commission of the European Communities (Case C-452/93P) [1994] ECR 1-4295
Ikimi v Ikimi [2001] EWCA Civ 873, [2002] Fam 72, [2001] 3 WLR 672, [2001] 2 FLR 1288, CA
Knoch v Bundesanstalt für Arbeit (Case C-102/91) [1992] ECR I-4341, ECJ
L-K v K (No 2) [2006] EWHC 3280 (Fam), [2007] 2 FLR 729, FD
Marinos v Marinos [2007] EWHC 1404 (Fam), [2007] 2 FLR 1018, FD
Moore v McLean iv 1ère 14 December 2005 (B No 506), Fr Ct Cass
Munro v Munro [2007] EWHC 3315 (Fam), [2008] 1 FLR 1613, FD
R v Lucas (Ruth) [1981] QB 720, [1981] 3 WLR 120, [1981] 2 All ER 1008, 73 Cr App Rep 159, CA
R v Middleton [2000] TLR 293
R v R (Divorce: Jurisdiction: Domicile) [2006] 1 FLR 389, FD
Rigsadvokaten v Ryborg (Case C-297/89) [1991] ECR I-1943, ECJ
Rogers-Headicar v Headicar [2004] EWCA Civ 1867, [2005] 2 FCR 1, [2004] All ER (D) 142 (Dec), CA
Silvani di Paulo v Office national de l'emploi (Case 76/76) [1977] ECR 315, [1977] 2 CMLR 59, ECJ
Swaddling v Adjudication Officer (Case C-90/97) [1999] 2 FLR 184, ECJ

Timothy Scott QC for the applicant
Rebecca Bailey-Harris for the respondent

Cur adv vult

RYDER J:

[1] BZ and GZ are respectively the petitioner and respondent in divorce proceedings commenced in this jurisdiction by a petition dated 3 July 2008. By an order made by Her Honour Judge Plumstead on 8 January 2009 this hearing was listed to determine a preliminary issue between the parties as to jurisdiction.

[2] BZ, who I shall refer to as the wife, asserts that both parties were habitually resident in England and Wales at the date of the petition whereas GZ, who I shall refer to as the husband, disputes habitual residence and subsequently issued his own proceedings in France which have been stayed pending the outcome of this hearing.

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[3] Accordingly, the issue before the court is whether the court has jurisdiction to determine divorce proceedings on the basis of Art 3 of Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matter of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, hereafter referred to as BIIR. This is a mixed question of law and fact.

[4] The court has had the benefit of careful skeleton arguments which are agreed as to the principles of law to be applied albeit that in their interpretation the parties submit that there are subtle nuances between them. In addition I have read two affidavits, one from each party, setting out the factual circumstances they rely upon. The parties jointly asked that oral evidence be heard and accordingly I have heard from both the wife and husband and it is common ground that I should, where appropriate, make findings of fact as to the disputed questions between them rather than just assessing the relative weight of their prima facie cases. In respect of these findings, the burden of proof of habitual residence once disputed is on the wife as petitioner and proof of any facts in issue is to be satisfied on the simple balance of probabilities in accordance with the most recent authority of their Lordships' House in *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11, [2008] 3 WLR 1, [2008] 2 FLR 141. I have reminded myself that a witness may give truthful evidence as to one matter without necessarily being truthful about all matters and vice versa (in accordance with the well-known dicta in *R v Lucas (Ruth)* [1981] QB 720, [1981] 3 WLR 120 and *R v Middleton* [2000] TLR 293).

[5] Both parties were born in France, the husband in 1958 and the wife in 1961. They are French nationals. The husband's grandparents came to France from Armenia in the 1920s.

[6] The parties were educated in France at both secondary and tertiary levels. French is their first language although they are fluent in other languages. The husband has an MBA from INSEAD and since 1987 has pursued a career with the 3i venture capital group. The wife has a masters degree in finance and marketing and worked for 8 years until their first child was born.

[7] The parties married in Paris on 5 July 1994 and adopted the regime of separation de biens. The matrimonial home in Paris was purchased in February 1994. They cohabited from about 1990.

[8] There are three children of the marriage. A and B were both born in Paris on 18 June 1997 and 12 April 1999 respectively. C was born in Amsterdam on 21 January 2002. All three children have French birth certificates and are French nationals. French is their first language. Until the end of summer term 2007 the girls were at school in Paris. The wife has been a full-time parent since A's birth.

[9] From 1984 to 1987 the husband worked in his family's knitting business in Paris.

[10] In 1987 the husband joined 3i Gestion which has its head office in Paris. The first 6 months were spent at the headquarters in London and the following 10 years were spent in the Paris office. Thereafter the husband's position in the company involved postings outside France. The husband was posted to Amsterdam from November 1998 to May 2002 to establish 3i's

business in Benelux. The family's accommodation in Amsterdam was paid for by 3i. The husband returned to Paris as managing director of 3i, accompanied by the family, in May 2002, shortly after C had been born in Amsterdam, whereupon the family returned to their home in Paris.

[11] In January 2007 the husband became managing partner, Growth Capital Europe for 3i which in April 2008 was expanded without change to his terms and conditions to managing partner, Global Growth Capital. It is not in issue that the managing partner positions were based at the London headquarters of 3i but that the husband travelled for approximately 50% of each year.

[12] On 30 or 31 August 2007 the family removed from France to take up residence at a suite of serviced apartments in Stanhope Gardens in London. That accommodation formed part of a location package provided by 3i. The parties' French apartment remains unlet in Paris.

[13] Since arriving in London A, their eldest daughter, has attended the Lycee Francais in Kensington whereas B and C have attended St Nicholas School in Hyde Park because of the additional French curriculum provided to them. In more recent times B has moved to Queens Gate School to prepare her better for 11+ examinations she will be taking in this academic year.

[14] The parties' marriage had been in difficulty since before the move to London. The husband has a relationship with a woman which was initially undisclosed but which by early 2007 was known to the wife. The parties consulted French lawyers in 2007 before their move and three draft separation agreements were prepared but ultimately neither agreed nor acted upon.

[15] Sadly the relationship deteriorated so that by November 2007 a trial separation was discussed and on 4 February 2008 the husband moved to a separate apartment in the same serviced block in London. It was agreed that for the time being the children should not be told: indeed they would have believed he was away from home travelling overseas rather than resident in the same accommodation.

[16] Ultimately on 2 July 2008 the husband told the children that their parents were separating. The next day the wife petitioned for divorce and on 9 September 2008 the husband did likewise in France. On 16 December 2008 the French court stayed its process pursuant to Art 19 of BIIR.

[17] On 6 April 2009 the chief executive officer of 3i sent the husband an email requesting his permanent return to Paris by January 2010 at the latest.

[18] The wife's case is that:

(a) the husband's appointment was on an open ended contract which was neither time limited nor temporary and contained provisions indicative of an open ended appointment in England;

(b) the children moved schools in what would have been understood by them to be permanently changed circumstances, ie no attempt was made to keep open any education places in France;

(c) the fact that the parties never identified a permanent home is of no significance: they moved into a home in London and the wife attempted to identify a permanent home but would have been as reluctant as the husband to give up valuable re-location benefits which extended even to a benefit for leaving the French

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apartment empty and in any event the situation was interrupted by the husband separating from her;

(d) the family entered into a range of social activities in London, forsaking their previous routines in Paris and starting a new life in England;

(e) the wife told the husband, family and friends of her and their intention to live in England long term.

[19] The husband's case is that:

(a) the move to London was a temporary 3-year expatriate posting which expired on or about 31 December 2009 and was purely for employment purposes;

(b) the children's schooling was as suited to the continuation of their education in France as it was in England and was deliberately chosen to be so;

(c) the parties' accommodation was temporary and only provided as part of a temporary re-location package;

(d) the husband worked and was never part of any new social nexus that was created by the wife but, in any event, the wife's social connections and linguistic preferences remain overwhelmingly French and not English;

(e) the husband has maintained his connections with France, that is where his relationship is conducted, where the empty apartment is located, where his extended family live and where his social connections including his golf club are situated;

(f) he never had nor expressed an intention to remain in London beyond the duration of the 3-year re-location package;

(g) the arrangements were the same as for the temporary posting previously enjoyed in Amsterdam;

(h) the arrangements did not amount to the establishment of London as his centre of interests with a sufficiently stable character;

(i) the wife filed for divorce only 10 months after arriving in England and is not entitled to rely on her own habitual residence, if established;

(j) the fact of employment is insufficient to establish habitual residence;

(k) the family's civil status and administrative arrangements are largely French: passports, identity cards, credit cards, bank accounts, mobile telephones, electoral cards, taxation and social security albeit in the case of the latter two aspects as overseas residents.

[20] Before dealing with the law, the essence of which is agreed, I would like to describe the two parties who have given evidence to this court. It is important that they know the basis upon which I have come to my conclusion.

[21] They are both highly intelligent, thoughtful and genuine people who care very deeply about their children and who have neither made arrangements in haste nor on a whim.

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[22] The wife is an amusing, articulate, justifiably wounded woman who is neither vindictive nor seeking to obtain an unfair advantage. I accept her oral evidence about her own understanding of the move and her own intentions. Without question she intended to move to England long term and her habitual residence in this jurisdiction was established at or shortly after the move.

[23] The husband is a careful, under-stated but nevertheless powerful man whose outward demeanour belies the emotions he feels about the situation which has been created. He would not deliberately cause harm to anyone least of all his wife and family but it is as a consequence of that, that he has withdrawn from them and not communicated his innermost thoughts. That silence applies both to the breakdown of the marriage which he freely conceded he realised was in trouble some 10 years before its terminal stages and his intentions which, in my judgment, vacillated according to the powerful emotions which were in play. Not least, as he told me in oral evidence, because of his desire not to challenge his wife and to keep contentious issues from his children.

[24] I have come to the conclusion that although I accept his evidence as being an overwhelmingly truthful account, his recollection of the period of what was effectively a trial reconciliation when the parties moved to London is incomplete. I have come to the conclusion that he likewise had formed an intention to stay in England for as long as the job lasted in the hope that his marriage and/or his relationship could be resolved.

The law

[25] BIIR provides jurisdictional grounds as follows:

> '(1) In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State—
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> (a) in whose territory—
> - the spouses are habitually resident, or
> - the spouses were last habitually resident, insofar as one of them still resides there, or
> - the respondent is habitually resident, or
> - in the event of a joint application, either of the spouses is habitually resident, or
> - the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
> - the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;
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> (b) of the nationality of both spouses, or, in the case of the United Kingdom and Ireland, of the "domicile" of both parties.

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(2) For the purposes of this Regulation, "domicile" shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.'

[26] Under Art 6, a respondent who is habitually resident in, or a national of, a Member State can be sued only in accordance with the jurisdictional grounds contained in the Regulation. In the circumstances of this case, jurisdiction under the Regulation is exclusive.

[27] In para 3 of her petition dated 3 July 2008, the wife asserts jurisdiction on the basis that 'the Petitioner and Respondent are both habitually resident in England and Wales'. This requires the court to determine that England and Wales is the habitual residence of both spouses on the relevant date. As appears, at the very least, the wife must establish the husband's habitual residence, her own is insufficient.

[28] The authorities establish that the court's determination of jurisdiction under the Regulation is not wholly dependent on what a party pleads in the petition. Rather, the court has an independent function and responsibility to investigate and determine, of its own motion, in compliance with the Regulation, whether jurisdiction lies with the court or not: *Rogers-Headicar v Headicar* [2004] EWCA Civ 1867, [2005] 2 FCR 1, *R v R (Divorce: Jurisdiction: Domicile)* [2006] 1 FLR 389 and *L-K v K (No 2)* [2006] EWHC 3280 (Fam), [2007] 2 FLR 729. Therefore, in this case it is open to the court to consider jurisdictional grounds in Art 3 not pleaded by the wife in her petition.

[29] The wife filed for divorce less than 12 months after arriving in England, and so Art 3(1)(a), limb 5 does not apply. Domicile does not appear to be an issue on the evidence and so Art 3(1)(a), limb 6 and Art 3(1)(b) do not apply. Jurisdiction could be argued on the basis of the husband's habitual residence alone (Art 3(1)(a), limb 3), but this would make no material difference to the outcome, since if the husband's habitual residence in England and Wales cannot be established for the purpose of Art 3(1)(a), limb 1, the English court must decline jurisdiction.

[30] The regulation does not itself define habitual residence for the purposes either of Art 3 or Art 8. In *L-K v K (No 2)* (above) at para [37], Singer J described this lack of definition as deliberate:

'I find great force in the proposition that the European autonomous meaning was deliberately undefined. That appears from para 32 of the Explanatory Report dated 28 May (1998) OJ C 221/27 by Professor Borras (the *Borras* report) which is a part of the *travaux preparatoires* of Council Regulation (EC) (No 1347/2000) of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses (Brussels II), but the relevant provisions of Brussels II Revised are the same. That passage discusses the meaning of habitual residence in terms of the decisions of the Court of Justice as a result of which this quotation is advanced to help one detect habitual residence or its absence. "The place where the person had established,

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on a fixed basis, his permanent or habitual centre of interests with all the relevant factors being taken into account for the purpose of determining such residence".'

[31] With respect, I agree that the interpretation must be found in the relevant *travaux preparatoires* and in case-law. There is to date no ECJ judgment on the interpretation of habitual residence in the context of Art 3 of the Regulation, although there is in the context of Art 8 in *Re A (Area of Freedom, Security and Justice)* (Case C-523/07), [2009] 2 FLR 1. The interpretation provided in *Re A* must be distinguished on the basis of its different context. The English authorities on the interpretation of habitual residence in Art 3 are *L-K v K (No 2)* (above), *Marinos v Marinos* [2007] EWHC 1404 (Fam), [2007] 2 FLR 1018 and *Munro v Munro* [2007] EWHC 3315 (Fam), [2008] 1 FLR 1613.

[32] There are obvious and powerful policy reasons for an autonomous interpretation of habitual residence for the purposes of the Regulation (as of any international instrument), to be applied uniformly throughout the European Community, and which is not susceptible of different interpretations according to the national laws of the Member States.

[33] Recital (1) of the Convention underscores the desirability of a uniform, community-wide concept of 'habitual residence'. It provides:

> 'The European Community has set the objective of creating an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the community is to adopt, amongst others, measures in the field of judicial co-operation in civil matters that are necessary for the proper functioning if the internal market.'

[34] That habitual residence in Art 3 of the Regulation is to receive an autonomous interpretation has been expressly recognised in the English authorities: *L-K v K (No 2)* at paras [35], [36] and [37], *Marinos* at paras [18], [38], [41] and [75], and *Munro* at para [45]. As Munby J said at para [18] of *Marinos*:

> 'That "habitual residence" has an autonomous meaning in Community law, and that its meaning in community law may not be the same as its meaning in our domestic law, is recognised in the authorities. Thus in *Rayden & Jackson on Divorce and Family Matters* (LexisNexis UK, 18 rev edn, 2005) para 2.145, it is said in connection with the regulation, that "in European Community law it [scil, habitual residence] has a community wide meaning and will be determined by the judgments of the European Court of Justice". And in addition to the well-known words of Thorpe LJ in *Ikimi v Ikimi* [2001] EWCA Civ 873, [2002] Fam 72, [2001] 2 FLR 1288, at para [31], there is the clear statement of the deputy judge in *C v FC (Brussels II: Free-Standing Application for Parental Responsibility)* [2004] 1 FLR 317, at para [98] that:
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>> "The expression 'habitually resident' must be given the same meaning and effect under the laws of all the Contracting States in which Brussels II has effect."

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I respectfully agree. Similarly, in *L-K v K (No 2)* [2006] EWHC 3280 (Fam), [2007] 2 FLR 729, Singer J referred to the autonomous meaning of the phrase in Community law and said (at para [35]) that:

> "There is, of course, no need for the concepts to be the same in domestic and in community law."

Again, I respectfully agree.'

[35] Accordingly, the English authorities are in agreement on the interpretation of habitual residence for the purpose of Art 3. The accepted interpretation is drawn from the Borras Report (OJ 1998 C 221/27), at para 32:

> 'The place where the person has established, on a fixed basis, the permanent or habitual centre of his interests, with all the relevant factors being taken into account for the purpose of determining such residence.'

[36] That formulation was itself based on decisions of the ECJ in contexts other than divorce, including *Silvani di Paulo v Office national de l'emploi* (Case 76/76) [1977] ECR 315, [1977] 2 CMLR 59, *Rigsadvokaten v Ryborg* (Case C-297/89) [1991] ECR I-1943, *Knoch v Bundesanstalt für Arbeit* (Case C-102/91) [1992] ECR I-4341, *Fernandez v Commission of the European Communities* (Case C-452/93P) [1994] ECR 1-4295 especially at para [22] and *Swaddling v Adjudication Officer* (Case C-90/97) [1999] 2 FLR 184 especially at paras [29] and [30].

[37] The ECJ authorities establish that the interpretation of habitual residence involves not a purely quantitative evaluation of the time spent by a person in a particular place, but, rather, a qualitative evaluation of all the facts pertaining to an individual's links with a place. As Singer J stated at paras [38] and [39] of *L-K v K (No 2)* (above):

> '[38] By way of gloss on that, it does not have to be permanent. It needs to be habitual. The emphasis is on a person's centre of interests. The verb used is "established" and all relevant factors are to be taken into account. But there is nothing beyond any degree of length of time in the words used, except as can be ascribed to the word "established". One can establish something very quickly, or it may take time to establish. Once a situation is firm it is established.
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> [39] The *Borras* Commentary is largely reflected in the decision of *Fernandez v EC Commission* [1994] ECR 1-4295. The relevant passage is para 22 on 4308. The entirety of that paragraph is as follows:
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> > "As the court at first instance, referring to the settled case law of the Court of Justice, pointed out the place of habitual residence is that which the official concerned has established with the intention that it should be of a lasting character, the permanent or habitual centre of his interests. However, for the purpose of determining habitual residence all the factual circumstances which constitute such residence must be taken into account."'

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[38] The ECJ/Borras formulation was adopted by the French Cour de Cassation in *Moore v McLean* iv 1ère 14 December 2005 (B No 506), cited in *L-K v K (No 2)* at para [42] and in *Marinos* at para [29]. Thus in *Marinos*:

> '[29] In *Moore v Mclean* iv 1ère 14 December 2005 (B No 506) (a continuation in France of the litigation an earlier English phase of which is reported as Moore v Moore [2004] EWCA Civ 1243, [2005] 1 FLR 666) the Cour de Cassation, First Civil Chamber, had to consider a husband's appeal against the ruling of the French Judge of Family Affairs in Grasse, upheld by the Court of Appeal of Provence, that the wife was not, for the purposes of Brussels II, habitually resident in France (the case was brought under the third limb of para 1(a) of the regulation). Dismissing the appeal on 14 December 2005, the Cour de Cassation said (in translation) that:
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>> "habitual residence, an autonomous notion of community law, is defined as the place where the party involved has fixed, with the wish to vest it with a stable character, the permanent or habitual centre of his or her interests."'

[39] Habitual residence for the purposes of Art 3 of the Regulation is, therefore, a legal concept and not merely a question of fact.

[40] The autonomous EC interpretation of habitual residence (in contrast to the domestic interpretation) does not accord determinative significance to the length of time a person spends in or out of a country, whether initially to acquire or to lose habitual residence. A centre of interests may be established quickly or slowly, depending on the circumstances. Habitual residence in one country may not be lost despite a lengthy period in another.

[41] The focus is on centre of interests, and all relevant factors have to be taken into account, including both intention and objective connecting factors. There is no requirement that the centre of interests has to be permanent: it need only be habitual. But it must have a stable character. It is also established that for the purposes of Art 3 of the Regulation, a person may have only one habitual residence at a given date.

[42] This contrasts with the position under domestic law in *Ikimi v Ikimi* [2001] EWCA Civ 873, [2002] Fam 72, [2001] 3 WLR 672, [2001] 2 FLR 1288 (above) but is coincident with considerations of language, principle and policy. If an individual could have more than one habitual residence for the purposes of Art 3 the available fora would be greatly multiplied, with obvious consequences for forum-shopping and lack of cohesion within the EC. The Art 3 grounds of jurisdiction are intended to deal with mobility without sacrificing legal certainty. The grounds are based on the principle of a genuine connection between the person and a Member State. Unlike the position in general civil proceedings there is only a minor role for a participant's free choice. It is implicit that forum-shopping should not be encouraged.

[43] If there is any difference between the parties it is as to the weight to be accorded to a party's intention or what is meant by 'an established centre of interests with a stable character'. As to intention I note with agreement the citation by Munby J in *Marinos* at paras [23] and [24] of the decisions in *Fernandez v Commission of the European Communities* (Case C-452/93P) [1994] ECR 1-4295 as follows:

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'As the Court of First Instance, referring to the settled case-law of the Court of Justice, pointed out, the place of habitual residence is that in which the official concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests. However, for the purposes of determining habitual residence, all the factual circumstances which constitute such residence must be taken into account.'

And *Swaddling v Adjudication Officer* (Case C-90/97) [1999] 2 FLR 184 at para [29]:

'In that context, account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances.'

[44] I accept that intention forms a part of the court's overall assessment and that it takes its place as one of the facts in the case. For that reason I cannot accept that a time limited residence which otherwise satisfies all the character of a centre of interests with a stable of character is automatically established if the parties intend that their stay be temporary. That would have undesirable policy consequences for international families who re-locate on a regular basis. However each case must be decided on its facts.

[45] Turning then to the facts which I find on the evidence of the parties: I accept the wife's evidence as follows:

- She believed and intended the move to London to be for the foreseeable future, ie as long as her husband's job lasted and not for a temporary or time limited posting whether of 3 years or otherwise.
- She told her friends and family and the husband of her belief and intention.
- The children regarded the move as a long-term move – if not permanent, then certainly not temporary: their English schooling was and still is organised on this basis and their French school places were not retained.
- The husband's contract for his London appointments was an open ended contract with special provision for continuing benefits in England after the 3-year relocation package expired. It was not a time limited or temporary arrangement.
- The wife did not find a suitable permanent home in London and any joint approach to that task was fundamentally interrupted by the parties' de facto separation. That did not, however, preclude the establishment of a home which, in my judgment, existed from their occupation of Stanhope Gardens where it still exists.
- The wife and children have a social nexus in England which has developed at the expense of friends in France.

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[46] I have no doubt that the wife established a centre of interests of a stable character in England and that her habitual residence was in England and Wales from the time of her removal to this jurisdiction.
[47] In respect of the husband I find as follows:

- At the point where the decision was made to remove the family from France to England the husband was undertaking a difficult emotional re-consideration as to his own future: was he to continue a marriage which was in difficulties or a relationship with another woman or both.
- By November 2007 the husband had decided upon a trial separation and from some time after that but not before he started to form his present intention namely to continue to reside in England for a time limited period only. Only he knows when he formed that intention but it was after November 2007 and could have been as late as the decision of 3i to post him back to Paris.
- At a time unknown to the court 3i decided it was in its commercial interests to base the husband back in Paris: although that was only recently communicated to the husband the rationale for it no doubt influenced the husband in forming his intention to leave London at the end of the re-location package period.
- The previous posting to Amsterdam was temporary.
- The husband spends approximately 50% of his time in England.
- The husband always intended the children to have exposure to the beneficial effects of a broad childhood experience by their joining him in London and he is right to assert that the form of their education is not a determination fact: it could just as easily be a good preparation for a return to education in France.
- The husband's social life and connections are dependent on his work, travel and his relationship in France.
- The husband's tax and benefits position are as he conceded the result of careful advice provided to him by independent advisers paid for by 3i. He takes their advice which is intended to maximise his and the family's remuneration position. No inferences can be drawn as to the centre of interests question from the contents of these documents which are prepared for quite different purposes.
- The husband did not want to divorce the wife because she had expressed a wish never to be divorced.
- The husband is likely to make financial proposals for the benefit of the wife and children of similar effect whether the proceedings are concluded here or in France.
- The husband did not communicate his feelings about the marriage to the wife, eg he told her in this hearing that for some 10 years before November 2007 he had realised the marriage was in trouble.
- The husband feels real guilt about the circumstances which exist and there is a patent empathy still between the parties.

- In my judgment, his intention at the time of the family's move was to reside in London long term. He conceded in evidence he was at that time overtly committed to the marriage and, in my judgment, he had also committed himself to the long-term re-location plan.
- The husband neither communicated nor acted upon any change of intention prior to the wife's petition being issued.
- The husband's genuine views about his connection to his civil status in France are not determinative. It is facts on ground rather than theoretical propositions which are important.

[48] The husband entered into the re-location to London with the intention of staying with his wife and children and for as long as the job lasted but then changed his mind when he could find no resolution to the continuing conflict presented by his failing marriage and his relationship with another woman. His intention changed to a return to France when the opportunity of the end of the re-location package presented itself. He did not allow himself to communicate that change of intention and now fails to recognise how he came to that position.
[49] He had established a habitual residence, ie a centre of interests of a stable character in England and Wales by the time of the family's removal to join him. The fact that he subsequently changed his intention does not on all the facts of the case change his habitual residence.
[50] Accordingly limb 1 of Art 3(1)(a) is satisfied and the courts of England and Wales have jurisdiction.

Order accordingly.

Solicitors: *Levison Meltzer Pigott* for the applicant
Withers LLP for the respondent

PHILIPPA JOHNSON
Law Reporter