**EXPATRIATE LAW DUBAI**

**CHILDREN IN THE INTERNATIONAL CROSSFIRE:**

**WHEN WILL THE ENGLISH COURT GET INVOLVED?**

**3RD MAY 2018**

*This talk is principally for delegates practising family law in Sharia states with particular focus upon cases involving England and Wales and a second state outside the EU and neither a signatory to the Hague Convention 1980 (The Abduction Convention) or the Hague 1996 Child Protection Convention (e.g. Morocco and Russia).*

**PART 1: JURISDICTION**

1. Jurisdiction to invoke the English court in family proceedings is derived from the Family Law Act 1986; read with Council Regulation (EC) No 2201/2003 of 27th November 2003 (Brussels 2R). The statute is convoluted:

***S. 2 Jurisdiction: general*** *(1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless –*

*(a) it has jurisdiction under the Council Regulation [No 2201/2003] or the Hague Convention [1996], or

(b) neither the Council Regulation nor the Hague Convention applies but –*

*(i) [matrimonial or civil partnership proceedings]

(ii) the condition in section 3 of this Act is satisfied.
….*

*(3) A court in England and Wales shall not make a section 1(1)(d) order unless –*

*(a) it has jurisdiction under the Council Regulation or the Hague Convention, or

(b) neither the Council Regulation nor the Hague Convention applies but –*

*(i) the condition in section 3 of this Act is satisfied, or

(ii) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of the powers is necessary for his protection."*

***S. 3 Habitual residence or presence of child*** *(1) The condition referred to in section 2(1)(b)(ii) of this Act is that on the relevant date the child concerned –*

*(a) is habitually resident in England and Wales, or

(b) is present in England and Wales and is not habitually resident in any part of the United Kingdom or a specified dependent territory,
……."*

1. In summary, jurisdiction lies with the English court:
2. If the child is habitually resident in England and Wales [FLA 1986 s.2, 3].
3. If a child is present but not habitually resident in the jurisdiction the court may make temporary orders pending return of the child to the primary state or transfer to England of jurisdiction [FLA 1985 s.2(3)(b) (ii)].
4. If the child is a British national if the court decides that this is necessary in the child’s interest. The scope of this principle is unclear.
5. The child was wrongfully removed to or retained in a Non-EU state pursuant to Council Regulation 2201/2003 Article 10 (Brussels ii Revised).
6. If there are matrimonial proceedings pending in England pursuant to FLA1986 S.2(i)(b)(i).
7. In cases (b) (c) (d) and (e), if the court may exercise jurisdiction it will proceed to determine whether it should exercise the jurisdiction in the interests of the child.

**PART 2: HABITUAL RESIDENCE**

1. Despite the quintet of Supreme Court cases (most recently **Re B 2016 UKSC 4**) this question of habitual residence is often the controversial issue, central to the decision of whether or not the English court has jurisdiction at all to make any but interim orders. I underline certain passages of assistance.
2. **Re J [2017] EWCA Civ 80. Black LJ** as she then was, summarized the principles:

*27. The message from these cases is that the European formulation of the test, to be found in* Proceedings brought by A *Case C-523/07, [2010] Fam 42, is the correct one and accordingly "the concept of habitual residence …. must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment". The position can be found set out, for example, in the passage in Baroness Hale's judgment in* A v A (supra) *commencing at [45], where she dealt with* Proceedings brought by A *and also with the additional observations made in* Mercredi v Chaffe *(Case C-497/10PPU) [2012] Fam 22) about the relevance of the child's age and the need for "stabilité". What is also very clear is that the identification of a child's habitual residence is a question of fact and that "glosses" or "sub-rules" about it should be avoided.*

 *28. It may be helpful, particularly as counsel for the mother focussed upon it as an integral part of her argument, if I set out [54] of* ***A v A*** *here, because in it Baroness Hale drew the threads together. She said:*

*"54. Drawing the threads together, therefore:*

1. *All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.*
2. *It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.*
3. *The test adopted by the European court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends on numerous factors, including the reasons for the family's stay in the country in question.*
4. *It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.*
5. *In my view, the test adopted by the European court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from* R v Barnet London Borough Council, Ex p Nilish Shah *[1983] 2 AC 309 should be abandoned when deciding the habitual residence of a child.*
6. *The social and family environment of an infant or young child is shared with those (whether parents or others) on whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.*
7. *The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.*

*29. Nothing that I say in this case is intended in any way to deviate from these well-established principles, further explained/developed in the subsequent Supreme Court authorities, culminating most recently in* Re B *[2016], to which I now turn in a little more detail. In* Re B *[2016], the particular focus of the court was on the point at which a child loses his or her habitual residence. This was material to whether the English courts had jurisdiction to entertain an application concerning the child which had been made in this country less than two weeks after the child and her mother had left to live in Pakistan permanently. The finding of Hogg J had been that the child and her mother had lost their habitual residence here upon their departure from the country, although she considered it probable that they had not acquired habitual residence in Pakistan at that stage.*

 *30. It is interesting to note Lord Wilson's comment at [39] of* Re B *[2016] that habitual residence requires "not the child's full integration in the environment of the new state but only a degree of it", and his observation that it is clear that in certain circumstances, the requisite degree of integration can occur quickly. He particularly noted that Article 9 of Brussels IIA expressly envisages a child's acquisition of a fresh habitual residence within three months of his lawful move to another Member State. As he said, in* A v A *Baroness Hale had declined to accept that it was impossible to become habitually resident in a single day. He also remarked, at [45], on the unlikelihood of a child being in limbo without a habitual residence, saying:*

*"45. I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts* down *those first roots which represent the requisite degree of integration in the environment of the new state,* up *will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it." (emphasis in the original)*

*31. It is also worth noting that Lord Wilson said at [42], when looking at Recital 12 to Brussels IIA, that:*

*"if the interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former."*

*This further underlines that the "default setting" (as I might loosely call it) is that a child will have a habitual residence somewhere.*

 *32. At [46] Lord Wilson went on to make three "suggestions" about the point at which habitual residence might be lost and gained. He said:*

*"One of the well-judged submissions of Mr Tyler QC on behalf of the respondent is that, were it minded to remove any gloss from the domestic concept of habitual residence (such as, I interpolate, Lord Brandon's third preliminary point in the* J *case [1990] 2 AC 562 ), the court should strive not to introduce others. A gloss is a purported sub-rule which distorts application of the rule. The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him: (a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state; (b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for**him a continuing link with the old state, probably the less fast his achievement of it."*

1. ***This decision provides a convenient summary.***
2. **N (Hague Convention - Habitual Residence) [2017] EWHC 63 (Fam). Cobb J.**

N aged 2 born in England. parents separated. October 2015 they decided to make a fresh start in Canada. They travelled on 6-month holiday visas . Separated finally in February 2016. Relationship floundered soon after arrival In April 2016 the father and N returned to England. The mother travelled to the airport with them. An "agreement to travel" document was prepared and signed by mother but not father. It provided the father could remove N but was to return with her by 16 August 2016. The parents did not agree the circumstances. M moved to Alberta in July 2016. M moved to Alberta to live with or close to a new partner. She gave birth to E who was removed from the mother's care due risk by the mother's partner. M in 2016 commenced Hague proceedings.

**Held citing** *Re L (Habitual Residence: Domestic Abuse)* [2016] EWHC 1844 (Fam) at [23]. 21. , parental intent is a relevant factor, not in relation to habitual residence as a legal concept, but in relation to the reasons for a child's leaving one country and going to stay in another (Re KL (A Child) (Custody: Habitual Residence)(Reunite: International Child Abduction Centre Intervening) **[2013] UKSC 75**, [2014] AC 1017 at [23]). 22. It is important for the court to consider the stability of the arrangements; inRe LC (Reunite: International Child Abduction Centre Intervening) [2014] UKSC 1, Baroness Hale said this at [59]: "The first principle is that habitual residence is a question of fact: has the residence of a particular person in a particular place acquired the necessary degree of stability (permanent is the word used in the English versions of the two CJEU judgments) to become habitual? It is not a matter of intention: one does not acquire a habitual residence merely by intending to do so; nor does one fail to acquire one merely by not intending to do so". (emphasis added).

And this at [87]: And discussed again in AR v RN (Scotland) **[2015] UKSC 35**, in which it was said (per Lord Reed) at [16]:

*"It is therefore the stability of the residence that is important, not whether it is of a permanent character. There is no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely" (again, emphasis added).*

The formal steps of obtaining citizenship of Canada and registration with a doctor did not represent real social and family integration. "*There is no evidence whatsoever that N integrated socially or otherwise, to any degree at all, outside* of the home – there was no nursery, no playgroup, indeed no evidence of any life at all" at [32]. N's life in England: she was born and raised in England; her enduring link with the country was preserved by the parental agreement and she retained family links.

1. ***The case fell away when the court decided that the child was not integrated sufficiently in its new life for habitual residence to have been established.***
2. **Re L-S** **2017 EWCA 2177**. **Parker J.**

Parker J ordered return to the USA of a baby aged 3 months born to an English mother in England. The married parents had had a peripatetic life in the USA. F a truckdriver. The mother came to England to her family to give birth. She returned as planned when the baby was 6 weeks old and felt very unsettled. She and the baby felt isolated. She left with the baby after 8 weeks. She argued that she had the right to remove the child to England because the child was not habitually resident in the USA at the time of removal. She appealed against the return order. Held (allowing the appeal on other grounds) the appeal against the finding of habitual residence was dismissed

**Held** baby had acquired habitual residence in the USA. Hague return order followed. Black LJ granted leave to appeal. Held habitual residence appeal dismissed. Appeal allowed upon the defence of acquiescence. Judgment set aside. We seek leave to appeal to the SC on the ground inter alia of unwarranted interference with decision on the facts.

1. ***The baby born in England returning to the USA on the breast of its mother acquired the new habitual of the father after 6 weeks.***
2. **Re D and Other Children) [2017] EWHC 284 (Fam**). **Ms Pamela Scriven QC**. An English mother left the Canary Islands permanently with the 3 children with the knowledge of the father. The family dog was shipped to England with the bicycles. They knew their grandparents home in England well. The mother had found a school locally although term had not started, they were fitted for uniforms. The father demanded their return to Spain after they had been in England for 12 days. If they were still habitually resident in Spain at that point there was a wrongful retention. **Held** the children had acquired habitual residence in England within 12 days of arrival. By the time the father changed his mind it was too late. The case is reported on costs
3. ***English children leaving Spain returning to the grandparents’ home where the family dog and bicycles were waiting achieved a habitual residence in 12 days.***

**Parens patriae: the inherent jurisdiction**

1. **Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FLR 951, and Re N (Abduction: Appeal) [2012] EWCA Civ 1086,** [2013] 1 FLR 457 confirm that the court will show extreme circumspection in accepting jurisdiction where a child lives abroad. However where the child is a British national the court may accept jurisdiction based on nationality *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 60 The Supreme Court in *Re B (A Child)* [2016] UKSC 4 when considering o the circumstances in which the inherent jurisdiction based on nationality can be exercised leaves open the question
2. **Re K and D** **2017] EWHC 153 (Fam) Macdonald J** decided that where two infant British nationals had been removed to Northern Cyprus it was a permissible use of the parens patriae jurisdiction to order their return on the ground that they were British nationals. He pointed out that the Supreme Court in Re B had left open the question of the circumstances in which the jurisdiction would be exercised, while allowing the appeal from the Court of Appeal decision
3. ***This is an important evolving jurisprudence, although a cautious approach is required.***

**Article 10 B2R: retention or removal in a Non-EU state**

1. In the event that the child has been “*wrongfully removed or retained*” from England to a non EU state (usually without the consent of the other parent with parental responsibility ) Art 10 of BIIa provides as follows with respect to the question of habitual residence in cases of child abduction:

*“****Article 10 Jurisdiction in cases of child abduction***

*In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:*

1. *each person, institution or other body having rights of custody has acquiesced in the removal or retention; or*
2. *the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:*
3. *within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;*
4. *a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);*
5. *a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);*
6. *a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.”*
7. **Re K and D 2017 EWHC 153.** Macdonald Japplied this principle: -

In Re H (Jurisdiction) [2015] 1 FLR 1132 the Court of Appeal considered the proper interpretation of Art 10, which provides a scheme for retention of jurisdiction in the Member State from which the child has been abducted, but also includes provision for the retained jurisdiction to come to an end where the child has acquired a new habitual residence in another Member State and certain other conditions are satisfied. In Re H the Court of Appeal concluded that that part of Art 10 which governs the circumstances in which jurisdiction is lost by the Member State from which the child has been abducted must be read as applying only to another EU Member State. In the circumstances, the retained jurisdiction is not brought to an end where a child's new habitual residence is in a non-Member State, even though the jurisdictional scheme in BIIa is not geographically limited to the EU.

1. ***This line of authority may provide a lifeline for parents whose children are wrongfully removed or retained outside the jurisdiction whose habitual residence has shifted to the new state by the time proceedings are commenced in England changed.***
2. If there are matrimonial proceedings pending in England FLA 1986 s.2(i)(b)(i) confers jurisdiction to exercise jurisdiction over children.
3. **Lachaux v Lachaux [2017] EWHC 385 (Fam). Mostyn J** pronounced that the section is obsolete. The mother issued a CA 1989 application for contact in relation to the parties' son. **Held** S.2(1)(b)(i) of the FLA 1986 did not aid the mother: "*it is time to recognise that there are now no imaginable circumstances where it can be said that a child issue arises 'in connection with' matrimonial proceedings".* The court did have a residual inherent power to be exercised in exceptional circumstances, to protect the welfare of a British citizen living abroad who was a minor. If the father broke his promise to the court in respect of contact, serious consideration would be given to making such an order.

1. J v U**[2017] 2 WLR 760**, **Bodey J** decided that sinces.2(1)(b)(i) of the FLA 1986 confers power to make children orders where matrimonial proceedings are pending, they must be applied. Accordingly there are conflicting judicial views.
2. ***The English court will not make an order unless it is in the interest of the child to do so. There must be a proximity between the divorce and the order which the court is being asked to make [AP v TD TD 2011 1 FLR 1851]. No order will be made unless the court is satisfied that the it is in the child’s interest.***

**Securing the return of a child: miscellaneous points**

1. The English High court will make a raft of orders to aid locating the child, removal of passports of children and parents, securing the return of the child when in England, preventing an abductor from leaving the jurisdiction until the children are returned.
2. The High court is not able to order an overseas court to carry out an order but a request may be made and this may be effective. The office of the International Liaison Judge - currently Macdonald J - will endeavour to assist.
3. Breach of a court order to return a child is a contempt of court. The court will imprison a contemnor for 2 years upon proof to a criminal standard that the contemnor had it within his power to bring a child back to England. Child abduction is a crime as well.
4. Funding is an important issue. Legal aid on means merits tested basis is available to pursue within wardship an application for the return of a child to England.
5. The President of the Family Division issued Guidance in March 2018 which practitioners have taken to heart.
6. Precedent orders are herewith together with an anonymised order made by Williams J in a case involving wrongful retention of a child in Kenya.

CLARE RENTON

29 BEDFORD ROW CHAMBERS

WC1 R 4 HE

3.5.2018