UKSC 2015/0048

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE EXTRA DIVISION OF THE

INNER HOUSE OF THE COURT OF SESSION (SCOTLAND)

IN THE MATTER OF AR (CHILDREN) (SCOTLAND)

BETWEEN:

AR

Appellant

and

RN

Respondent

and

REUNITE, CHILDREN AND FAMILIES ACROSS BORDERS, AND IAML

Interveners

SUBMISSIONS ON BEHALF OF

THE INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS

The nature of these submissions

1. The International Academy of Matrimonial Lawyers ("IAML") is a not-for-profit association of specialist family lawyers practising in 49 countries. Fellows of the IAML are elected on the basis of their experience of family law and their standing in their own jurisdictions. The IAML has over 690 fellows worldwide. It has observer status at the Hague Conference and IAML fellows have attended many of the sessions on the 1980 Convention.

2. The IAML's application to intervene in this case was made on the basis that the collective knowledge and experience of its fellows would enable us to collate and put before the Court information about how the aspects of the law of habitual residence which are relevant to this case (in particular the role of parental intention) are treated in other jurisdictions.

3. Fellows known to have expertise in the 1980 Convention were provided with a summary of the facts of the present case and were asked the following two questions:-

   (i) How do the courts in your jurisdiction analyse the term habitual residence?

   (ii) To what extent is parental intent (or lack of it) a factor in the analysis of habitual residence?

   They were also asked to provide copies of any authorities and/or of any academic work from their own jurisdictions which might be material to the determination of the present case by this Court.

4. We set out below a summary of the responses which have been received. Each of the fellows concerned has been given the opportunity to confirm the accuracy of (or to correct) these summaries of their respective contributions. The names which appear below each country heading are those of the contributing fellow(s) from that country. Countries are listed in alphabetical order.

5. Unfortunately formal translations of the judgments from non-English speaking countries are not accessible and it has not been possible to procure them in the time available. The judgments from Australia and the USA are of course available but many of them may be familiar to this Court in any event. A decision was therefore taken to present these submissions without any supporting material in the way of judgments or otherwise.

Timothy Scott QC
29 Bedford Row
London WC1R 4HE
8 May 2014

SKO Family
Forsyth House
93 George Street
Edinburgh
EH2 3ES
Agents for the IAML

Australia
Ian Kennedy AM, Kennedy Partners

6. The leading case on the process by which a child's habitual residence is determined is *LK v Director-General, Department of Community Services* (2009) FLC 93-397, a judgment of the High Court of Australia.

7. This case concerned a husband and wife, married and living in Israel, who separated in September 2005. The four children (born in Israel but entitled to Australian citizenship) continued to live with the wife in Israel. In May 2006 the wife and the four children (aged between 15 months and 8 years) travelled to Australia on return tickets with the husband's knowledge and consent on the understanding that they would return to Israel if the parties reconciled but not otherwise. Before their departure and immediately after their arrival the wife established a home in Australia. Two months after their arrival the husband told the wife that he wanted the children to return to Israel but that he still wanted a divorce.

8. At first instance and on appeal to the Full Court of the Family Court the absence of a settled intention to abandon Israel as the place of habitual residence was treated as determinative, and the children were found to have remained habitually resident in Israel.

9. In a joint judgment from the Full Bench the High Court allowed the appeal and set aside the return order. It was held that determination of habitual residence requires a broad factual enquiry. The following passage from the decision of the Court of Appeal of New Zealand in *Punter v Secretary for Justice* [2007] 1 NZLR 40 was cited with approval (#44):-

> "*Such an inquiry should take account of all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration.*"

10. The relevance of past and present intentions was addressed at #23 and further at #28 – 35 of the judgment:-

> "*It is sufficient for present purposes to make two points. First, application of the expression "habitual resdience" permits consideration of a wide variety of circumstances that bear upon where a person is said to reside and whether that residence is to be described as habitual. Secondly, the past and present intentions of the person under consideration will often bear upon the significance that is to be attached to particular circumstances like the duration of a person's connections with a partiuclar place of residence.*" (#23)

"...examination of a person's intentions will usually be relevant to a consideration of where that person habitually resides. Sometimes intention will be very important in answering that question. The example of a person who leaves a jurisdiction intending not to return is one such case. But unlike domicile ... intention is not to be given controlling weight." (#28)

"Individuals do not always act with a clearly formed and singular view of what it is intended (or hoped) the future will hold. Their intentions may be ambiguous." The case before the Court was described as such a case. (#29)

"...when considering where a child is habitually resident, attention cannot be confined to the intentions of the parent who in fact has the day-to-day care of the child ... it may be accepted that the general rule is that neither parent can unilaterally change that place of habitual residence. The assent of the other parent (or a court order) would be necessary. But again, if it becomes necessary to examine the intentions of the parents, the possibility of amibguity or uncertainty on the part of one or both of them must be acknowledged." (#34)

11. In conclusion the High Court held:-

"The absence of an agreed and singular purpose or intention at the time of the wife's departure with the children from Israel was not to be treated as deciding the question of habitual residence. Further, the intentions of the parents were not the only factors which bear upon whether the children were habitually resident in Israel in July 2006." (#48)

"Where, as here, the parents' intentions at the time of departure from Israel were expressed conditionally (to live in Australia unless ...) <u>and</u> the mother took the steps she did, both before and after arrival in Australia, to establish a new and permanent home for the children in Australia, it should have been found that the children were not habitually resident in Israel in July 2006. The possibility the children might again take up habitual residence in Israel (if their parents reconciled) does not deny that they had ceased to be habitually resident there. ... What was decisive was that the children had left Israel on the basis that both parents agreed that they would stay in Australia unless there was a reconciliation <u>and</u> the wife had set about effecting that shared intention both before and after their departure to Australia." (#49)

12. The decision of the High Court in *LK v Director-General, Department of Community Services* has been considered and applied (*inter alia* in relation to the issues of shared intention and settled purpose) in two subsequent decisions of the Full Court of the Family Court:-

Zotkiewicz & Commissioner of Police (No 2) (2011) FLC 93-472

State Central Authority & Camden (2012) FLC 93-501

France

Veronique Chauveau, CBBC Cabinet d'Avocats

Alexandre Boiché, Alexandre Boiché Avocats

13. Naturally the courts of France and of all other EU Member States follow the decisions of the ECJ / CJEU and in particular in this context *Mercredi v Chaffe* and *Re A (Area of Freedom, Security and Justice)*. There has been a very recent decision of the French Cour de Cassation on the habitual residence of children in the context of the Hague Convention.

14. On 4 March 2015 the Cour de Cassation gave its judgment in Case No. 14-19015. The mother, who lived in Limoges, had two children by a previous relationship. Her only child with the father ("the child") was born in October 2011. In August 2012 the parents decided to try to make a life together in Belgium where the father was working. They had not previously cohabited.

15. The mother retained her apartment in Limoges. She also retained the school places for the two older children, while simultaneously enrolling them in a school in Belgium. The child was placed in a crèche in Belgium.

16. The cohabitation was not a success. The mother and all three children returned to the apartment in Limoges on 22 December 2012. The father issued an application under the 1980 Convention in respect of the child.

17. The Court of Appeal in Limoges found that the child had remained habitually resident in France. Until the move to Belgium its whole life had been spent in France. The mother had reserved the possibility of a return to France if the cohabitation was not successful and the period of residence in Belgium had not been sufficiently stable to become habitual in the light of the mother's equivocal intentions.

18. The Cour de Cassation overturned this, holding that the Court of Appeal had focused too much on the periods of time which had been spent in France and Belgium respectively and had not sufficiently considered the surrounding circumstances, including the intentions of the parents. In spite of the mother's reservations the parents had shared an intention to make a life together in Belgium. Although the period of time in Belgium had been short, steps had been taken to integrate the child into a life there.

19. The Cour de Cassation summarised the law by saying that the habitual residence of a child must be determined:-

> "*in the light of all specific factual circumstances including the common intention of the parents to transfer the residence as well as decisions taken with the aim of integrating the child.*"

The intention of the parents is thus treated as an important part (but not the only part) of the overall factual matrix.

Israel

Edwin Freedman, Edwin Freedman Law Offices

20. The Israeli Supreme Court addressed the habitual residence of children in *Anonymous v Anonymous*, Civil Appeal 7784/12, 20 June 2013. The Court conducted a wide-ranging review of international case law, including authorities from Canada, the USA and Germany.

21. The facts of *Anonymous* were that the mother had been given permission to relocate from Canada to Israel after a contested hearing in Canada. The father appealed. The mother asked for permission to relocate pending the appeal. This was granted on terms that she agreed to abide by the decision of the appellate court. The mother and the children moved to Israel in August 2011.

22. On 30 June 2012 the Canadian court allowed the father's appeal. The mother refused to return the children and the father applied for a return order in Israel under the 1980 Convention. The mother argued that the children had become habitually resident in Israel. The Supreme Court held that the mother's consent to abide by the decision of the Canadian appeal court meant that they had not. The move was conditional on the outcome of the appeal and both parties had agreed to abide by the appeal court's decision.

23. On the facts of this case the question of consent was thus crucial. More generally the Supreme Court's conclusion (in the light of its review of international authorities) was that habitual residence should be determined by a factual analysis from the child's perspective. This analysis must take into account both parental intention and length of stay among other factors; no single factor is determinative. The longer the period of time which has elapsed before the application for a return order is made, the more likely it is that a child would be found to have become habitually resident in the new country, even if the left-behind parent had not consented to the move.

24. The Court did not treat this approach as a complete break with the earlier approach in which parental intention was given greater priority. Rather, parental intention is now taken into account as one aspect of the wider factual background, always seen from the child's perspective. However, a departure from a previously agreed plan (such as by starting legal proceedings in the new country which are inconsistent with the temporary or provisional nature of an agreed move) would be likely to be determinative.

The Netherlands

Sandra Verburgt, Delissen Martens

25. On 17 June 2011 the Dutch Supreme Court (Hoge Raad) gave its judgment in Case *11/00346*. This case concerned a Greek father and a Dutch mother. They lived in The Netherlands from 2002 until June 2009. Two children were born during this time, in 2004 and 2006.

26. The father returned to Greece in June 2009. In July 2009 the mother, who was pregnant, followed the father with the children in the hope of saving the marriage. She did not deregister from the Dutch municipal registry. The third child was born in Greece. On 25 February 2010 the mother returned to The Netherlands with the three children.

27. The father asked the Greek Central Authority to assist. Proceedings were instituted in the Greek courts but the father's application in Greece was refused at first instance and on appeal.

28. A petition for a return order was issued in The Netherlands. At first instance the District Court refused the application, holding that the habitual residence of the two older children had remained in The Netherlands and that the habitual residence of the third child followed that of the mother: which was also The Netherlands.

29. The Court of Appeal overturned this, holding that the habitual residence of the children at the time of their return to The Netherlands was in Greece. Among other factors the older children had gone to school while they were in Greece; they had dual nationality; and they spoke fluent Greek.

30. The Supreme Court quashed the decision of the Court of Appeal and restored the order of the District Court. The Court applied *Mercredi v Chaffe*, taking note in particular that the mother's sole intention in going to Greece was to save her marriage rather than to establish residence there. It was clear that if the marriage did not survive she intended to return to The Netherlands. Her move was provisional.

31. This was why she had not deregistered from the municipal registry. In addition, she did not speak Greek (though the children did), and she had no job and no income there. Her geographical and social roots were still in The Netherlands. She had left her possessions in The Netherlands and had kept her Dutch bank accounts. The children were necessarily part of the mother's social and family life. Therefore the habitual residence of the mother and the children had remained in The Netherlands.

32. The mother's intentions were integral to the decision. The Supreme Court summarised and approved part of the judgment of the District Court as follows (at #3.2.3):-

"In view of the joint custody there should have been (in the end) a mutual decision to establish a residence with the children in Greece permanently. It is an established fact that the father had that intention. However, the mother's intention is controversial. It is for the father to bring evidence that the habitual residence has changed. It is the District Court's view that the father did not plausibly show that the habitual residence had changed and, considering that the mother had disputed the father's position, the father had provided insufficient facts and circumstances that could indicate that the mother's residence was intended to be in Greece permanently."

Russian Federation

Elga Sykiainen, 129343 Moscow, Amundsena str 3-2-5

33. There have to date only been a small number of cases in Russia under the 1980 Convention. It should be noted that as a matter of Russian law (Article 20 of the Civil Code) the parents' place of residence is deemed to be the child's place of residence. Under Article 6 of the law "On the Right of Citizens to Freedom of Movement and Choice of Place of Residence within the Russian Federation" Russian citizens are required to register a new place of residence within seven days of leaving their previous place of residence.

34. Normally when a Russian citizen moves abroad he or she will be removed from the register in Russia and registered instead at the Russian consulate in the country of residence. The place of registered residence is often determinative of any issue about residence in the Russian courts.

35. The second ever Russian case under the 1980 Convention was heard in the Pyatigorsk City Court in October 2014. The father was a Canadian citizen and the mother a Russian citizen. The parties married in Canada and then moved to Japan where the mother had a three year employment contract and the father was also able to work. A baby was born ten months after the move to Japan.

36. The mother took the baby to Russia when it was six months old, before her employment contract had come to an end. The child was 13 months old when the proceedings started in the Russian court. There was an issue over the habitual residence of the child. The father argued that the child was habitually resident in Japan as the parties had decided to make Japan their permanent home and had moved there.

37. The mother argued that her presence in Japan was only temporary and was subject to the term of her employment contract. The family had lived in rented accommodation in Japan and had been there on the basis of limited term visas. Neither she nor the baby had been registered with the Russian consulate as resident in Japan.

38. In addition the mother relied on the fact that she owned an apartment in Russia which had remained her registered place of residence. She had also registered the child as resident there. The father owned a property in Canada.

39. The Court upheld the father's arguments, saying:-

> "*Having examined the evidence submitted by the parties, the Court finds that the Defendant has failed to refute the plaintiff's arguments that Japan is the place of habitual residence of the minor, who lived together with the parents in Japan from the date of birth up to the date of departure with the mother. The parents lived in*

Japan before the child was born and the Plaintiff still considers Japan to be the place of his habitual residence and that of the child."

40. The father lost on other points and appealed. The question of the child's habitual residence was examined during the course of the appeal. The appeal court affirmed the decision of the trial court that Japan was the country of the child's habitual residence on the basis that Japan was where the parents had agreed that the child should live.

USA

Edwin Freedman, Edwin Freedman Law Offices

41. The US Supreme Court has yet to rule on habitual residence in the context of the Hague Abduction Convention. Among the 13 Federal Circuit Courts there are different approaches to the weight to be given to parental consent (or absence thereof) in establishing whether a child has become habitually resident in a new place.

42. In broad terms the First, Second, Fourth, Seventh and Ninth Circuits follow the well known decision of the Ninth Circuit in *Mozes v Mozes*, 239 F3d 1067 (9th Cir. 2001). *Mozes* places great weight on parental consent. The Court distinguished between three factual situations:-

    (i) Where the family unit has manifested a settled purpose to change habitual residence, qualms on the part of one of the parents will not stand in the way of the establishment of the new habitual residence.

    (ii) Where the relocation was clearly intended to be for a specific limited period, a change of mind on the part of one of the parents will not change the habitual residence of the child even after an extended stay.

    (iii) The intermediate position is where the applicant parent had earlier consented to let the child stay abroad for a period of uncertain or ambiguous duration. This is clearly more difficult but the Court said that it should be slow to infer that the previous habitual residence has been abandoned.

43. The Ninth Circuit Court of Appeals has recently reaffirmed the *Mozes* approach in *Re ALC*, 2015, WL 1742347. The mother, when pregnant with a second child, brought the older child from Sweden to the USA. At first instance the District Court found that so far as the father was concerned, the purpose of the visit was to enable the mother to give birth and recover before returning with both children to Sweden: a total of approximately six months. When this period had passed the father objected to the mother and the children staying longer and in due course applied for a return order.

44. The District Court found that both children were habitually resident in Sweden and ordered their return. The Court of Appeals upheld the order in respect of the older child. In the absence of shared parental intent for a stay of longer than six months, the attachments which that child had formed in Los Angeles were insufficient to prove unequivocally that he had acclimatised to the USA or that he had abandoned his habitual residence in Sweden.

45. In relation to the younger child, who at the time of the first instance hearing had never been to Sweden, the Court of Appeals overruled the District Court. It observed that habitual residence describes a factual state of affairs and recognised the 'obvious truth' that habitual residence cannot be acquired without physical presence.

46. The First Circuit Court of Appeals has recently followed the *Mozes* approach in *Mauvis v Herisse*, 2014 WL 5659412 (C.A.1 Mass). The Fourth Circuit has also adopted the *Mozes* approach in *Maxwell v Maxwell*, 588 F.3d 245 (2009) and more recently in *Velasquez v Funes de Velasquez*, 2015 WL 1565142 (E.D Va). In the latter case the family's move from El Salvador to the USA was an open ended one but there was no clear parental intention to abandon the habitual residence in El Salvador. On examination of all the circumstances, including the passage of time, the Court concluded that returning the children to El Salvador would not amount to returning them home. The father's application was refused.

47. The Third, Sixth and Eighth Circuits take a more child focused approach which gives little weight to parental intention. These Courts follow *Friedrich v Friedrich*, 983 F.2d 1396 (1993) ("Friedrich I").

48. *Friedrich I* has recently been reaffirmed and re-considered in *Panteleris v Panteleris*, 2015 WL 468197 (Sixth Circuit April 2015). The Sixth Circuit Court of Appeals (citing *Friedrich I* and other authority) laid down five principles to determine a child's habitual residence:-

    - Habitual residence is a factual issue and technical rules should be avoided.

    - The Court should consider only the child's experience.

    - The enquiry should focus entirely on the child's past experience. Any plans the parents may have for the future are irrelevant.

    - A person can have only one habitual residence.

    - Only a change in geography and the passage of time can combine to bring about a change in habitual residence.

49. So far as parental intention is concerned, the Court referred to its rejection of the *Mozes* approach in earlier cases. *Mozes* was said to be inconsistent with *Friedrich I* and with the goals of the Convention. The door is left open for the possible relevance of parental intention in a case concerning a child so young or so developmentally disordered as to lack the cognisance necessary to become acclimatised to a particular country or to develop a sense of settled purpose.

50. The Court referred to its own previous characterisation of *Mozes* as considering "*the subjective intentions of the parents as all but dispositive of a child's habitual residence.*" This characterisation might well not be accepted by those courts which do take the *Mozes* approach.

UKSC 2015/0048

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM

COURT OF SESSION, INNER HOUSE

IN THE MATTER OF AR (CHILDREN) (SCOTLAND)

SUBMISSIONS ON BEHALF OF

THE INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS

SKO Family
Forsyth House
93 George Street
Edinburgh
EH2 3ES
Agents for the IAML