`http://www.incadat.com/ ref.: HC/E/UKs 71`
`[24/10/1995; Inner House of the Court of Session (Scotland); Appellate Court]`
`Cameron v. Cameron 1996 SC 17, 1996 SLT 306, 1996 SCLR 25`

C. v C.

Court of Session

Inner House (Second Division)

24 October 1995

Lord Justice-Clerk (Ross), Lord Morison, Lord Osborne

Lord Justice Clerk, (reading the opinion of the court): In this petition the petitioner asks the court to order the respondent to return the children, [R and S], to France and the jurisdiction of the court of Charente in terms of the Child Abduction and Custody Act 1985 and the Hague Convention. The background to this application has been fully set forth by the Lord Ordinary in his opinion and need not be repeated here. After a proof at which evidence was adduced on behalf of both parties, the Lord Ordinary refused the prayer of the petition. He did so because in all the circumstances he was not satisfied that the petitioner had proved that as at 12th April 1995 (when the respondent failed to return the children to the petitioner) the two children were habitually resident in France. Against the interlocutor of the Lord Ordinary dated 18th July 1995, refusing the prayer of the petition, the petitioner has now reclaimed.

In opening the reclaiming motion, junior counsel for the petitioner explained that if the reclaiming motion were granted, there would still require to be further procedure in the case and that the case would require to be remitted back to the Lord Ordinary for that purpose. She also intimated that parties had reached an agreement upon expenses, whatever the outcome of the reclaiming motion. This was subsequently confirmed by junior counsel for the respondent and it appears that parties have agreed that as regards the whole cause to date there should be no expenses found due to or by either party.

Two grounds of appeal were put forward on behalf of the petitioner.

'1. The Lord Ordinary erred in holding that the initial arrangements made in respect of the children of the parties residing in France were tentative or provisional.

2. Esto the said arrangements were tentative or provisional (which is denied), the Lord Ordinary erred in law in holding that the tentative or provisional nature of the arrangements deprived them of the requisite settled purpose for habitual residence to be established.'

Counsel for the petitioner pointed out that before the court could hold that there had been wrongful retention of the children by the respondent and that an order should be made for the return of the children to France, it would require to be established that the children were

habitually resident in France immediately before the wrongful retention. This was because of the terms of article 4 of the Hague Convention to be found in Schedule 1 to the Child Abduction and Custody Act 1985. Article 4 is in the following terms.

'The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.'

Counsel for the petitioner proceeded to examine what was meant by 'habitual residence'. In Dickson v Dickson the court had occasion to consider a similar question. In delivering the opinion of the court, the Lord President at p 703[A-C] pointed out that there were three questions of law which arose. He proceeded as follows.

'The first was what is meant by "habitual residence". The second is whether it was necessary for the child to acquire a habitual residence in this country before his habitual residence in Australia could be said to have been abandoned. And the third was the date to which to look as the critical date at which the habitual residence in Australia had to be established by the petitioner.'

The Lord President proceeded:

'So far as the first point is concerned the Lord Ordinary said that the concept of habitual residence implies more than physical presence in the country concerned. He said that it requires also an intention to fix the residence as habitual. No criticism was made of this approach, and we need not examine it in detail in this case. It is enough to say that in our opinion a habitual residence is one which is being enjoyed voluntarily for the time being and with the settled intention that it should continue for some time. The concept is the same for all practical purposes as that of ordinary residence as described by Lord Scarman in R v Barnet London Borough Council, ex parte Shah at pp 342 and 343. A person can, we think, have only one habitual residence at any one time and in the case of a child, who can form no intention of his own, it is the residence which is chosen for him by his parents. If they are living together with him, then they will all have their habitual residence in the same place. Where the parents separate, as they did in this case, the child's habitual residence cannot be changed by one parent only unless the other consents to the change. That seems to us to be implied by the Convention.'

Counsel accepted that statement of the law except that she contended that it was possible in law to have two habitual residences at the same time. Thus she submitted that, although it was necessary for the petitioner to show that the children had acquired a new habitual residence in France when they accompanied their father there, it was not necessary to show that they had lost their old habitual residence. We do not agree with that submission by counsel. We respectfully agree with the Lord President that a person can have only one habitual residence at any one time and that it follows that if a person is to acquire a new habitual residence, he must lose the old habitual residence.

In R v Barnet London Borough Council, ex parte Shah at pp 341-342 Lord Scarman said:

'In the present cases Lord Denning MR adopted the same view of the natural and ordinary meaning of the words: for in his judgment he said [1982] QB 688, 720:

'"Traditionally we ought simply to apply the natural and ordinary meaning of the two words 'ordinarily resident' in the context of [the Education Act 1962] . . . If we were to do that here,

I feel I would apply the test submitted by Mr Lester [counsel for the Shahs]. The words 'ordinarily resident' mean that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration. On that test all [the] students would qualify for a mandatory award."

'Strictly, my Lords, it is unnecessary to go further into such case law as there is in search of the natural and ordinary meaning of the words. In 1928 this House declared it in general terms which were not limited to the Income Tax Acts. Lord Denning has reaffirmed it in 1981, thus showing, if it were needed, that there has been no significant change in the common meaning of the words between 1928 and now. If further evidence of this fact is needed (for the meaning of ordinary words as a matter of common usage is a question of fact) the dictionaries provide it: see, for instance, Oxford English Dictionary sv "ordinarily" and "resident". I, therefore, accept the two tax cases as authoritative guidance, displaceable only by evidence, which does not exist, of a subsequent change in English usage. I agree with Lord Denning MR that in their natural and ordinary meaning the words mean "that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration". The significance of the adverb "habitually" is that it recalls two necessary features mentioned by Viscount Sumner in Lysaght's case, namely residence adopted voluntarily and for settled purposes.'

Subsequently at p 344B, Lord Scarman said:

'There are two, and not more than two, respects in which the mind of the "propositus" is important in determining ordinary residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is. And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.'

As we understood it, counsel on both sides of the bar were prepared to proceed upon the basis that the tests described by Lord Scarman fell to be applied. For our part, with great respect, we are not satisfied that in all cases the residence must be voluntarily adopted before there can be habitual residence. Even though Robinson Crusoe had no opportunity to escape, we are inclined to think that he had his habitual residence on the desert island. Likewise, in recent years, Nelson Mandela and other political detainees on Robben Island in South Africa, who were on the island for prolonged periods, in our opinion had their habitual residence there although they were detained or imprisoned.

However that may be, it is unnecessary to consider that aspect of the matter in this case, which concerns children who went to stay with their father in France in consequence of an agreement reached between their parents.

Counsel on both sides of the bar were agreed that in determining the issue of whether the children were habitually resident in France on 12th April 1995, it was of critical importance to have regard to the minute of agreement between the parties which the Lord Ordinary has very usefully set out in full in his opinion. Again, there is no need to repeat these provisions here, except to emphasise that in clause 1 it is provided inter alia:

'It is agreed between the parties that they shall share joint custody of the three children. Mr C. shall take [R] and [S] with him to live at *, France.'

Clause 1 also provides that the respondent shall exercise unlimited access to the children in France and that she shall be entitled to residential access to the children in Scotland. In that connection it is provided inter alia as follows.

'It is agreed that [R] and [S] will be available for Mrs C.'s visit to France each year during the first half of the French school holidays and that [R] and [S] will visit Mrs C. in Scotland for at least fourteen days during the second half of the French school holidays. Such periods of visits to be valid each year unless other arrangements for any specific year are agreed by both parties.'

Clause 2 provides that if [R] and [S] become unhappy residing in France with the petitioner and wish to reside with the respondent, the petitioner shall immediately arrange to return the two children to the respondent in Scotland at his expense.

Clause 4 is in the following terms.

'The parties agreed that the arrangements as agreed between them relating to the children shall be reviewed on the expiry of six months after the date of the execution of this agreement.'

Counsel submitted that it was necessary for the court to have regard to the terms of the minute of agreement and also other undisputed facts referred to by the Lord Ordinary. In the course of his opinion, the Lord Ordinary explains that the provisions in clause 1 relating to access had been added to the draft minute of agreement by the respondent's father. It was, however, agreed by both parties in this court that the minute of agreement which had been signed by the parties contained their agreement and that effect must be given to it. In his opinion the Lord Ordinary expressed the view that clause 1 was sufficiently wide to have effect in the longer term, but he concluded that the minute of agreement also had a shorter-term aspect which was essentially tentative in the sense of being a trial of the arrangements. He reached this conclusion because of the terms of clauses 2 and 4. Counsel for the petitioner submitted that the Lord Ordinary was in error in holding that the minute of agreement was in character essentially tentative in the sense of being a trial of the arrangements. They submitted that clause 2 was a sensible clause for the parents to include in their agreement and they submitted that neither clause 2 nor clause 4 created any provisional quality.

Counsel for the petitioner also submitted that the Lord Ordinary's decision appears to have been arrived at to some extent upon the view that a period of a few months was insufficient to establish habitual residence. They pointed out that for habitual residence a person must have resided in the country in question for an appreciable period. In In re J (A Minor) (Abduction: Custody Rights) at p 578 Lord Brandon of Oakbrook said:

'The first point is that the expression "habitually resident", as used in Article 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A and his subsequently becoming habitually resident in country B. 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 long-term residence 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. During that appreciable period of time the person will have ceased to be habitually resident in country A but not have become habitually resident in country B. The fourth point is that, where a child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.'

In relation to the period required for habitual residence, counsel also referred to Dickson v Dickson; Re S (A Minor) (Abduction); V v B (A Minor) (Abduction); and Moran v Moran.

In the light of these authorities counsel maintained that the residence in France of some three months in the present case was more than sufficient to enable the children to become habitually resident in France and that the Lord Ordinary had erred in not accepting that.

Counsel for the respondent maintained that the Lord Ordinary had arrived at a correct conclusion in relation to the matters raised in both grounds of appeal. Counsel for the respondent maintained that it was important to bear in mind all the relevant circumstances. These included that the children had both been born in Scotland and had resided in Scotland (apart from seventeen days) until the petitioner took them to France in January 1995; at the time when the minute of agreement was entered into the children's habitual residence was in Scotland; the children could not speak much French prior to January 1995 and by April 1995 they were still not fluent in French; neither the petitioner nor the respondent is fluent in French, and it was accordingly plain that there was a language barrier; although the two children lived with the petitioner in France from January to April 1995, both the petitioner and the respondent had joint custody of them during this period.

As regards the minute of agreement, counsel accepted that clause 1 was capable of being construed as dealing with a period of years, but they maintained that clauses 2 and 4 showed the tentative nature of the arrangement which had been made; all that the respondent had agreed to was that the children should go to France as an experiment. Counsel stressed that whether or not the children had a habitual residence in France was a matter of fact. They also contended that since the agreement reached between the parties was temporary or provisional, the children could not have acquired a habitual residence in France. In any event, they submitted that the children had not lived in France for a sufficiently long period to justify the inference that they had acquired a habitual residence there. Counsel stressed that there required to be settled intention to take up residence in the new country for an appreciable period of time and they submitted that the terms of the minute of agreement showed that there could be no settled intention in this case. Moreover, in the circumstances a period of approximately three months was insufficient to demonstrate that the children had become habitually resident in France. They also pointed out that in the cases cited by the petitioner the court had been mainly concerned with the question of whether the children had lost their habitual residence and acquired a new one, whereas in the present case the critical issue was whether the children could, in the circumstances, be held to have acquired habitual residence in France.

It is clear from the Lord Ordinary's opinion that he concluded that the arrangements contained in the minute of agreement were tentative only. He also talks about the arrangements being 'experimental'. We have come to the clear conclusion that in this respect the Lord Ordinary erred. We are not satisfied that the agreement contained in the minute of agreement was tentative in the sense of being provisional or temporary. On the contrary, we are satisfied that the minute of agreement contained a final agreement. Looking at clause 1, it is plain that there is nothing tentative or provisional in what was therein agreed. One

matter agreed was that the petitioner should take the two children with him to live in France. The fact that the access arrangements provide for visits 'each year' is only consistent with the intention of the parties being that the children were to remain with the petitioner in France for a number of years.

Clause 2 appears to us to be a sensible provision for the parties to have made providing for the contingency that the children might become unhappy residing in France, but such a provision does not, in our opinion, detract from the fact that a firm and final agreement had been expressed in clause 1. We recognise that, having regard to the terms of clause 4, the arrangements made in clause 1 were to be reviewed after the lapse of six months, but the fact that the arrangements were to be reviewed at that time does not mean that they were necessarily going to be altered. In any event, it was the whole arrangements in the minute of agreement which were to be the subject of review, and review might have been restricted to the provisions regarding access or the provisions relating to the information which the respondent was to receive regarding the medical arrangements made for the children. The existence of clause 4 does not mean that the agreement that the petitioner should take the children to live with him in France was to endure for six months only; despite the provision for review contained in clause 4, the arrangement that the petitioner was to take the children to live with him in France might well have continued indefinitely. If the parties' intention had been that the petitioner was to have the children for a trial period only, the minute of agreement would have been expressed differently.

In our opinion, there was nothing tentative in what was agreed in the minute of agreement. On the contrary, the petitioner and the respondent reached a final agreement which was contained in the minute of agreement and, although the arrangements made were to be subject to review after six months, that did not render the arrangements tentative or provisional.

In the course of his opinion the Lord Ordinary states that when the children left Scotland on 21st December 1994 the respondent believed that they would be back in Scotland with her in the summer of 1995 and that their long-term future would ultimately be settled at that time. Having regard to the provisions in the minute of agreement dealing with access, she was no doubt justified in concluding that the children would be in Scotland in the summer of 1995 on a visit. She may have believed that their long-term future would ultimately be settled at that time, but that was not what was agreed in the minute of agreement. It does not matter what the respondent may have believed had been agreed, one has to look to the minute of agreement to ascertain what the terms of the agreement were.

The other issue debated was whether, on the assumption that the arrangements were not merely tentative or provisional, the children had resided in France for a sufficient period of time to support the view that they were habitually resident there on 12th April 1995. On 12th April 1995, when the respondent failed to return the children, they were in fact in England where the petitioner was visiting his mother. That, of course, is not inconsistent with their being habitually resident in France, if that was where they were normally resident and if they were visiting England upon a temporary basis (R v Barnet London Borough Council, ex parte Shah, p 342). In our opinion, having regard to the terms of clause 1 of the minute of agreement to the effect that the petitioner was to take the children with him to live in France and the fact that the children did in fact live there with him from early January 1995 until 12th April 1995, apart from their short visit in April to the petitioner's mother, we are of opinion that by 12th April 1995 the children clearly had become habitually and normally resident in France. That was the intention of both parties as expressed in clause 1 of the minute of agreement. In consequence of what had been agreed, the children had gone to France and had taken up residence there with their father. They attended school in

France from early January 1995 for the whole of a term. During that period they participated in a number of social events with local children. Arrangements for local medical care were put in place. In these circumstances we are satisfied that by 12th April 1995 they had lived in France for a sufficiently long period to show that they had become habitually resident there. There is no minimum period which is necessary in order to establish the acquisition of a new habitual residence, but it is significant that a period of three months was sufficient for a new habitual residence in Re S (A Minor) (Abduction), and that in V v B (A Minor) (Abduction) a period of two months appears to have been held to be sufficient to establish a new habitual residence.

In order to establish a new habitual residence, it is not necessary to show that when the child moved to the new country there was any intention to reside there permanently. Nor need there be any intention to reside there indefinitely. It is sufficient if there is an intention to reside there for an appreciable period. In Moran v Moran Lord Prosser pointed out that habitual residence might well be for a limited period and we agree that that is so. In the present case, when the father took the children to France in early January 1995, having regard to the terms of clause 1 of the agreement, this was clearly for an indefinite period. It was plainly for an appreciable period in terms of In re J. Moreover, even if, contrary to our opinion, the minute of agreement is to be construed as meaning that parties had agreed that the children should be taken to France for a period which might not be for more than six months, that would, in our opinion, be an appreciable period, sufficient to show that by 12th April 1995 the children were habitually resident in France. If on 12th April 1995 one were to ask where was the normal residence of these children, the only answer which could be given at that date would be that it was in France.

For the foregoing reasons we are satisfied that the Lord Ordinary's conclusion in this case was erroneous. In all the circumstances the proper conclusion is that the petitioner has proved that as at 12th April 1995 the two children were habitually resident in France.

Parties were agreed that if the petitioner was successful in this appeal, further procedure would require to take place before the Lord Ordinary in view of the issues raised in the respondent's third and fourth pleas-in-law.

We shall accordingly grant the reclaiming motion, we shall recall the interlocutor of the Lord Ordinary dated 18th July 1995 and thereafter we shall remit to the Lord Ordinary to proceed as accords.

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