---

http://www.incadat.com/ ref.: HC/E/UKe 302
[16/06/2000; High Court (England); First Instance]
Re N. (Abduction: Habitual Residence) [2000] 2 FLR 899

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

16 June 2000

Black J.

In the Matter of re N.

Counsel: Michael Nicholls for the father; Richard Todd for the mother

BLACK J: The plaintiff father applies for an order under the Hague Convention for the return of the children: N born 16 December 1994 (aged five); O born 5 March 1996 (aged four); and C born on 27 July 1997 (aged two) to Spain following their removal to England by their mother on 13 November 1999 (see the Convention on the Civil Aspects of International Child Abduction (the Hague, 25 October 1980; TS 66 (1986); Cm 33) (the Hague Convention), as set out in Sch 1 to the Child Abduction and Custody Act 1985).

Under art 3 of the Hague Convention, the removal of a child is to be considered wrongful where it is in breach of rights of custody attributed to a person under the law of the state in which the child was habitually resident immediately before the removal.

Where there has been a wrongful removal in terms of art 3, art 12 requires that the immediate return of the child is to be ordered. However, art 13 qualifies the mandatory terms of art 12 and, in certain circumstances, allows the court a discretion as to whether the return of the child is ordered.

The defendant is the children's mother. She does not dispute that the father has rights of custody with regard to the children under Spanish law by virtue of the fact that the parents are married or that her removal of the children to England is capable of being a breach of those rights of custody. However she resists the father's application for the return of the children on the basis that: (1) the children were not habitually resident in Spain when she returned with them to England and there was therefore no wrongful removal within the terms of art 3; and (2) there is a grave risk that the return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation (art 13 (b)) and the court should exercise its discretion not to order their summary return to Spain.

The facts

The parties were married on 20 April 1993 in England. The marriage is still subsisting although the mother began divorce proceedings in the county court by a petition dated 25 February 2000.

Prior to leaving for Spain on 13 November 2000, the family's connections were predominantly with England:

-- Apart from a period of seven months: when the mother worked as a nanny in Madrid, and the period spent in Spain between November 1999 and February 2000, she has never lived in any country except England. She is a British citizen. Her family all live in England.

-- The father originates from Iran where he still has family and owns a property which is let. However he also has a sister who lives in this country and, apart from three visits to Iran during the course of the marriage, he has lived in England continuously from 1988 until the family left for Spain. He obtained British citizenship in the early 1990s.

-- The children were born in England. Until the trip to Spain in November 1999, they had never lived in any country except England. They are British citizens and, save for the Spanish they picked up recently, speak only English.

-- The parties and the children all have British passports. The father has also got an Iranian passport which appears to have expired.

-- There were no family or other connections with Spain prior to the parties going there in November 1999.

For most of the marriage, the family lived in the London area. Latterly, the father had his own business, doing property maintenance and repairs. The mother did not work. There appears to be no dispute that she has always been the main carer of the children though the parties are not in agreement as to the degree of involvement that the father has had in their care. She says he never had sole care of them because she considered him to be unfit to undertake this. He says that on numerous occasions he had sole care of the children. N attended nursery school in England and, in September 1999, had started at infant school.

In 1995 the parties had moved from council accommodation into their own property. This property was in the father's sole name. It was sold at the end of October or beginning of November 1999 in the face of mounting financial difficulties and debts. When the mortgage was paid off there was just over £100,000 left. Most of the parties' belongings were put into storage in two containers (large ones measuring about seven feet by seven feet) in Sheffield. Other items, including the children's toys, were kept at the home of the mother's parents or father's sister. When the father returned from Spain to England to fetch the car in January 2000, he brought some of these items out. The parties are not agreed on what they were. The mother says he brought a train set for the children and 'some junk'. The father says the items brought back included a Persian carpet, toys and games, a portable television and a microwave. There is no dispute that the two containers remained in store in Sheffield. The father says he was 'arranging' for them to be sent out when the mother and children returned to England though it is plain that this had not got as far as contacting the storage company as the documentation exhibited to the affidavit of the mother's father shows.

The parties agree that they had talked about going to live abroad when the house was sold. Both parties agree that other possibilities were explored as well including living somewhere else in England or Scotland, possibly running a newsagency, store or pub.

The father says that the decision to relocate to Spain was made after extensive and careful consideration and that the plan crystallised after the family went to an exhibition run by Scirocco Estates about relocation to Spain in about July 1999. He says research was done into the practicalities through a company associated with Scirocco Estates called Eagle Globe, which is based in Fuengirola.

The mother says the final decision was made at the last minute. She produces documentation from the estate agents dated 4 November 1999, which refers to an arrangement for the father to view a property in England that day. There is also a note which appears to confirm that 'Mr/s [N]' did view the property as arranged. It seems to me that this must indicate remaining uncertainty about the move to Spain. Either the decision to go to Spain had still not been finalised by then or, as the mother's second affidavit seems to suggest, the plan was for a property purchased in England to return to should things not work out in Spain.

It is common ground that between 2 and 16 October 1999, the family took a holiday in Spain with the mother's parents. This was a holiday which the mother's parents had found at the last minute using teletext. It is agreed that it was not arranged for the purpose of exploring a move to Spain. However the father says that the parties told the mother's parents about their plans to re-locate to Spain before the holiday and the holiday plans were changed so that they would have the opportunity to pre-plan the move in Malaga whilst on holiday. The mother's father's affidavit says that the mother told him they were thinking of living in Spain as one of many possibilities but that the holiday was selected simply because it was a bargain.

No practical arrangements were made whilst the parties were on the holiday either to set up home or to start a business in Spain though they did visit some properties. The father says the mother fell in love with the area and that they were both even more convinced that they had made the right decision about going to live there. The mother agrees she was interested in going to Spain but says that her preferred choice was still England.

The parties both agree that there had been long-standing problems in their marriage, prior to their final separation in February 2000. As the father puts it 'our relationship has been difficult throughout, dating back prior to our marriage in 1993'. Each party blames the other for this.

The mother says that separations had come about because of the father's behaviour towards her, in particular his violence. She complains that he was volatile and possessive and that he had an alcohol problem. She says that the children have witnessed him attacking her. Her affidavits detail incidents of violence, threats and abuse towards her dating back to 1990.

The father puts the arguments down to the mother's personality and says she struck him in temper. He does not accept that he has been violent to her or that he drinks to excess.

There was a separation in the early stages of the mother's pregnancy with N and near separation on at least one other occasion.

On the day of completion of the sale of the home there was a further serious rift. The row that time appears to have been over clearing the property of the parties' belongings and vacating it for the new owners. The mother returned to her family with the children. She says she had decided then that she did not want to live with the father again. There is a file note from the TUC legal department showing that they were contacted on 1 November 1999 for advice because 'client's daughter going through acrimonious divorce' (the client was the mother's father who had telephoned for legal advice on the mother's behalf).

However the parties subsequently began to live together again at the father's sister's home. The mother says the catalyst for this was the father's threat to kill himself which led her to give in and talk to him on the telephone. The father says he did not threaten to kill himself but said something like 'you and the children are my life and my reason for living'. The mother says he made promises to her that he would give up drinking. She told him she could not live in Spain because if he ran a bar there was obviously a risk that his drinking would worsen; he promised he would not drink at work. She told him if he ever hit her again, she would leave and divorce him. She said that he must make sure all the debts were paid because she would not otherwise be able to settle in Spain and he agreed. The father appears to accept that the original intention was that the debts would be paid off before departure.

However he denies, of course, that he drank to excess or used violence to the mother and he denies that the decision to relocate to Spain was in any way conditional on himself and the mother reconciling, his behaviour changing or anything else, for that matter.

It appears from the father's affidavit that the original intention was to tie up arrangements in Spain before leaving England. However after the renewed matrimonial difficulties, the parties decided it would be better to go immediately. Both parties agree that finance played a significant part in this decision. The father says they did not want to waste their scarce resources in this country but to get to Spain as soon as possible. The mother says that the father wanted to leave quickly to escape their unpaid debts.

A cheap flight to Malaga was rapidly arranged for 13 November 1999. Even two days before they were due to depart, no arrangements had been made about accommodation. A rented apartment in Malaga was then arranged as a short-term measure with help from Eagle Globe.

The parties did not close their bank and building society accounts in this country. There appear to have been a number of accounts including the father's sole account and the parties' joint account with the National Westminster Bank, an account in the names of the father and his deceased mother, the mother's Halifax current account and accounts for the children at the Halifax. Significant sums of money were paid into some of these accounts before the parties departed for Spain. The father took £83,000 in cash with him to Spain. A bank account was also opened in Spain.

The family departed for Spain with hand luggage only, their other belongings remaining in storage here as I have described. It is common ground that at that stage they had not taken any administrative steps to register with the Spanish authorities for work purposes and the father did not have a job organised. They had only the rented accommodation which had been arranged at the last minute and they had not made any arrangements for N's schooling.

The plan was to try to find a bar to run. £13,000 was paid for a bar which they found during November and which was opened on 24 December 1999. The mother helped in the bar and did the cooking. The family continued to live in the rented flat.

There is a dispute between the parties as to what happened in relation to education for the children. The fact is (and this is not in issue) that none of the children received any education at all between 13 November 1999 when they arrived in Spain and 15 February 2000 when they returned to England. They spent all their time around the bar.

The father says they looked for places for the children and visited several schools but the schools were full. His case is that they reserved places for the boys in a private school but it

was full until September 2000. They got the application forms to fill in but had not completed the paperwork before the mother and the children left in February. His affidavit says he has asked the school to provide a letter confirming the steps taken by himself and the mother. No such confirmation has been forthcoming and the father has not provided the application forms which he says the parties had obtained either.

The father says that the parties had also made the necessary arrangements to enrol the boys temporarily in the local state school where they were due to start at the end of February 2000. Once again he said he asked the school for confirmation but has produced nothing for inspection by the court.

The father says Spanish tuition had been arranged with 'Nicki' for the boys. This arrangement appears to have been in principle only, however, because he also says that the start of the lessons had not been arranged by the time the children left Spain.

The mother's case is that no arrangements were made to enrol the children in schools. She agrees the father made tentative inquiries but she says no place was ever offered to her knowledge. According to her, she was the one who did any form filling that was required when they were in England and she never filled any forms in for schooling in Spain. She also says nothing came of the suggestion of private Spanish lessons.

There is no dispute that the parties had not secured residential status in Spain prior to the mother's return to England though they had obtained a national insurance number in order to run the bar. The father says it was intended before they left England that they would secure residential status (which would register them for the payment of tax in Spain) and they had obtained the necessary paperwork by the time of the mother's departure from Spain but the forms were not completed because social security cards are needed in support of the application and they had not yet been issued.

The mother's affidavit of 25 April 2000 requests that the father should produce any papers which he filed in order to secure residential status. Nothing has been produced nor has he produced any blank forms which could have been used for that purpose.

Eventually a house was purchased in Spain in the parties' joint names. The purchase of this property was completed approximately one week before the mother left Spain in February 2000 and the family never moved in to live there. The mother says she was not enthusiastic about the purchase though the father says she was very keen on the property and it was a joint decision to buy it and to do so in joint names. The mother's case is that the father wanted to make the purchase in his sole name but the property was put into joint names because the mortgagee advised that. She only signed the purchase deed because she dreaded the father's reaction if she refused. She says she had already decided that the marriage was not going to work and she was going to leave and seek a divorce though she had not yet told the father. She describes how the father's behaviour had in fact deteriorated since being in Spain, with him drinking to excess and criticising and bullying her. He had not paid off any of the debts as he had promised; this the father seems to agree but gives the explanation of the hurried departure for Spain and a decision of the parties to defer payment until they were established.

Things culminated in a serious row between the parties at the bar on 12 February 2000 whilst the mother's father and a friend of his were staying with the family. Once again both parties blame each other. Hostilities rumbled on over 13 February when there was another unpleasant incident. The events of that day led the mother to the decision that she would take this opportunity to leave the father for good. The following day, she consulted a lawyer

about the proprieties of returning to England with the children and on 15 February 2000 flew to Gatwick with the children without telling the father.

When he learned that the mother and the children were in England, the father returned to this country in an attempt to persuade them to return to Spain. This was unsuccessful and he had to return himself because he needed to re-open the bar in order to ensure a flow of income for the family. In due course, he submitted a Hague Convention application which has resulted in the hearing before me.

Meanwhile, the mother instituted proceedings in the county court with regard to the children, on 25 February 2000 issuing an application for a residence order and a prohibited steps order preventing the father from taking the children out of the jurisdiction. A residence order was granted to her, apparently ex parte, on 2 March 2000 and the prohibited steps application was adjourned. Prior to the return date in the county court with regard to that application, however, the originating summons in these proceedings was issued on 18 April 2000. Thereafter, orders have been made in the High Court in these proceedings and there have been no more steps taken in the county court.

It is common ground that the children were habitually resident in England until 13 November 1999 when the family left for Spain. The question is whether at some stage thereafter, prior to the mother returning with the children to England on 15 February 2000, the habitual residence of the children changed to Spain.

In relation to habitual residence, I proceed upon the basis of a number of uncontentious propositions of law which can be derived from a number of authorities, including Akbarali v Brent London BC, Abdullah v Shropshire CC, Shabpar v Barnet London BC, Barnet London BC v Shah [1983] 2 AC 309, [1983] 1 All ER 226; Re J (a minor) (abduction: custody rights) [1991] FCR 129, [1990] 2 AC 562, and Nessa v Chief Adjudication Officer [1999] 3 FCR 538, [1999] 4 All ER 677:

-- 'Habitual residence' is not defined by the Hague Convention or by the statute: the words are to be understood according to their ordinary and natural meaning. It refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being whether of short or long duration.

-- The question of 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.

-- Habitual residence can be lost in a single day if a person leaves a country with the settled intention not to return but to take up long-term residence elsewhere.

-- There is no fixed period of residence required in the new country before habitual residence there can be established. What must be shown is residence for a period which shows that the residence has become habitual and will or is likely to continue to be habitual.

-- A short period of residence may suffice in some cases and there may be special cases where someone is resuming residence in a country where they were formerly habitually resident rather than coming for the first time.

It has been argued on behalf of the father in this case, in a submission that builds upon the dissenting judgment of Thorpe LJ in the Court of Appeal ([1998] 1 FCR 461, [1998] 2 All ER 728) in the Nessa case, that a family court may need to be quicker to find habitual residence

established than a court dealing with another area of the law. This is necessary, it is said, because the protection of children (against international abduction in particular) is increasingly based upon habitual residence making it imperative that a child should always be habitually resident somewhere. Because of my findings of fact, it has not been necessary for me to decide upon this argument, which, it is said, was left open by the House of Lords ([1993] 3 FCR 538, [1999] 4 All ER 677) in Nessa.

The case has been approached upon the basis of the written evidence with neither party seeking to adduce any oral evidence before me. I have had, in the circumstances, to derive guidance from such documentary evidence as there is and from a common sense view of what appears probable in the light of the facts about which the parties agree.

I have absolutely no hesitation in preferring the evidence of the mother, supported by that of her father, about the circumstances in which this family left for Spain in November 1999 and what then happened in the period prior to 15 February 2000 when she and the children left for England. It is her evidence which, in my judgment, accords with the probabilities in this case and with the documentation that is available.

It is plain that the marriage was in serious difficulties immediately prior to the departure for Spain, so serious that, as the TUC documentation shows, legal advice was sought on 1 November 1999 for the mother on the basis that she was getting a divorce. This was the last in a line of difficulties to do with the relationship. I accept that the mother was influenced in agreeing to a reconciliation by comments by the father that led her to fear he may be threatening suicide rather than seeking a reconciliation entirely of her own volition. I accept that she sought assurances from the father about his future behaviour and that she started to live with him again and embarked upon the Spanish venture only with reservations and conditionally upon things changing in future and she told him this. There is no doubt that there were considerable debts. The father agrees that the original intention was to pay them off and it seems to me probable that the mother also made it a condition of the new venture that the father did discharge them. That condition was not fulfilled and I am not persuaded that this was, as the father suggests, because the parties reached an agreement to give priority to setting things up in Spain.

There are many features which indicate to me that the departure from England was not, at least on the part of the mother and possibly on the part of the father too, with the settled intention not to return but to take up long-term residence in Spain instead. In part, I am influenced by the reservations of the mother about the marriage and the conditions she was putting upon her renewed relationship with the father and upon the trip to Spain. I also find that the decision to go there rather than adopting any of the other possibilities that had been under consideration was arrived at at the last minute. If there had been a firm decision after the July exhibition as the father suggests, and early practical assistance from Eagle Globe, I am quite sure there would have been documentation collected which he could have produced and I have seen nothing at all. The complete absence of any prior arrangements in Spain until the rented flat was organised days before the departure underlines the last minute nature of the decision. Furthermore the parties were still looking at property in England on 4 November and they left behind them here all but their hand luggage plus all their English banking arrangements.

What then happened in Spain reinforces my view about the lack of a settled intention to leave England and take up residence there. The purchase of the bar was inevitable because some form of income had to be provided and it did not use up any significant proportion of the parties' assets. Residential status was not obtained and the mother did not participate in any application for it. Education was not sorted out. The father's failure to produce any

documentation concerning these two matters when documentation would, I am sure, have been available if his version of events were accurate led me inevitably to prefer the mother's account about them. As for the purchase of the house, I accept the mother's account (which rings true in the light of her departure for England just one week after the completion of the purchase and at a time when the parties had not even taken up residence in the property) that she had already decided by the time of the purchase that the marriage was over and that her participation in the purchase was not with a view to the house forming a home for the family. Far from improving, the matrimonial situation of the parties had deteriorated over the time in Spain and the culmination was the bitter row commencing on 12 February 2000.

I am prepared to accept that, at least by the time he purchased the house in February 2000, the father, who was probably thinking about things very differently from the mother, may well have become habitually resident in Spain. However, I find that the mother never ceased to be habitually resident in England and certainly did not become habitually resident in Spain.

Assuming that the father did become habitually resident in Spain at least by the time of the purchase of the house there, it follows that there would be the unusual situation immediately prior to the mother and children departing for England on 15 February 2000 of two married parents living together with each other and their children but each with a different habitual residence. In these circumstances, what is the habitual residence of the children?

Counsels' researches provided very little by way of guidance as to the correct approach in these circumstances.

It is common ground that the habitual residence of the children when they initially went to Spain was in England. To become habitually resident in Spain would therefore represent a change.

The tenor of the authorities thus far has been to the effect that one of two parents with joint parental responsibility cannot change the habitual residence of their child unilaterally.

In Re S (minors) (child abduction: wrongful retention) [1994] 1 FCR 83 at 95, [1994] Fam 70 at 82 Wall J said:

'Even if which must be doubtful, the mother has herself lost her habitual residence in Israel, it seems to me plain that where both parents have equal rights of custody no unilateral action by one of them can change the habitual residence of the children, save by the agreement or acquiescence over time of the other parent, or court order determining rights of residence and custody.'

That was a proposition he derived from the observations of Lord Donaldson MR in the Court of Appeal in Re J (a minor) (abduction: custody rights) [1991] FCR 129, [1990] 2 AC 562 (which subsequently went to the House of Lords ([1991] FCR 129, [1990] 2 AC 562)) to the effect that --

'in the ordinary case of a married couple, in my judgement, it would not be possible for one parent unilaterally to terminate the habitual residence of the child by removing the child from the jurisdiction wrongfully and in breach of the other parent's rights.' (See [1991] FCR 129 at 136, [1990] 2 AC 562 at 572.)

It was a proposition approved by the Court of Appeal in Re KM (a minor) (habitual

residence) [1996] 2 FCR 333 at 339. Sir John Balcombe interpreted it this way:

'All that Wall, J. was saying was that, when the children came with their parents to England for what was clearly a temporary purpose, they did not lose their habitual residence in Israel. They had not acquired an habitual residence in England and they did not lost their habitual residence in Israel.'

It is argued on behalf of the mother in the light of these authorities that to change the children's existing habitual residence a common intention of both parties would be necessary and, the mother never having lost her habitual residence in England or participated in the Spanish venture as anything other than an experiment or exploratory period of attempted reconciliation, there was no such common intention.

On behalf of the father, it is submitted that, faced with this conflict of habitual residences of the parents, one should look at the objective evidence and ask the question: if the children were asked where they live, what would they say? I do not consider that this is an answer, and particularly not where the children are so very young as these.

Alternatively, it might be that the habitual residence of the children should follow that of the father in such circumstances as would their domicile. As to this, I do not find it helpful to carry over principles relating to domicile into a determination of the issue of habitual residence when the courts have been quite clear that a different approach is to be taken when determining someone's habitual residence from that adopted when determining domicile.

In my view, it is important to recognise that what the father seeks to establish is that the children's place of habitual residence has changed. I have concluded that this cannot happen where he alone of the parents with whom they are living has lost the habitual residence that he shared with the mother and the children and become habitually resident elsewhere. It is argued on behalf of the father that the mother's indorsement of the move to Spain, albeit with reservations, should be taken as agreement to or acquiescence in the children's habitual residence changing to Spain once their father became habitually resident there. I do not consider that the conditional enterprise undertaken by this mother had this effect, and in particular not where the father had been told expressly about the conditional nature of the move, where the marriage had not improved whilst the parties were in Spain, and in the light of the paucity and lateness of arrangements made in Spain for the family and the period over which the stay in Spain lasted.

Accordingly, I have concluded that the children did not lose their habitual residence in England or become habitually resident in Spain at any time before they left that country with their mother on 15 February 2000. It follows that the mother's removal of the children was not wrongful and the father's application for their return to Spain fails.

In the circumstances, it is not strictly necessary for me to deal with the mother's argument under art 13(b) but I will do so for the sake of completeness.

The mother bases her submission under art 13(b) upon the domestic violence which she says would recur if she and the children returned to Spain. She argues that this would place her (and potentially also the children) at direct risk and that the children would also be harmed by witnessing the father's violence and unpleasantness towards her. In her affidavits, she describes her fear of the father in strong terms, including a suggestion that she would need to go into hiding if she were to return to Spain and that she would be in fear of her life. She and her father say they fear that the father's behaviour will worsen now that he knows that

the mother is not returning to live with him. She says that Spanish law would not be sufficient to protect her and the children.

The mother bears a heavy burden in seeking to establish that the case comes within art 13 (b). Clear and compelling evidence is required.

I note that in her statement of arrangements accompanying her divorce petition, the mother says she has no objections in principle to contact taking place between the father and the children provided adequate safeguards can be put in place to prevent him from absconding with them out of the jurisdiction. In my view, this is a position which is inconsistent with a claim that there is a grave risk that the return of the children to Spain would expose them to harm such as would satisfy the terms of art 13(b) and in my judgement the evidence does not substantiate the mother's argument that that article applies.

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]
