

RE F (ABDUCTION: UNBORN CHILD)
[2006] EWHC 2199 (Fam)

Family Division

Hedley J

25 August 2006

*Child abduction – Wrongful removal – Status of foetus – Habitual residence –
Stay of proceedings – Comity*

The mother was pregnant when she went to Israel on 4 October 2002. The father alleged that he agreed to her going to Israel on the basis that she would return to resume family life in South Wales after the birth, but that her real intention had been to remain in Israel. The child was born in November 2002. On 3 October 2003 the mother announced her intention to remain in Israel, and she thereafter lived there with the child. On 23 March 2005, Hedley J stayed all proceedings in this jurisdiction in relation to the child. In proceedings in which the father participated, the Israeli court exercised a welfare jurisdiction in relation to the child on 9 June 2005 and in doing so found that she was habitually resident in Israel.

The father also applied to the Israeli court under the Hague Convention on the Civil Aspects of International Child Abduction 1980 for summary return of the child, and sought the assistance of the English court in those proceedings. Notwithstanding the stay, Hedley J permitted trial of a preliminary issue of whether there could have been a wrongful removal or retention of the child within the meaning of Art 3 of the Hague Convention.

Held – declining to make any declaration and refusing to disturb the stay –

(1) The law of England and Wales conferred no independent rights or status on a foetus and it was not possible in law to abduct a foetus so as to constitute a wrongful removal under Art 3 (see para [5]).

(2) Habitual residence was a question of fact. The child had never been present in this country, and to say that she was habitually resident here in October 2003 would be wholly artificial (see para [9]).

(3) In any event, the question of habitual residence was for the requested and not the requesting State, and the Israeli court had already pronounced on the issue. It behoved the English court, on principles both of the Hague Convention and comity, to remain silent on the subject. The English court had no role to play unless and until the child was present in this jurisdiction (see para [10], [13], [14]).

Statutory provisions considered

Family Law Act 1986, s 41(1), (2)

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 3,

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Cases referred to in judgment

Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FLR 951, CA

B v H (Habitual Residence: Wardship) [2002] 1 FLR 388, FD

M (Abduction: Habitual Residence), Re [1996] 1 FLR 887, CA

W and B v H (Child Abduction: Surrogacy), Re [2002] 1 FLR 1008, FD

The applicant appeared in person and was not represented

Henry Setright QC for the respondent

Cur adv vult

HEDLEY J:

[1] This case concerns a child, J, who is aged 3½ years old. She lives with her mother in Israel. Her father lives in South Wales. I heard this matter in Cardiff on 28 July 2006 and reserved judgment, to be handed down in due course without attendance of the parties. This I now do.

[2] On 23 March 2005 I gave a judgment in this matter staying all proceedings in England and Wales in respect of the child. The background to this case appears in that judgment and there is no need to repeat it here. It is enough to say that the mother went to Israel while pregnant. Dr F says he agreed to her doing so on the basis that having given birth she would return to resume family life in South Wales. She never did so but has remained with the child in Israel ever since. It is Dr F's contention (and he may well be right) that this had always been her intention to which she knew he would not agree.

[3] The family court in Israel has exercised a welfare jurisdiction in relation to the child and Dr F has partaken in those proceedings. However, he also has a claim before the Israeli court for a summary return of the child to this jurisdiction under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). Notwithstanding the stay ordered by me, he has pressed this court to come to his assistance in the Hague Convention proceedings. On 31 March 2006 I made the following order:

- (1) The appellant be deemed to have applied to lift the stay of proceedings herein and imposed on 23 March 2005.
- (2) In pursuance thereto a preliminary issue be tried as follows:

On the basis that the respondent left the jurisdiction whilst pregnant with the said child without the consent of the father to a permanent removal from the jurisdiction and after the birth of the said child remained outside the jurisdiction with the said child without his consent

AND in pursuance of the application to lift the said stay to determine the question whether on the basis of the facts above there could have been a wrongful removal of the said child by the respondent within the meaning of Art 3 of the Hague Convention.

It was my view that unless this court could (and should) give active assistance to Dr F in his Hague Convention application in Israel, there were no grounds for removing the stay already imposed.

[4] In due course the mother instructed new solicitors, Dawson Cornwall who in turn instructed Mr Henry Setright QC for whose skeleton argument and submissions I am grateful. Dr F also lodged a skeleton argument and at the hearing it became plain that I was required to resolve a comparatively narrow issue. I propose to set out briefly the contentions of each side.

[5] Dr F acknowledged that, given the state of domestic law, he would not make out a case of wrongful removal. In that I am sure he is right. Our law generally confers no independent rights or status on a foetus and in my judgment it is not possible in law to abduct a foetus so as to constitute a wrongful removal within the terms of Art 3 of the Hague Convention. What he

wanted to do was to make a case for a wrongful retention. Notwithstanding the terms of my order, it was agreed that he should be allowed to try to do so. [6] His first submission was that when the child was born she was (albeit in Israel) habitually resident in England and Wales for that was the habitual residence of her mother on the basis that at the date of birth she was only temporarily in Israel. He draws attention to para 16 of my earlier judgment, in which I said this:

‘Of course, in order to consider the position as it is now, it is of some importance to know what the position has been and whether it can be said there has or has not been any change. It seems to me that if one looked at the case as it was in November 2002, ie the date of [J]’s birth, one would come to the conclusion that the habitual residence of both father and mother, on the evidence I presently have, was in the United Kingdom, and that since the child takes her habitual residence from the habitual residence of the parents, then her habitual residence at that stage would have been in the United Kingdom.’

He then submits that the date of retention is the 3 October 2003 when the mother made an unequivocal statement of her intention to remain in Israel. She had initially gone to Israel on 4 October 2002. He then submits that this case is governed by s 41 of the Family Law Act 1986. He contends that the combined effect of subss (1) and (2) on the facts of this case is to preserve the habitual residence in England and Wales for 12 months from 4 October 2002. Thus he submits the child was habitually resident in England and Wales on the day of the retention, thus making it wrongful within the meaning of Art 3 of the Hague Convention (it being accepted that he had rights of custody) and I should so declare. He asserts (though this is disputed) that the Israeli court has adjourned its proceedings to await the outcome of this application.

[7] Anticipating an argument based on habitual residence not being possible without some physical presence, he relies upon the judgment of Charles J in *B v H (Habitual Residence: Wardship)* [2002] 1 FLR 388, especially at paras [113]–[115] and [134]. It is true that Charles J did indeed find (on the facts of that case) that a baby born abroad who had never been to England and Wales was nevertheless habitually resident here. He submits that I should follow the reasoning of Charles J and reach a similar conclusion in relation to J.

[8] Mr Setright’s case is rather different. It accepts, of course, the factual assumptions underlying the defined preliminary issue, although they are disputed by the mother. He makes two essential submissions. First, he argues that J, having never been present in England and Wales, cannot be (or ever have been) habitually resident there. His submissions are essentially founded on the judgment of Thorpe LJ in *Al Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951 which (on this point) in turn draws on the judgment of Balcombe LJ in *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887. These cases emphasise and re-affirm that habitual residence is essentially a question of fact and assert (in Balcombe LJ’s words, at 895):

‘Before a person, whether a child or an adult, can be said to be habitually resident in a country, it is clear that he must be resident in that country.’

Now of course residence is not lost by temporary absence but there must be some physical presence. Insofar as the judgment of Charles J is inconsistent with that, he says that it should not be followed. To that end he relies on something said by me in *Re W and B v H (Child Abduction: Surrogacy)* [2002] 1 FLR 1008 at para [23]. I certainly adhere to the view that where an issue to be determined is an issue of fact, then each case ultimately turns on its own facts. Given that J has never been present here, then as a matter of fact in this case she cannot be habitually resident here, so submits Mr Setright.

[9] If, of course, Dr F were right about his wife’s true intentions, she would have lost her habitual residence in England and Wales at the point of departure. Whether she had acquired habitual residence in Israel by the time of J’s birth or whether it came later matters not; what can be asserted is that J could never have had habitual residence here. If, however, she had changed her mind about returning after birth, it would still be wholly artificial to say (at least by October 2003) that J was habitually resident here. It would have no basis in fact and is a legal theory postulated on the accuracy of what I said in para 16 of my earlier judgment coupled with s 41 of the Family Law Act 1986. Section 41, Mr Setright contends, is only relevant to movement within the different jurisdictions of the UK or specified dependant territories.

[10] Mr Setright’s second principal submission, founded in case-law exemplified by *Al Habtoor*, is that the question of habitual residence is for the requested and not the requesting state – in this case for the Family Court of Israel and not for me. Further, contends Mr Setright, the Israeli Court has indeed pronounced on that issue. He draws my attention to the judgment of Judge Shlomo Elbaz (in translation) given on 9 June 2005. In para 33 he is translated as saying:

‘Regarding the other pleadings made by the parties, the applicant bears the onus of persuading the Court that the scales clearly and significantly tip in favour of the foreign forum and he did not succeed in discharging that onus. An examination of the preponderance of connections indicates that the Minor’s life is centred in Israel. For the duration of her short life, the Minor has lived in Israel, the mother and her extended family have raised her in Israel and Israel is without a doubt her habitual place of residence. It should further be added that in any case in which the involvement of any welfare authority is necessary, it is clear that the welfare authorities of the place in which the Minor was born and raised are the appropriate authorities for the examination of her needs and for giving recommendations concerning her.’

That, says Mr Setright, should, on the principles both of the Hague Convention and of comity, be decisive. (I should add here that Dr F did not necessarily accept the accuracy of the translation). Dr F’s application for leave to appeal against the decision of Judge Shlomo Elbaz was refused. In short Mr Setright says that in circumstances such as these this court should forbear from any declaration as to habitual residence or wrongful retention.

[11] I have given careful thought to this matter, not least because Dr F may have an entirely genuine grievance against the mother for the way she behaved before and after J's birth. Moreover, although Judge Shlomo Elbaz was not specifically considering it, it is clear that Hague Convention proceedings have been intimated in Israel. Nevertheless I have come to the clear conclusion that Mr Setright's submissions are well founded in both aspects.

[12] Part of the trouble, I think, lies in the way that I expressed myself in the para 16 of my earlier judgment, set out at para [6], above. Habitual residence was not an issue I then had to determine. My views were based on a snapshot of the date of birth taken on the assumption that the mother's stay was then to be regarded as temporary. Of course when habitual residence is in issue then the court must have regard to all the facts which is a scenario much greater than a snapshot. Knowing what we now know, I think it most unlikely that the mother still had habitual residence at the date of birth and even less likely that she still had it 363 days later. Moreover, I do not think s 41 of the Family law Act 1986 assists Dr F for it is not intended to cover circumstance such as these. I am satisfied that (however correct a decision on its facts) the judgment of Charles J in *B v H* lays down no principle that can assist Dr F on these specific facts. Whilst one can never say that physical absence can never permit a finding of habitual residence, the usual approach on the facts is to look for some physical presence and there is none here. My conclusion is that Dr F simply cannot establish that at 3 October 2003 J was habitually resident in England and Wales. That is enough to dispose of the preliminary issue.

[13] However, in my judgment Mr Setright's second submission is even more telling. I accept his submission that the question of habitual residence is a matter for the courts of the requested state, here Israel. As a matter of fact that is the way the jurisdiction is always operated and that is how the Hague Convention falls to be operated. No request has been made under Art 15 nor will it be since habitual residence is not regarded as a proper subject of such a request. Accordingly, in my judgment, it behoves this court to remain silent on the subject. That is the more so, as comity demands, since the Israeli court has addressed itself to the issue in any event. It follows that on this ground too the court can make no declaration. The greater part of the written submissions addressed to me by Dr F are really for the court actually dealing with the Hague Convention application, ie not this court.

[14] Accordingly I decline to make any declaration in relation to Hague Convention proceedings involving J. It follows from that that I refuse to disturb the stay on family proceedings in England and Wales imposed by me on 23 March 2005. This judgment will be issued to the parties. Any applications consequential to this judgment should be addressed to me in writing. As I will not be able to deal with those until October, I will, of course extend any time limits as necessary to accommodate that. All proceedings in respect of J whether under the Hague Convention or the welfare jurisdiction will now continue in Israel. This court has currently no role left to play unless and until J is present in this jurisdiction.



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Order accordingly.

Solicitors: *Dawson Cornwell* for the respondent

REBECCA BAILEY-HARRIS