IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

No. ZC18D00100

[2019] EWHC 702 (Fam)

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 6 March 2019

Before:

MR JUSTICE COHEN

B E T W E E N :

AJ — Applicant

- and -

DM — Respondent

ANONYMISATION APPLIES

MR P. CAYFORD QC and MR JONATHAN TOD (instructed by Mills & Reeve) appeared on behalf of the Applicant.

MR J. WARSHAW QC (instructed by Donohoe & Co. Solicitors) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE COHEN:

1 The applications before the court are as follows:

(i) the wife's application for leave to amend her petition for divorce from the residual ground of sole domicile, to indent 2 of Article 3(1)(a) of Council Regulation 2201/2003 - namely, that the petitioner and respondent were last habitually resident in England and Wales and that the petitioner still resides in this jurisdiction.

(ii) the husband's application to stay the financial proceedings brought by the wife pursuant to the Form A issued together with her petition that was filed by her on 17 April 2018. There has been no similar application brought by him to stay the wife's application under Schedule 1 of the Children Act 1989, although I will need to consider that too.

(iii) the wife's application to adjourn both matters until after the determination of her application for leave to remove from St Lucia the one child of the family - J - who is aged a little under two and a half. That is before the courts of St Lucia, but without a final hearing date in place.

Basic facts

2. The husband was born in Ireland and brought up there and moved to Australia in 2005. He works in financial services. In 2012, he took Australian citizenship in addition to his citizenship of Ireland. The wife was born and brought up in England and she moved to Australia in 2009. She is, by training, a solicitor, although in recent years has worked in the provision of legal training and education. In 2014 she also took up Australian citizenship in addition to her British citizenship.

3. The parties met in March 2014 in Australia. The wife says, and I accept, that she had at that time been planning to return to England later in the year and would have done so, but for meeting the husband. They commenced cohabitation in December 2014 in Sydney. On 18 December 2015 they were married in Australia and had a repeat ceremony in England in January of 2016. Both had good jobs in Australia.

4. In about January 2016, soon after the marriage, the wife became pregnant. She says that during her pregnancy she realised how much she was missing her family in England and in March 2016, whilst on a holiday to England, she decided that she wished to see out her pregnancy in England. She says that she made it clear that though she hoped her marriage could survive, she intended to stay in England during her pregnancy. The husband was understandably upset and in June 2016, having tidied up various business affairs in Australia, came to Dublin where his family live, making trips over to England to see the wife. The husband was trying to find work in England or in Ireland. By May 2016, it appeared that the parties had split up, but in July 2016, they reconciled and began working towards a full resumption of the marriage.

5. Whilst the parties were in Australia, the husband was shortlisted for a job which would have involved him living and working in either Jamaica, St Lucia or Florida. There was discussion about the job in December 2015 and January 2016. Ultimately, he was pipped by an insider, but the wife was fully aware and engaged in the discussions about him taking that job which would have entailed her moving with him.

6. In or about July 2016, he was approached again by the company with whom he had got so close a few months before. Their appointment had not worked out and he was the only candidate to

be the replacement. The husband said that he was interested, but needed to discuss it with the wife. The wife agreed that the husband should put his hat in the ring. There were, of course, many details that still had to be worked out, not least an agreement as to salary. In or about September 2016, he was offered the job as CEO of the business in St Lucia, subject to various testing and checks, but he made it clear to his future employers that he needed to stay in England for the birth and early weeks of his child.

7. In September 2016, the husband moved over from Ireland to England to resume cohabitation with the wife and in early October 2016, the parties took a 12 month lease of a property in Warwickshire with a six month break clause and moved in. They had been there about two weeks before J was born. It was some 10 days after his birth that the employment contracts were signed. The husband says, and I accept, that he kept the wife fully informed throughout the process of his recruitment.

8. The husband moved to St Lucia to start his new job on 7 January 2017 and the wife and J moved over to join him on 16 March 2017 as planned. On doing so, they surrendered their lease of the rented English property. I accept that it would have been the wife's preference to stay in England with the husband working there, but she regarded the move to St Lucia as an acceptable compromise. He was the breadwinner and she would go with him and St Lucia was 8, rather than 24, hours flying time from England and close enough for her family to visit and, indeed, her parents had previously already visited the island.

9. The family lived in a serviced apartment in St Lucia and had a comfortable life. They had a car, a nanny/childminder and all the other perks that usually go with an expatriate lifestyle. J was registered with a local paediatrician. They were going to be there for at least three years. I put it that way, because the wife said that she understood that they were simply going to be there for three years, which was the term of the husband's contract. He says that he explained that it was likely to be extended to up to five years. The difference does not matter as it is accepted by the wife that it would be three years in any event and she accepts, as she must, that the family - that is, all three members of it - became habitually resident in St Lucia. Their home, their life, his work were all there.

10. In the period between March 2017 and April 2018, the wife came over to England on two occasions, 10 days in May 2017 and 11 days over the period of the end of June/start of July 2017, one of those two trips being on the back of a business trip that the husband was undertaking.

11. The marriage became increasingly unhappy and in February 2018, the wife sought professional help from a counsellor and from solicitors. On 2 April 2018, arriving the next morning, she left St Lucia and came to England with J for what was agreed between the parties to be a holiday. There were return tickets bought for 27 April. There has been no suggestion from the wife, either in her statements or in evidence that, at the time she arrived in England, this trip was anything other than a holiday. She described it herself on many occasions as a holiday and she had return tickets. Further, J had a nursery place in St Lucia waiting for him which his mother had arranged. It was to have started in April 2018, but she put back the start to early May 2018 to allow her holiday to take place and for J to recover from any jetlag. When she went to England most of her wardrobe and personal belongings and J's clothes, toys and personal belongings, remained in St Lucia.

12. Between 3 April and 13 April, she mulled over her marriage and unhappiness and on 13 April, she says that she received legal advice which led her to determine that day that (i) she no longer wanted the marriage to continue; and (ii) she did not intend to return to St Lucia with J. It is

accepted on her behalf that those two matters were decided by her at the same time. 13 April was a Friday.

13. On 16 April, the next working day, a petition for divorce was issued by her solicitors. At section 5 of the petition, she did not complete para.5.1 which provides that the court had legal power to deal with the application for divorce if one of certain provisions apply - the relevant one in this case being Article 3(1) of Council Regulation (EC) No. 2201/2003 - but she instead completed para.5.2, which reads as follows:

> "The court has jurisdiction other than under the Council Regulation on the basis that no court of a EU Member State has jurisdiction under the Council Regulation and the petitioner is domiciled in England and Wales on the date when the application is issued."

Thus, it was said, that because none of the provisions of Article 3 applied, residual jurisdiction was provided by Article 7 of the Regulations. A MIAMs form was completed stating that the exemption applied because "the prospective applicant or all of the prospective respondents are not habitually resident in England and Wales".

14. On 17 April, the petition was issued and the wife rang the husband to tell him that she wanted a divorce and had taken the necessary steps. As far as he was concerned, that news came completely out of the blue. On the same day the wife issued a Form A seeking financial remedy orders within the divorce proceedings and an application to invoke the wardship jurisdiction and for a child arrangements order.

15. Inevitably, the husband responded with an application for a summary return of J to the jurisdiction of St Lucia. The hearing of the husband's application was fixed for 7 June, but was adjourned until 20 July when the wife threw in her hand, as it seems to me she would have had to, and agreed to return with J to St Lucia and her applications under the Children Act for a child arrangements order and wardship were dismissed.

16. She returned to St Lucia with J on 23 July and on 14 August did what she should have done in the first place, namely, to apply for leave to remove. Those proceedings are still ongoing and there is no date for the final hearing, the proposed dates having been adjourned for reasons, as I understand it, connected with the filing of evidence. I do not know when it will be heard, although it is probably reasonable to assume that it might be in the late summer of this year.

17. In those proceedings the wife seeks leave to relocate with J to England. The husband's position is not entirely clear or consistent as his statement in those proceedings is heavily critical of the wife/mother and he states in different places in his statement that he wants to be the primary carer of J, but also as well that he seeks a shared custody arrangement. That was his position in oral evidence - namely, that J should remain in St Lucia and his time be divided equally between his parents. I cannot predict what the outcome will be, or when exactly the proceedings will finally be concluded.

18. That uncertainty as to timing and outcome was one of the factors that led me to refuse the application for an adjournment, although I have kept the matter under review throughout the hearing. The other, as I will refer back to, is the lack of nexus between the outcome of the leave to remove application and the jurisdictional issues I have to determine. I remain of the view that it would be inappropriate to adjourn this application which has been fixed before me since July of last year.

19. In the meantime, in the middle of June 2018, the husband initiated an application in the family court in Australia for financial relief, seeking an order against himself. Those proceedings, I am told, are freestanding and do not require there to be divorce proceedings in place. Both parties are Australian citizens and, he says, that in so far as they have assets, they are more to be found in Australia than anywhere else.

20. On 5 July 2018, the wife issued various applications. First, she applied to amend her petition to plead under section 5 of an amended petition that the court had the legal power to deal with the application pursuant to Article 3(1) of Council Regulation 2201/2003 on the basis that "The petitioner and respondent were last habitually resident in England and Wales and the petitioner still resides there." That provision is to be found in indent 2 of the Article 3.1(a) of the Regulation. Secondly, she issued a Form A seeking financial relief under Schedule 1 of the Children Act 1989. Thirdly, she sought a legal services payment order pursuant to the 1973 Matrimonial Causes Act.

21. It is trite law that in seeking that amendment to the petition the wife argues that the provisions of that indent were in place on 17 April 2018 when the petition was issued. Thus, it is that there are now proceedings in three jurisdictions: (i) in England for divorce and financial remedies, the financial claim being made both within the divorce and under Schedule 1 of the Children Act; (ii) in Australia for financial relief; and (iii) in St Lucia for leave to remove. At the moment the Australian proceedings are adjourned for directions which are due to take place at the end of this month. The financial remedy and Children Act proceedings in this country are stayed pending the outcome of this hearing.

22. At a hearing before Recorder Allen QC on 7 September 2017, which led to a reserved judgment delivered some two months later, the wife persuaded the judge that, despite his hesitation and on a preliminary basis, she was habitually resident in England and Wales on 17 April 2018 and 5 July 2018 and the husband was ordered to pay all the wife's outstanding costs and her costs on a pound-for-pound basis going forward in all three jurisdictions. Recorder Allen did not have the benefit of the further evidence which has been filed in these proceedings, nor of hearing any oral evidence, and he rightly pointed out that his preliminary view should be read subject to that significant qualification and was not intended to be binding on me or any other judge.

23. I have had the benefit of the further statements and I have heard what amounts to about one day of oral evidence between the parties. The parties have been able to agree that (i) the wife is domiciled in England and Wales; (ii) the wife and the other members of the family were habitually resident in St Lucia until the start of April 2018, the dispute raging about habitual residence thereafter; and (iii) importantly, that the husband will submit to orders in St Lucia and Australia that he will pay pound-for-pound towards the wife's costs of those proceedings. Thus, he says, the wife will not be starved of funds for those proceedings in the event that I were to stay the English proceedings. Of course, for the English financial remedy proceedings, there is already an order in place.

<u>The wife's application to amend</u>

24. In my judgment, it is doomed to failure. It is plain on the facts that I have recited that the parties were not last habitually resident in England and Wales. They were habitually resident last in St Lucia. Mr Cayford QC who appears with Mr Tod on behalf of the wife says to me that the original petition on the basis of domicile was a mistake. I think that is unfair to the wife's experienced solicitors. I note also that in the instructions given in the abduction proceedings to the single joint expert on 17 May 2018 it is expressly recited that the parties and J are habitually resident in St Lucia, notwithstanding that by the time of those instructions the wife had been in

England for something over six weeks. Nevertheless, as Mr Cayford says, I must not allow myself to be blinded by labels that lawyers put on things and I must look at the reality.

25. The amendment sought is important because under Article 7 the applicant/petitioner is not able to obtain an award of maintenance which has been construed in many authorities to mean a needs-based award. She can only obtain an entitlement-based award and in this case, where there is a reasonably big income but negligible capital, a needs-based award will subsume any entitlement award. The proposed amendment would avoid this problem. The stumbling block to it is that, in my judgment, she cannot satisfy the provisions of indent 2 of Article 3(1)(a) of Council Regulation 2201/2003.

26. Although in the light of my other findings what I am about to say is obiter, I would not regard the provisions of Family Procedure Rules 7.13 as fatal to her application to amend as Mr Warshaw QC on behalf of the husband, argues. I am against him on that for two reasons. The first is Rule 7.13(3), which says that:

> "No supplemental application may be made and no amendment to an application for a matrimonial or civil partnership order (ie. a divorce petition) ... if an application under rule 7.19(1) has been made in relation to the marriage or civil partnership concerned."

That is, in other words, if an application had already been made to the court for it to consider the making of a decree nisi (formerly directions for trial). It is true that an application had been lodged, but the wife's application was rejected, wrongly, as it appears, and she would thus have to re-apply for the court to consider the making of the decree nisi. Further and in any event, pursuant to Rule 7.13(5), the restriction may be overcome with the permission of the court.

27. The wife seeks to get round the problem created by the words of the indent in a way that is developed and well explained by Recorder Allen in his judgment, and I refer now to paras.44 to 47. What was said on behalf of the wife is as follows:

> "The wife has petitioned for divorce on the jurisdictional basis of her sole domicile, but was habitually resident in the jurisdiction as at the date of the issue of the petition and, thus, the court has jurisdiction under Article 3(b) of the Maintenance Regulation, Council Regulation (EC) 4/2009 (i.e. the court for the place where the creditor is habitually resident)."

28. Mr Warshaw tried to persuade Recorder Allen otherwise and submitted that when the jurisdictional ground for the divorce is the petitioner's sole domicile, as a consequence of Article 3(c) of the Maintenance Regulation, the English court does not have jurisdiction irrespective of whether the petitioner was habitually resident in the jurisdiction at the date of the issue of the divorce petition and, thus, he says, that she cannot avail herself of Article 3(b).

29. The judge was troubled by the argument, but he, on balance and "albeit not without some hesitation" accepted the wife's interpretation fortified by the editorial notes to Article 3 of the Maintenance Regulation in the 2018 Family Court Practice at p.2947, where it is said that:

> "In the case of a divorce petition issued after 18 June 2011, on the basis of the sole domicile of one party, the English court will not have jurisdiction to hear a claim for spousal maintenance <u>unless</u> Article 3(a) or (b) can be relied upon."

In consequence, the judge, having found that he was satisfied as to both the legal argument and habitual residence, went on to make the order.

30. I have not heard significant argument on this issue as the parties have focused their attention on whether or not the wife was in fact habitually resident in England and Wales on 17 April 2018. For my part, I would need persuading of the rightness of the argument that the provisions of Article 3 of the Maintenance Regulation circumvent the difficulty presented by a petition based solely on domicile. However, I intend to skirt round the issue of competing jurisdictional requirements and their interconnection, because if I find that the wife was not habitually resident in England and Wales on 17 April, that is the end of the matter.

Habitual residence

31. Powerful points were made on both sides. For the wife it was emphasised that: (i) she never lost her connection with England. Indeed, she would have returned here in 2014 but for meeting her husband; (ii) it was to England that she came in March 2016 when feeling vulnerable, both because of her pregnancy and the difficulties which were appearing in communication between her and the husband; (iii) her departure to St Lucia in March 2017 was not of her choice in the sense that she would have preferred he had got a job in England or Ireland, or although certainly St Lucia was preferable to Australia; (iv) she kept her car in England, she had in 2016 registered with a GP and, of course, she had relatives and family - her parents and a sister - in England and not in St Lucia.

32. It is said, rightly, on her behalf, that it is far easier to re-establish habitual residence in a country where the party in question has been habitually resident - as indeed this wife was for all of her childhood and youth and, in all probability, between the period between March 2016 and March 2017 - than it is to a completely new country. Likewise, I accept that her unhappiness in St Lucia must impact on the depths of the roots she had put down there and, thus, the ease with which they could be pulled up.

33. On the other hand, Mr Warshaw makes similarly powerful points; (i) the duration of the stay in St Lucia was not going to be brief. Even at its shortest, it was going to be three years; (ii) they did put down roots in St Lucia. They had their home there. They had their belongings in it. They had - the three of them - their family there. They had no home in England; (iii) they had all the benefits that go with an expatriate life there. They had a car. They had health insurance. They had a social life (iv) the husband's work was there. The wife was not working and was not intending to work during this early period of J's life; (v) they had a childminder/nanny, described almost as an additional family member, to help with the care of J and they had enrolled J for a nursery to start as soon as he returned from holiday.

The law

34. The test which I have to apply in considering habitual residence is conveniently set out in *Tan v Choy* [2014] 1FLR 492. At para.31, it was accepted that:

> "... a person was 'habitually resident' for the purposes of Article 3(1)(a) if three tests were satisfied: (i) that there was 'a permanence or stability' in the residence of the person concerned in the relevant territory; (ii) that this location was the centre of the person's interests; and (iii) the person had, at that time, no other 'habitual residence', because" -as it was put in that case "you have to lose one 'habitual residence' before you can obtain another one."

35. I have also been referred to and considered the case of *Marinos v Marinos* [2007] EWHC 2047 (Fam), a decision of Mr Justice Munby, as he then was and, particularly, para.34 where the judge says this:

> "There is one important point I should add. In deciding where the habitual centre of someone's interests has been established, one has to have regard to the context. Many of the ECJ cases to which I have referred are cases where what was in issue was the entitlement of a worker to social security benefit. So, the claimant's place of work was obviously an important factor in ascertaining the location for that purpose of the habitual centre of his interests. Here, in contrast, the issue is as to the identification of the court (or courts) which have jurisdiction in relation to family matters, specifically, in the context of Article 3 of the Regulation, in relation to matters of divorce, legal separation or annulment. So, the place where the matrimonial home is to be found, the place where the family lives, qua family, is equally obviously an important factor in ascertaining the location for that rather different purpose of the habitual centre of a spouse's interests."

36. I am not going to read it all out, but I have also had regard, in particular, to paras.81, 85. 86 and 89, but I do want to refer specifically to paragraphs 86 and 89 where Mr Justice Munby considered the possibility that if he had been wrong in his initial view as to jurisdiction, he was fortified by his conclusion as to jurisdiction arising at a later date. He says this - and I am going to run the relevant parts of those two paragraphs together:

> "It is important to remember the circumstances in which the wife returned to this country on 31 January 2007. She had severed her links with Greece. She was returning to this country with her children, intending to make it her, and their, permanent home. She had arranged schools for them and taken steps to obtain early vacant possession of the family home in England. Moreover, she and the children came with the husband's consent, not merely consent to them coming over here, but consent to them staying here. I can see no reason why, in those circumstances, she did not immediately acquire a habitual residence in this country upon her return here on that day ...
>
> In a case such as this where someone - as in the case of the wife here - is undertaking a planned, purposeful and permanent relocation from one country to another, there is nothing in community law to prevent the acquisition of a new habitual residence contemporaneously or virtually contemporaneously with the loss of one's previous habitual residence."

37. It has also been helpful to me to consider the Supreme Court cases of *A v A (Children: Habitual Residence)* [2013] UKSC 60 and *Re B* [2016] UKSC 4 where it is noted that the centre of interest case in *Tan v Choy* is likely to produce the same result as the degree of integration in a social and family environment test adopted in abduction cases. Both sets of authorities refer to the greater the amount of pre-planning and pre-arrangement for life in the new state, the faster habitual residence will be acquired.

38. Mr Cayford relies heavily on the fact that whatever the position was until 13 April, from that day her intention crystallised to be habitually resident in England and Wales and that her centre of interest transferred on that day. I accept that in some cases the centre of interest can change in a day. Indeed, that is referred to in the passage I have cited from *Marinos* and also in *Nessa v The Chief Adjudication Officer* [1999] 2 FLR 1116. But *Nessa* was a case in a very different context, namely a lady who came to England and Wales with all her belongings and on a one-way ticket; a pre-planned and pre-arrangement permanent move, as indeed was the case with *Marinos*.

39. This case was not a pre-planned and purposeful relocation. It was the antithesis of that - a lady who, in the course of a holiday, changed her mind. I accept that that does not mean that every

brick has to be in place for a new life in England and Wales, but there were no bricks in place at all here.

40. It is also important that when she decided on 13 April not to return, it is unimaginable that she was not aware that her removal of J to England had developed from an agreed removal for a holiday to a wrongful retention within the meaning of the Hague Convention. She had not asked for the husband's permission. She sought to present him with a fait accompli before later returning under a consent order made in July 2018. I am well aware that there are cases where a wrongful retention or removal can, after a period of time, nevertheless produce a change in habitual residence regardless of the wrongful act, but I know of no case where this has happened within just four days - namely, between 13 April and 17 April.

41. I therefore conclude that: (i) the wife was not habitually resident in England and Wales on 17 April; (ii) the new ground proposed by the amended petition cannot be made out and, thus, I am not prepared to allow the amendment; and (iii) there is no jurisdictional basis for the making of a maintenance order.

42. This is not the end of the matter as the wife, nevertheless, would have the ability to claim in financial remedy proceedings an award based on entitlement rather than need in the circumstance where her petition is based on domicile alone, but it seems to me that in this case that is an academic ability. There is nothing of substance in this case, other than the husband's large income and her claim will, therefore, be inevitably based on need. That is something that can be done within the Australian proceedings. In so far as there are assets, they are at least as much in Australia - and probably rather more - than anywhere else. It is a jurisdiction which operates a similar system of law to that here and whilst it is inconvenient geographically, in other respects it is a convenient forum, particularly in circumstances where the wife's legal costs funding is going to be secured.

43. The issue of jurisdiction of habitual residence in the Children Act Schedule 1 proceedings is much harder. The wife and J have been here for three months by the time of issue. J had started a school and so there would have been a greater element of settlement and he would have become accustomed to the fact that he was not due to return within a very short time at the end of the holiday to St Lucia. On the other hand, the application was issued just two weeks before the final hearing of the abduction application and the wife was well aware, because she must have been told by her own lawyers and, in any event, was told by Mr Justice Williams at a directions hearing, that the likelihood of her having to return to St Lucia with J was very great. But once again this is an issue that I do not need to resolve because the wife accepts, as she must, that the application under Schedule 1 is, effectively, in cold storage. It was issued at a time when she and J were in England and Wales. It can be resuscitated if she obtains leave to remove and actually arrives in this jurisdiction with J, but not until then.

44. Mr Warshaw invites me to dismiss that application now, but I am not going to do so: (i) because I have not made a concluded finding as to habitual residence in those proceedings; and (ii) there is no application to be dismissed. In my judgment, the appropriate course for me now to take is to stay the application under Schedule 1, rather than to dismiss it. It will be a matter for the wife in due course, as so advised, as to whether or not she restores it.

45. Mr Cayford says I should take a broad view. He says it is absurd for litigation to take place on three fronts. It will inevitably have to take place on two fronts because J's future can only be determined in St Lucia and apparently the parties do not fulfil the necessary residence criteria to have their divorce there. But, he says, the husband should give in and let the divorce take place in England with the full financial remedy proceedings here too, rather than the very limited

remedy that is open to the wife, and that it would be wrong for the wife to have to litigate on the other side of the world where neither of the parties live, or have family.

46. I have some sympathy with the argument, but I cannot bestow jurisdiction where it does not exist. As I have sought to explain, what I have done is with the cooperation of the husband, is to secure the continuation in St Lucia of the financial support that he makes along with the provision of accommodation and the other benefits which were part of the protective measures agreed in the abduction proceedings, and the payment in St Lucia and in Australia of the legal fees on a pound-for-pound basis. Thus the wife will be funded for litigation in all jurisdictions and I accept the husband's undertaking to make that provision.

47. I have not overlooked Mr Cayford's point that the wife could simply circumvent what is going on by having her divorce petition dismissed and when she has obtained leave to remove and arrives back in this country with J she could then file a fresh petition and application for financial remedy orders on the basis of habitual residence which she will then have gained, but this argument is based on a series of premises which may not necessarily come about. I have to leave the parties to take such steps in the future as are appropriate.

48. There is an important final thing that I ought to say. This case has generated an enormous amount of legal costs. The parties cannot begin to afford continued litigation in the way that they have spent on it so far. There is next to no money in the case other than an income which cannot sustain the level of fees. I would urge the parties to sit down and mediate their dispute, hopefully on everything but, if not, at least on the money, because it must be possible for them to be able to reach an agreement.

49. That concludes my judgment.

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