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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2023-004-000277
[2023] NZFC 7827

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[MARIO ROSSI] Applicant
AND	[MARY ROSSI] Respondent

Hearing:	7 July 2023
Appearances:	A Ashmore for the Applicant I Blackford with I Stevenson for the Respondent S Houghton as Lawyer for the Child
Judgment:	25 July 2023

RESERVED JUDGMENT OF JUDGE D A BURNS
[In relation to application for an order for return under the Hague Convention]

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[1] The Central Authority of New Zealand applies for an order for the return of [Martin Rossi] born [date deleted] 2017 ("[Martin]") to the United Kingdom pursuant to Subpart 4 of the Care of Children Act 2004 ("the Act") (Hague Convention). The applicant alleges that the child has been wrongfully retained in New Zealand.

[2] At the hearing counsel confirmed that the sole issue for the Court to determine was "habitual residence". The Court has to determine s 105 jurisdiction. No s 106 defences are raised.

[3] Counsel agree that the Court has no residual discretion. If the Court determines that the child's habitual residence is United Kingdom then it must order a return of the child to the United Kingdom. If the Court determines that the child has no habitual residence then the application must fail.

[4] Counsel accept that the onus is on the applicant.

[5] Counsel are experienced Hague Convention lawyers. They accept that there is no dispute between them as to the applicable law. Counsel both agree that it is an intensely factual dispute and the case raises no question of law.

[6] Mr Ashmore provided written submissions to the Court dated 5 July 2023. Ms Blackford provided submissions on the case dated 4 July 2023.

[7] With respect to habitual residence Mr Ashmore set out the law in paragraphs 11-26 of his submissions. I set those paragraphs out in full as follows:

> 11. As stated, the onus is on the applicant to satisfy the jurisdiction requirements of s 105, including proving that the child was habitually resident in the UK at the time of the wrongful removal or retention.
>
> 12. There is no substantive definition of "habitual residence" in the COCA or the Hague Convention itself . This is deliberate, with it being "primary a question of fact to be decided by reference to the circumstances of each case".
>
> 13. The concept has been discussed in three Court of Appeal decisions that clearly prescribe the approach to be taken in this Court.

14. The Court of Appeal in *SK v KP* held at [80] that:

> Length of stay in the new State is a factor taken into account but it is only one factor. The purpose of the stay and the strength of ties to the existing State must also be taken into account. Where the period is limited and the purpose temporary, such as for holidays or visiting relatives, and the ties to the existing habitual residence strong, the courts have normally found that the existing habitual residence subsists. Where, however, it is not so clear that the purpose the stay was temporary, such as a stay for educational purposes or for fixed term employment, the courts have been much quicker to find a change in habitual residence, particularly if the ties to the former habitual residence are weak.

15. The Court of Appeal in "First Punter" clarified that the establishment of a second habitual residence was not a prerequisite of losing an earlier habitual residence. Glazebrook J held that:

> "if a person has a settled purpose to leave the place of his or her habitual residence and does so in accordance with that purpose, then the former habitual residence is lost immediately. The new place will only become a habitual residence, however, if there is both a settled purpose to take up that habitual residence and residence for an appreciable period".

16. The significance of parental intention was squarely addressed in the 'Second Punter". The Court of Appeal confirmed that the test elucidated in *SK v KP*, takes a middle course between Mozes (Ninth Circuit Division of the United States Court of Appeals) and the child-centred approach in Feder v Evans-Feder (Court of Appeals for the Third Circuit). The test in *SK v KP* weighs all relevant facts, with the settled purpose of the parents being an important factor, but not as important as it was seen to be by the Mozes Court.

17. The Court of Appeal strongly rejected the proposition that Habitual Residence was inevitably twinned to the intention of both parents – finding this proposition confused the concepts of domicile and habitual residence in the second Punter appeal.

18. The Court of Appeal in the second Punter appeal observed at [117] that it "does not have to be a settled purpose to live in a place forever but can be a purpose of residence for a limited period as long as there is intended to be a sufficient degree of continuity for it to be properly treated as settled".

19. The approach taken by the New Zealand Court of Appeal in Punter as mentioned above is effectively a moderating approach and a step away from the more rigid 'parental intention' model previously espoused in the United Kingdom. Recent international developments in the United Kingdom are more in line with the New Zealand approach discussed below.

20. In terms of habitual residence, the following principles therefore can be derived from the authorities:

    (a) It is not a question as to in which country is the child habitually resident – it is quite possible for a child to have no habitual residence. The question is whether or not the child had lost his habitual residence in the United Kingdom at the time of the alleged retention.

    (b) Secondly, while parental intention (particularly for babies) is often an important indicium but it is not the only indicia for habitual residence. Counsel in particular notes the recent decision of Justice Hale of in the matter of C Children discussed below.

21. It is ultimately a factual inquiry and the Court must focus on the reality for this particular child rather than on erudite definitions of the phrase.

UK authority

22. It is submitted that considerable guidance can be drawn from the relatively recent decision of the UK Supreme Court of Baroness Hale in the matter of C Children. This decision signals a further and significant acceptance by the UK jurisdiction of a more nuanced approach to habitual residence.

23. As stated above it must always be borne in mind that habitual residence is a question of fact, not of law and is ultimately an examination of the reality for the particular child concerned. If the Court has established a child is habitually resident in the applying state (as opposed to the state where they have ended up) it is much more palatable for the Court to be satisfied that a short circuiting of the normal 'best interests analysis' is justified if the child is after all 'returning home'.

24. In Re C the Court pointed out that it had previously been "regarded as axiomatic that one parent could not by unilateral action alter the habitual residence of the child." This proposition dated from a dictum of Lord Donaldson MR in In *re J (A Minor) (Abduction*: Custody Rights) [1990] 2 AC 562, 572".

25. The Supreme Court however go on to observe:

> "Such a proposition is however not generally adopted in other countries including the United States, sits uneasily with the equally axiomatic principle that habitual residence is a question of fact, not law, and is difficult to accommodate within the European approach which requires an examination of integration, as exemplified in Proceedings brought by A."

Conclusion as to habitual residence

26. The above cases were considered relatively recently by Judge Coyle in the decision of [deleted]. His Honour accurately summarised the current law on habitual residence as follows:

> "Pulling all those factors together, determining habitual residence requests a broad fact based inquiry, which includes consideration of parental intention, settled purpose and duration of any stay. It also, following Punter, includes a need to recognise the child's sense of habitual residence."

[8] With respect to the issue of standard proof and evidential issues Mr Ashmore provided submissions in paragraphs 27-30 which I set out as follows:

> 27. Historically in Hague cases the Courts have been hesitant when faced with competing affidavit evidence in placing weight on either.
>
> 28. The traditional position generally taken is that adopted by Butler-Sloss LJ where she stated:
>
> > "If the issue has to be faced on disputed non oral evidence, the Judge has to look to see if there is independent extraneous evidence in support of one side. That evidence has, in my judgment, to be compelling before the Judge is entitled to reject the sworn testimony of a deponent. Alternatively, the evidence contained within the affidavit may in itself be inherently improbable and therefore also unreliable but the Judge is entitled to reject it. If however there are no grounds for rejecting the evidence on either side, the applicant will have failed to establish his case."
>
> 29. The more recent New Zealand authority have taken a more moderate position, the High Court have observed in its decision of *H v R*:
>
> > [36] I make one further observation of some importance to cases such as this one. There is no doubt that the court considering the issue of consent must be satisfied of that fact on the balance of probabilities. As set out in of *Re K (Abduction: Consent)*, if the court is "left uncertain" as to consent, the defence must fail. But care must be taken that this does not lift the standard of proof from the balance of probabilities to proof beyond reasonable doubt. A similar note of caution was expressed by the Court of Appeal in *Basingstoke v Groot*, when considering the proper approach to assessing competing affidavit evidence in Hague Convention cases. Having referred to observations of Butler-Sloss LJ in *Re F (A Minor)(Child Abduction)* on that issue, the Court of Appeal stated:
> >
> > > [39] We consider that the approach of Butler-Sloss LJ is too extreme. The fact that the evidence has not been tested must be taken into account. However, the standard of proof remains on the balance of probabilities and Butler-Sloss LJ's approach risks raising that standard.

> In our view, deciding on conflicts of evidence is done in the usual way, taking into account such factors as any independent extraneous evidence, consistency of the evidence (both internally and with other evidence) and the inherent probabilities.
>
> [37] As well as the caution in respect of lifting the standard of proof, the above extract is a helpful reminder of the proper approach to assessing competing affidavit evidence in cases of this kind.

30. Obviously, in this case the Court was referring to the consent defence but similar considerations apply to any matter where there is lack of cross examination.

[9] Ms Blackford took no issue with that summary of the law advanced by Mr Ashmore. Ms Blackford summarised the applicable law on habitual residence in paragraphs 16-40 of her submissions which I set out as follows:

16. One of the purposes of the Act is to implement in New Zealand law the Hague Convention on the Civil Aspects of International Child Abduction.

17. The Supreme Court generally noted the objectives and purpose of the Convention:

    (a) At its heart is the twin objectives set out in Article 1A: prompt return of children wrongfully removed, and respect for the rights and custody and other jurisdiction; and

    (b) The purpose of return is to enable the court of the country of the child's habitual residence to decide matters of custody and access, rather than the country to which a child has been wrongfully removed.

18. `The Convention is a welfare and best interests document. It upholds the paramountcy of a particular child's welfare and best interests on the basis that, unless there are exceptional circumstances, wrongful removal across international borders is not in the best interests of children.

19. The general principles of the Convention are helpfully set out in the case of *LRR v COL*.

20. Section 105 of the Act provides that an application for an order for the return of a child may be made to the court having jurisdiction under subpart 4 of the Act by, or on behalf of, a person who claims:

    (a) That the child is present in New Zealand; and

(b) That the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and

(c) That at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and

(d) That the child was habitually resident in that other Contracting State immediately before the removal.

21. All grounds under section 105(1) of the Act must be met before jurisdiction can be established.

22. Sections 105 and 106 of the Act provide a clear process by which these applications shall be determined:

(a) The onus is on the applicant to prove that the jurisdictional grounds as set out in section 105 have been met. If the grounds are established, an order for return must be made unless any of the exceptions in section 106 are made out.

(b) The onus shifts to the respondent to prove that any of the section 106 grounds applies.

(c) The standard of proof for each party is on the balance of probabilities.

(d) In the event one of the affirmative defences in section 106 has been made out, the residual discretion then applies. The court may then either order the return of the child/ren or not, depending on the particular circumstances of the case.

23. In this case, counsel for the respondent submits that the applicant falls short at the first hurdle. He has failed to meet the criteria set out in section 105(1)(d) of the Act on the basis that [Martin] was not habitually resident in England at the time he travelled to New Zealand. On that basis, the application should ultimately be declined.

Habitual residence

24. A child must be habitually resident in the Contracting State at the time of removal. Habitual residence is a question of fact and evidence.

25. Section 95 of the Act does not define "habitual residence" nor does the Convention attempt to offer a comprehensive definition of "habitual residence".

26. The Court of Appeal in P v Secretary for Justice, confirmed this and further upheld its earlier decision of *SK v KP* which made inquiries into "habitual residence" noting that:

> "In *SK v KP*, the inquiry into habitual residence was held, at [80], to be a broad factual inquiry. Such an inquiry should take into account all relevant factors, including settled

> purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration. In this catalogue, *SK v KP* held that settled purpose (and with young children the settled purpose of the parents) is important but not necessarily decisive…"

27. The Court of Appeal provides useful commentary on the parent centred approach versus the child centred approach. The parent centred model provides that the "habitual residence of the child follows that of the parents". Whereas under the child centred model is that "children are treated as autonomous individuals, the quality of whose residence in a particular country does not necessarily depend on the quality of their parents' residence in that country." The child centred approach will also depend on the child's connections with the country in question.

28. The Court of Appeal in *P v Secretary of Justice* considered that the formulation of the test in *SK v KP* gave appropriate significance to parental purpose, taking a middle ground between the parent and child centred approaches.

29. In *SK v KP,* all relevant facts were weighed, with the settled purpose of the parents having been an important factor as was the parental purpose as to the quality and length of residence in the new state rather than as to abandonment of the previous habitual residence.

30. In other words, the inquiry into habitual residence is a broad factual inquiry.

31. In the High Court decision of *[Part A v Party B]*, Dobson J observed the commentary in both *P v Secretary of Justice* and *SK v KP*, noting that:

> "In summary the assessment of whether a particular country is a child's habitual residence is a factual inquiry, necessarily tailored to the particular circumstances of the individual case. Parental purpose may be a factor, but it is not determinative. The focus is on the actual situation of the child, and his or her connection with and integration in the relevant country."

32. Whilst there are several case authorities on "habitual residence" there is limited case law in which a court has found that a child had no "habitual residence" at the time of removal/retention.

33. A child cannot have more than one habitual residence but a child can have no habitual residence.

34. *[Part A v Party B]* concerned an appeal from a decision delivered in the Family Court at Nelson dismissing an application for an order that the seven-year-old child be returned to Australia. The Family Court dismissed the application as the applicant father could not make out the child's habitual residence in Australia. The Judge considered it

questionable whether either parent had a habitual residence due to their nomadic lifestyles.

35. Dobson J referred to the recent United Kingdom Supreme Court decision of *B (A child)*, in which Lord Wilson agreed with the submission that it is not in the interests of children routinely to be left without a habitual residence except only in exceptional circumstances. Dobson J referred to His Lordship's commentary in *B (A child)* that jurisdiction may be founded on the presence of the child in the absence of an ascertainable habitual residence.

36. The mother's evidence (not dissimilar to the applicant's evidence in this case) was that whilst they spent periods living on the boat sailing around the New Zealand Coast, they spent significant periods on land in New Zealand, it was the place they came back to after their travels, and as a family they had always referred to New Zealand as home.

37. When debating with counsel the relevance of the strength of attachment and degree of integration for the child, Dobson J noted that:

> "The factual assessment requires, among other things, consideration of the child's strength of ties to the state, which will not necessarily be affected by moving around. It also requires consideration of the social, educational and cultural connections to the community, which may also be present in an itinerant lifestyle."

38. Dobson J went onto say that:

> "Integration in a social and family environment ordinarily requires an opportunity for a child to put down roots somewhere or somehow, to make connections that enable the child to develop social skills and ideally to access schooling to advance an education reflecting the values of that country…I consider this aspect of the living arrangements is a relevant consideration, to be assessed alongside all other relevant factual matters."

39. Dobson J concluded that such an itinerant lifestyle (as was the case for these parents):

> "…is the antithesis of one that would enable the child to put down roots, and develop social, educational and cultural connections that ought reasonably to be expected of a child in its habitual residence. I am not satisfied that the evidence is sufficient to show the level of integration required to establish that Australia had become the child's habitual residence…
>
> "On my fresh assessment of the facts, focussing on the child's perspective of any habitual residence, I reach the same conclusion that the Judge did for different reasons. I find the child did not have an habitual residence in Australia at 27 July 2016."

40. The absence of proof of a settled purpose was material in determining the father's claim that the child was habitually resident in Australia.

I accept counsel's summary of the law.

[10] The applicant's position is as follows. The applicant asserts that:

(a) [Martin] is presently in New Zealand;

(b) [Martin] has been retained in New Zealand in breach of the applicant's rights of custody;

(c) At the time of retention, the applicant's rights of custody were being exercised by the applicant or would have been so exercised but for the wrongful retention; and

(d) [Martin] was habitually resident in the United Kingdom and/or Italy before his retention in New Zealand.

[11] The respondent's position is as follows. The respondent objects to [Martin]'s return to the United Kingdom on the grounds that:

(a) [Martin] was not habitually resident in the United Kingdom and/or Italy before the removal;

(b) [Martin] has no habitual residence at the time he travelled to New Zealand.

[12] Both parties have provided extensive affidavit evidence to the Court.

Summary of background

[13] There is a large amount of common ground between the parties as to the facts. They part in some material respects:

(a) the parties met on or about 2011 and married on [date deleted] 2012 (in Italy) and separated in either February or March 2023. The retention in New Zealand happened at the same time as the separation;

(b) the applicant father is Italian and the respondent mother is a New Zealander (with dual citizenship in both New Zealand and the United Kingdom);

(c) [Martin] was born in the United Kingdom on [date deleted] 2017 and holds a New Zealand, United Kingdom and Italian passport;

(d) the parties lived at a flat in London situated at [address 1], London from [date deleted] 2017 to [date deleted] 2021 a period of just less than four years. The parties during that time had various holiday trips outside the United Kingdom to Italy, Spain, France, Poland, United States, Australia and New Zealand. The applicant says at the time [address 1] was four and a half years, the respondent says it was just under four years. It is likely occupation of the flat would have been before the birth of [Martin];

(e) they resided with the applicant's brother for about 10 days between 1 September 2021 and 10 September 2021 in [address 2], Italy;

(f) they resided in a camping ground in [Italian city A] from 10 September 2021 to the end of October 2021;

(g) then they went to [address 3], [Italian city A] from the end of October 2021 to 1 December 2021;

(h) they then resided in [address 4], [Italian city A], Italy from 1 December 2021 to 2 November 2022. They were in Italy for 13 months. It is agreed that during that 13 months they had various trips around Italy, France and the United Kingdom;

(i) it is agreed that the parties shifted from [Italian city A] to [English county B], United Kingdom with the child, on or about 2 November 2022. They stayed at [address 5], [English county B], United Kingdom (a friend's house) from 2 November 2022 to 6 November 2022;

(j) they then went to [address 6], [English county B], United Kingdom (Airbnb bedsit) from 6 November 2022 to 5 December 2022---33 days;

(k) the applicant and the respondent then left the UK on 5 December 2022 and travelled on a return airfare to New Zealand to visit her family. They arrived on the 7 December 2022 and commenced living with her family at [address 7], Auckland, New Zealand from 7 December. The return date was set at 14 February 2023. The applicant returned to the UK on 16 February a slight delay due to Cyclone Gabrielle.

(l) in addition to those major changes referred to the parties also frequently travelled around the world (on some trips working remotely). Such places including Spain, China, Australia, New Zealand, Poland, France and the United States. It is therefore common ground between the parties that shortly prior to the birth of their son they lived in London for a period of four to four and half years. That is where the child spent his initial part of his life. Then there was a period of 13 months in [Italian city A], Italy with the applicant father having secured employment on a 12-month contract from September 2021 to November 2022;

Judgement on Habitual Residence in the UK

[14] I have no difficulty in finding that [Martin]'s habitual residence for the first four to four and a half years of his life was the United Kingdom. The respondent accepts this. Her contention is that [Martin] lost his Habitual Residence when he left the UK and either didn't gain one in Italy or having done so didn't regain it in the UK on arrival. I find the trips that he had with his parents to various parts of Europe and beyond were for holidays. The settled home was [address 1] in London. His doctor

was situated nearby. They resided in one area of London and were consistent with that. They consistently returned home to the London address after each trip.

[15] There would have been a natural need for the respondent as a mother about to give birth to a child in London with her husband to be settled and have an established place to bring up the child. This is what they did. They travelled extensively but the record shows leaving from London and returning to London.

[16] The next question is whether when they went to Italy for a period of 13 months whether the child's habitual place of residence changed from the United Kingdom to Italy or whether he retained United Kingdom as his habitual place of residence.

[17] It is accepted by both parties that the applicant obtained a 12-month contract which provided an incentive for them to travel and shift to [Italian city A]. It seems clear that the respondent continued her [business] online. They predominantly lived in [Italian city A] and continued with the pattern that they had established of travelling on a regular basis.

[18] Also it seems that the applicant wished to continue to see and be with his family. From the affidavit evidence it emerges that there were two principal reasons for shifting to [Italian city A]. One was the job which he says paid well and the second was to spend time with his family. I cannot see anywhere on the affidavits where there had been a strategic plan entered into or agreed between them for a defined period of time in [Italian city A]. The time seemed to be dictated by the length of the applicant's employment contract.

[19] I am satisfied that [Martin]'s habitual place of residence remained in the United Kingdom after going to Italy. There are a number of facts which persuade me of this finding:

(a) retaining a right-hand drive motor vehicle whilst in Italy and returning it to Britain;

(b) the respondent retaining her online business based in the United Kingdom;

(c) no evidence of a change of tax status to Italy by the respondent;

(d) retaining the child's family doctor in London;

(e) some furniture being stored in the United Kingdom with friends;

(f) selling furniture to the landlord in [Italian city A];

(g) travelling back from [Italian city A] to the United Kingdom with possessions in their motor vehicle. These facts convince me that the parties intended to retain the United Kingdom as their child's habitual place of residence.

[20] If I am wrong that the child's habitual place of residence remained the United Kingdom or subsequently held to be wrong and that it changed to Italy or not at all, I am satisfied that the parties reached a consensus that the child's habitual place of residence would revert to the United Kingdom after they left and returned to [English county B]. I do so for the following reasons.

[21] The common ground facts appear to be as follows. On 2 November 2022 [Martin] and the respondent travelled to [English county B], England and the applicant followed arriving in [English county B] on 5 November 2022. I understand the applicant packed up their motor vehicle (right-hand drive) and drove it back from [Italian city A] to [English county B]. The parties and [Martin] spent about 33 days in [English county B] in an Airbnb (apart from four nights with friends) before flying to New Zealand on 5 December 2022.

[22] Prior to leaving [Italian city A] the applicant asked the parties' landlord if he wanted to buy their furniture to which she agreed. Therefore they arrived in [English county B] with minimal belongings having sold most of them in [Italian city A]. Essentially everything they owned apart from the small items contained in the storage with their friends could be contained in their motor vehicle.

[23] I accept that during the 33 days the parties stayed in [English county B], neither were in employment, nor did they have any permanent accommodation and they had a small amount of belongings some of them in storage with friends in the United

Kingdom. I accept that both parties agreed to fly to New Zealand and it is clear that the purpose of the trip to New Zealand was for both of them and the child to spend time with the respondent's family. It is also clear to me that they intended to return to the United Kingdom because of two facts: firstly, they bought a return airfare and secondly, they entered into an arrangement for house sitting in Paris for a period of five weeks from 14 February 2023 (return date) to 6 April 2023. It is also clear that there was an intention to return to the United Kingdom from New Zealand because the respondent requested the time of her return to be extended and it was initially extended for a few days and then for a longer period of time subsequently resulting in cancellation. This reinforces the view that they intended to return to [English county B]. It was only after coming to New Zealand where the state of mind of the parties started diverging. Up to the date of departure from NZ they has a mutual settled purpose to return to the UK.

[24] It is clear in this case that the separation between the parties was initiated by the respondent. The applicant was taken by surprise. I accept his evidence that he was clear in his intention. That he felt that they had planned to return to [English county B] and enrol their son at school and for him to continue to be brought up in the United Kingdom. Consistent with that intent he started looking for jobs and secured one option. He enrolled the child at primary school.

[25] He did not realise that the respondent was having doubts because this was not communicated to him by the respondent. Looking at text messages attached to the applicant's affidavit the first communication he received indicating any intention to separate was when he received the phone call by video link shortly after he arrived back from New Zealand where the respondent informed him that she was worried about the situation in the United Kingdom. Looking at the text message initial exchange I draw the conclusion that initially the respondent was expressing considerable doubt and concern because she was worried about how they were going to survive in [English county B], how they were going to have an income, where they were going to live, and where he was going to school. The doubts and concerns that had been arising over a period of time started becoming more dominant in her thinking. I consider that the doubts and concerns that she was expressing had been surfacing over quite a long period of time but did not culminate in a requirement to make a

decision about the situation until she was in New Zealand. Her doubts don't unilaterally change the consensus they had when leaving Italy and returning to the UK up to when the applicant departed NZ.

[26] The difference in narratives between the parties can be explained by the fact that separation was occurring at the same time as the retention. The separation had the effect of blindsiding the applicant.

[27] I cannot see anywhere in the respondent's evidence where she had given any prior indication of an intention to remain in New Zealand until the video call was made shortly after he arrived in London. Initially the communication she entered into was couched more in the way of saying that she was not necessarily separating but she had a whole lot of concerns. The text message exchange makes it clear that the applicant endeavoured to resolve the issues initially until other matters started accumulating, like difficulty in contacting her, not being able to have free phone access or video links to his son, not having access to shared photographs and the information coming to him that the return time was changed initially to April and then subsequently the flight was cancelled completely.

[28] All of those things took a period of time and started adding up until he came to the inevitable conclusion that there was no prospect that the parties' marriage was going to continue.

[29] Therefore in the respondent's mind with her initiating the separation she was going through internal debates as to what she was going to do and it was probably not until she was in New Zealand with her family that she realised the benefit of family support and that she would be in a position to provide for [Martin]'s basic needs. When she was 'home in NZ' this cemented in place the doubts that she had about the relationship and also where she wanted to live. That she became equivocal about it and from her perspective she started to doubt the settled intent to regain or to re-establish the child's habitual place of residence in [English county B]. But this did not occur until she had been in NZ for some weeks. When she arrived in [English county B] I'm satisfied both parents wanted to make [Martin]'s habitual residence the UK.

[30] It is also equally clear that the applicant from his perspective intended to return to [English county B] and make their lives together and that is why he enrolled the child at primary school, started looking for accommodation and employment. I am satisfied that when they left [Italian city A] and sold their furniture and packed up the car they had a clear intent to relocate back to [English county B] UK. There was a consensus between them. It only changed for the respondent well after she got to NZ. I find on the evidence a mutual decision on leaving Italy and on arrival in the UK to re-establish the UK as [Martin]'s place of habitual residence. This finding is only relevant if I am wrong on my first finding that [Martin] didn't retain the UK as his habitual residence throughout.

[31] This mutual decision was cemented in place by arriving there and starting to look at accommodation even though they agreed to house sit in Paris for five weeks. That five weeks was going to fit into their trip to New Zealand with the return airfare to coincide with the house sitting. I find that the house sitting was a temporary option and they intended to return to [English county B] after the contract was finished. The respondent's doubts didn't become dominant in her thinking until she was back in New Zealand.

[32] Pursuant to ss 15 and 16 of the Act guardians of children are required to cooperate and consult each other with respect to guardianship issues. I acknowledge ss 15 and 16 are not incorporated into Part 4 of the Act. I consider however the obligation as guardians on them both are part of promoting the best interests and welfare of their son. There is a similar obligation in the Children's Act in the UK. Clearly, the child's habitual place of residence is a guardianship issue. Based on the respondent's own evidence it is clear that she did not at any stage consult the applicant with respect to a change of plan. The issue of where they lived as a couple or as separated parents is of huge importance. The New Zealand law makes it mandatory that guardians undertake the duties set out in the Act. It is clear to me that the respondent was in breach of her guardianship obligations. She did not raise with him any issues or concerns until after he had departed. Even then there were mixed messages given for a period of time. I consider it would wrong for the respondent to take advantage of her breach. Otherwise this would allow one party to a relationship to manipulate the outcome without going through proper due process of raising the

issue with the other partner, consulting each other about an important issue and cooperating. It is clear in this case that the respondent did not do so and she effectively delivered a fait accompli to the applicant.

[33] Therefore I prefer and accept the narrative given by the applicant of a settled intention to return to the United Kingdom and live in [English county B]. The respondent gave all appearances of accepting and agreeing with including travelling back to the United Kingdom from [Italian city A], agreeing to fly to New Zealand for the purposes of a holiday with return airfares, the entering into an arrangement to housesit a property in Paris which no one is suggesting was any intent to shift habitual residence to France. It is consistent with the frequent travel and holidays that they had always enjoyed. It is very difficult to have a changed mutual intention and if issues such as locality are not raised and discussed. The parties clearly cooperated frequently on travel because they did an enormous amount and the logistics required good communication.

[34] So I find as follows:

- The child's habitual place of residence was the United Kingdom and remained the United Kingdom when they travelled to Italy and subsequently New Zealand. I do not consider it ever changed.

- If I am wrong in the above finding or held to be wrong I find that the child's habitual place of residence if it changed to Italy or not at all, it reverted to the United Kingdom when the parties travelled from Italy to the United Kingdom in November 2022. I find that they had a consensus between them and an intention to return to the United Kingdom. They had an intention for their son to be schooled in [English county B] and brought up there.

- I find that the respondent was in doubt about her future plans because she was contemplating separating from the applicant but that did not become clear in her thinking until she was in New Zealand. I find she did not communicate her thinking to the applicant until he got back to the UK.

When she saw him off at the airport he had a clear understanding she was going to follow shortly thereafter which is confirmed by the consent to travel without him that he signed.

- That the stay in [English county B] was only about for a short time of 33 days but that does not mean to say that there was not a clear intent formed. I am satisfied that it was.

- I am satisfied that when returning from [Italian city A] back to the United Kingdom it is likely that they both would have told [Martin] that they were returning to the United Kingdom to live. It is likely that [Martin] would have had a child sense of habitual residence as being the United Kingdom. Therefore I find that he returned to the habitual place of residence that he enjoyed for the first four to four and half years of his life from [Italian city A] and I find that the United Kingdom is the habitual place of residence. Consistent with that finding are a number of factors set out in paragraph 19 of this judgment.

[35] The child's views have been ascertained by his lawyer Ms Houghton. The child views are consistent with the analysis that I have set out above. I set out paragraphs 16-21 of Ms Houghton's report of 21 June 2023 which captures [Martin]'s views. They reflect the parties' clear stated intention to him to return to [English county B], United Kingdom from Italy. That he clearly saw London, United Kingdom as his previous home and it is noteworthy that the bulk of his toys were left in the United Kingdom when he travelled to New Zealand. I consider his views encapture accurately the truth of the position asserted by the applicant father in this case.

> 16. [Martin] told me he thought he had been coming to New Zealand for a few weeks and that he and his mum were meant to go back to London but that mum phoned and told dad that they were not going back. He said his dad had told him that. Mum had told him that was not true but then Dad had said it was true. He said feeling mum and dad think different things about what is true, makes him feel sad.
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> 17. When I made reference to living in New Zealand, [Martin] corrected me and told me that he did not "live" in New Zealand. He said his home was London, that is where he was born and that is his favourite country. He said he also likes Italy and that is his other favourite country too. He told me he thought that all his friends are in London

but some have moved. He told me he had cousins in Italy and named three. He told me that when they were in Italy they had stayed with his dad's mum and dad, and also at their country house.

18. [Martin] told me that he could speak English because that was his main language but he could also say some Italian.

19. [Martin] told me that when he came to New Zealand he only brought two little toys. One was a little motorbike and a Spiderman, and another one was a little blue motorbike with a Ninja. He said he had lots of toys in London including a great big box of Lego.

20. He said in London he had lived in a nice big fun house. He told me that his mum in Auckland now had a different house and that he had a cousin here, [name deleted] who is 4½ and that sometimes [his cousin] is mean to him.

21. [Martin] thought he had lots of friends, a friend that sometimes is at dad's house, other children that he spends time with when he is with dad that he described as being best friends; he told me that he had had lots of friends in London. I also note that as is reflected within my April Memorandum, [Martin] had discussed with me the activities and games he enjoyed with [his cousin] and I recall those had been positive discussions.

[36] I consider [Martin] captured the truth of the situation. I therefore order that [Martin] had or regained his habitual place of residence in the United Kingdom and is habitually resident there at the time of wrongful retention in New Zealand. I therefore make an order for return to the United Kingdom and the application for such an order is granted as sought. I authorise the applicant to be able to accompany [Martin] back to the United Kingdom and ask for the Central Authority to make travel arrangements and plans to enable this to occur. I order the respondent can also accompany [Martin] back to the United Kingdom, if she chooses to return to the UK.

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Judge DA Burns
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 25/07/2023