

Case No: ZE14C00405

IN THE FAMILY COURT AT EAST LONDON

East London sitting at Westferry Circus, London E14

Date: 11th November 2014

Before :

HER HONOUR JUDGE CAROL ATKINSON

In the matter of D (Habitual residence)

Ms Bhutta for the London Borough of Newham

Mr Osborne for the child through her Guardian

Hearing date: 11th November 2014

Judgment

1. D is an 11 year old girl who was born in Lithuania on 21st January 2003. She has lived the whole of her life in Lithuania until May 2014 when she was brought to England by her mother, RS.
2. D came to the attention of the London Borough of Newham (LA) on 19th September 2014 when she was found sleeping rough by police. She refused to go home alleging that her mother physically abused her and that she was asked to “massage” men. The police placed her in police protection and the same day the LA placed her in foster care. Her mother subsequently signed an agreement to s.20 accommodation and D has continued to be cared for by the LA ever since, more recently under an interim care order.
3. Whilst living in foster care D has exhibited worrying sexualized behaviour which has led to concerns that she may have been exposed to sexual activity. It transpired that she had not been enrolled in a school or registered with a doctor since her arrival in the UK and D herself has alleged that she has been subjected to violence, left home alone or in the company of unsuitable adults and generally exposed to a high risk of danger through the neglectful parenting of her mother. Within a short space of time D was expressing a clear wish to return to Lithuania. At first she refused to enroll at school and does not wish to learn the English she needs to learn to be able to properly participate in life here. In the meantime, D’s mother has barely engaged with the LA, failing to attend meetings and allegedly blaming D for the difficulties that they have encountered.
4. For reasons which are unclear the LA did not issue proceedings until 5th December. Standard directions were given on 8th December listing the matter on for a CMH and an interim care hearing. The first available date was 5th January, I suspect because of the intervention of Christmas.
5. On 5th January, Recorder Roche instantly recognized the potential jurisdictional issues. He made an interim care order but listed the case for a hearing 3 days later to consider jurisdiction giving appropriate directions as to the enquiries that had to be made in the interim and the filing of proper arguments.
6. So it is that I need to consider as a matter of urgency whether this court has jurisdiction over D. The questions that I need to address in determining that issue are as follows:
 - (1) was D habitually resident in this country when these proceedings began?
 - (2) if not, was she still habitually resident in Lithuania?
7. If I answer the first of those questions in the affirmative then this court will have jurisdiction on the basis of D’s habitual residence pursuant to Article 8 Council Regulation (EC) 2201/2003, commonly known “Brussels II Revised” and referred to in this Judgment as BIIR. If the answer to both questions is in the negative then this court will have jurisdiction under the provisions of Article 13 of BIIR. If, on the other hand, I do find that D was habitually resident in Lithuania at the time that the court was seized of this matter then this court does not have jurisdiction to deal with this matter and other than

making the orders necessary to protect the child whilst arrangements are made for her return to Lithuania pursuant to Article 20 BIIR I am not empowered to interfere.

8. If I conclude that I have jurisdiction, I am then invited to go on to consider a third question, namely:
 - (3) whether this court should request a court in Lithuania to assume jurisdiction pursuant to Article 15 BIIR.
9. The agreed facts, to the extent that they are known, are as follows. D is a Lithuanian National. Her mother and father are also Lithuanian nationals. Her mother is currently in this country. She came here with D in May 2014 in circumstances which I will detail in a moment. Her mother has failed to engage in these proceedings. I am satisfied that she was served with them on 11th December and that she was informed of them again on 23rd December but indicated that she did not wish to play a part in them. In keeping with that position she has failed to instruct solicitors to act on her behalf and she has failed to attend any of the hearings.
10. T's father is presumed to be in Lithuania. He has had a limited involvement in her life and it is suggested by the Lithuanian authorities that he has no interest in the proceedings and no desire to provide care for his daughter. The LA has secured an address for him and sent correspondence there informing him of these proceedings. There has been no response.
11. D has four elder brothers, V (aged 20), S (aged 19), E (aged 17) and K (aged 16). The family became known to child protection services in Lithuania in 2005. On 16 December 2005 all five children were removed from the mother's care and placed in foster care due to issues of physical abuse and neglect. Between December 2005 and February 2012 it is understood that D lived with a Ms T who was granted a 'guardianship order'. D returned to the care of her mother on 3 February 2012 and the guardianship order was revoked.
12. D was subsequently assaulted by her mother and on 24 April 2013 she was again removed and placed in a children's home. It is understood that the mother was charged with a criminal offence in relation to this assault and ordered to take part in a 'violent behaviour modification program'. The mother continues to deny that she assaulted D and states that D ran away.
13. The mother came to England sometime in 2013. In May 2014 she requested permission to bring D to the UK. D returned to her mother's care on 16 May 2014 when it would appear that she was permitted to remove her from the children's home in which she had resided, by then, for over a year. It appears that they traveled to the UK shortly thereafter.
14. Initially the mother and D lived with her brothers K and S. However, in July 2014 the family was evicted and the mother and D moved in with the mother's new partner. K and S moved to separate accommodation.
15. D alleges that her mother forced her to massage men who visited them and would assault her if she refused to do so. D was not registered with any

authorities in the UK and did not attend school. It also appears D was left alone for most of the day whilst the mother was at work. D was found sleeping rough in a public building on 19 September 2014 and was placed in foster care by the police. Since D's removal the mother's engagement with the LA has been sporadic. D speaks little English and is placed with a Lithuanian speaking foster carer.

16. Whilst in foster care D has displayed sexualized behaviour and pornographic material has been found on her telephone. D has stated that she does not want to see her mother and wishes to return to the children's home in Lithuania.
17. Efforts to trace K and S have been unsuccessful. The CPS have not pursued charges against the mother in relation to the assault of D or the possible sexual exploitation. Since placement in foster care, D has been registered with a GP and has started to attend school, albeit reluctantly.
18. Although the issue of jurisdiction was not fully flagged up before the court the local authority has been diligently communicating with the Lithuanian Central Authority. Indeed it is through that means that the information that we have about D and her family is known. I have before me a good deal of information from the State Child Rights Protection and Adoption Service and a recent letter dated 7th January from the Director of that organization. I am extremely grateful to Teresa Roscinska and Odeta Tarvydiene who have both provided full assistance to the London Borough of Newham and to the court in accordance with good practice. Suffice to say that the final position of the Lithuanian authorities as set out in the most recent letter is that D is a Lithuanian child and should be returned to Lithuania as soon as possible.
19. It is the LA's case, that there is jurisdiction for me to deal with this case pursuant to Article 13 BIIR. Counsel for the LA suggests that I answer the first two questions posed above in the negative. However, the LA is nevertheless clear that this is a case in which the essential conditions for transfer are made out and I am invited therefore to make an Article 15 request for transfer of these proceedings to Lithuania with a view to the proceedings being transferred there and D likewise.
20. Mother takes no part in these proceedings. Accordingly I have no account from her as to the history and her intentions in coming to the UK and must determine these issues on the unchallenged evidence that I have read.
21. D's solicitor and Guardian support the LA position.

Jurisdiction

22. Article 8 of Brussels II Revised provides that:

“the courts of a member state shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that member state at the time the court is seised”

Thus the jurisdictional basis for the making of public law orders under Part 4 of the Children Act 1989 derives from the habitual residence in England of the child or children in question. Put simply, if D was habitually resident in the UK on 5th December 2014 then this court has jurisdiction.

23. Further, Article 13 provides that:

“where a child’s habitual residence cannot be established...the court of the member state where the child is present shall have jurisdiction”

Thus, if D’s habitual residence at 5th December 2014 cannot be established, this court would have jurisdiction based on her presence under Article 13.

24. Under Article 17:

“where a court of a member state is seised of a case over which it has no jurisdiction under this regulation and over which a court of another member state has jurisdiction by virtue of this regulation, it shall declare of its own motion that it has no jurisdiction.”

Thus if this court reaches the conclusion that D was at 5th December 2014 habitually resident in Romania, it must declare that it has no jurisdiction.

25. In those circumstances, the proceedings would come to an end, save that, pursuant to Article 20, this court could maintain the existing interim protective measures pending the return to Lithuania of D.

26. In Re E [2014] EWHC 6 the President of the Family Division, Sir James Munby, confirmed that, in determining the question of habitual residence, the courts will apply the principles explained by the Supreme Court in A v A [2013] UKSC 60.

27. The principles are summarised by Baroness Hale of Richmond at paragraph 54 of the Supreme Court judgment. In particular:

- a. habitual residence is a question of fact and not a legal concept such as domicile;
- b. the test adopted by the European court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned;
- c. this depends on numerous factors, including the reason for the family's stay in the country in question;
- d. the social and family environment of an infant or young child is shared with those on whom he is dependent – hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned;

- e. the essentially factual and individual nature of the enquiry should not be glossed with legal concepts which would produce a different result from that which the factual enquiry would produce;
 - f. it is possible that a child may have no country of habitual residence at a particular point in time.
28. Of further assistance on the issue of habitual residence is also the case of Re KL [2013]UKSC 75. Of particular interest to this case is the restatement of the proposition that there is no legal rule that a child is habitually resident where the parent with custody is resident and parental intent does play a part in establishing a change in the habitual residence of a child ie parental intent in relation to the reason for leaving one country and moving to another.

Discussion

29. It is clear that D was habitually resident in Lithuania until May 2014 when she came to the UK. There are no disputed facts in this case but there are undoubtedly gaps in our knowledge. We don't know, for instance, why the mother brought D to the UK in May 2014.
30. We do know that D had brothers here and that her mother had apparently taken up residence here the year before she arrived. It would appear that she returned to Lithuania in order to bring her daughter to the UK with her. It would not be unreasonable to assume that the purpose of this was so that they could live here together.
31. However, we also know that she failed to enroll her in a school or register her with a GP which is what one would expect were she intent upon settling her daughter into life in this country. Their accommodation was not stable and on occasion she had to sleep on a floor whilst her mother and boyfriend occupied the only bed. She was left home alone and generally neglected and she was asked to carry out inappropriate tasks such as "massage" on men visiting her mother. None of that speaks of a mother seeking to bring her child to a new country to care for her and settle her into life here. Although D has brothers in this country they cannot be traced and so there is no integration through that means. Further, D cannot speak English and there were no arrangements in place to alter that.
32. Other than her physical presence here for 7 months, 3 of which have been spent in foster care, there is nothing that points to D having integrated into social and family life in this country whilst in the care of her mother and nothing that suggests that it was her mother's intention that she should so integrate. No steps were taken towards making the stay permanent which would surely have involved enrollment at a school or registration with some public body. Accordingly, I am quite satisfied that D had not acquired habitual residence in this country at the time that the court was seized, namely December 2014.
33. Did D retain her habitual residence in Lithuania? It is the position of the LA and the G that she did not. D was removed from the children's home

legitimately and brought to the UK by her mother. I have no evidence that she has retained direct contact with her family in Lithuania or even her previous carers in the children's home, or Ms T with whom she lived for a time.

34. However, even though there is no evidence of contact, D retains her family links in Lithuania and of course she wishes to return there. As I have already found, her mother has done little to integrate D into social and family life in the UK in the 7 months she has been here. Whilst she has been away from Lithuania for 7 months that time period does not of itself necessarily speak of a cessation of her social and family links with Lithuania. Though there may be no evidence of direct contact with Lithuania there is nevertheless no doubt that her family links there remain intact and further evidence of her social integration into that member state is provided, it seems to me in the very clear and active position adopted by the Lithuanian authorities in her regard. In keeping with that should she return to Lithuania I understand that she would have automatic access to the education, health, social and therapeutic services she accessed previously.
35. All things considered I am satisfied that D continues to be habitually resident in Lithuania. That being the case, this court has no jurisdiction to deal with this matter and pursuant to Article 17 of BIIR, I must declare that to be so.

Article 15

36. I should add that had I been wrong and jurisdiction was founded on the basis of either habitual residence here or no habitual residence anywhere, I consider that this is a case in which an Article 15 request for transfer to Lithuania would have been inevitable.

37. Article 15(1) provides;

"By way of exception, the courts of a member state having jurisdiction as to the substance of the matter may, if they consider that a court of another member state, with which the child has a particular connection, will be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other member state in accordance with paragraph 4; or (b) request a court of another member state to assume jurisdiction in accordance with paragraph 5."

38. The route to the exception of Article 15(1) requires the fulfillment of the three conditions highlighted above. All three of those conditions are fulfilled here:
- a. D has a "particular connection" with Lithuania within the meaning of Article 15(3)(b) and (c) by virtue of her Lithuanian nationality and the fact that it was her place of former residence;
 - b. The court in Lithuania is self evidently much "better placed to hear the case" by virtue of its extensive history with this family both in proceedings and out. Hearing the case in this jurisdiction would require evidence from Lithuania, necessitating either the attendance of witnesses or the translation of many documents;

- c. There is no family carer in this country. D's mother has effectively abandoned her. Her brothers have not come forward to offer care. The only alternative for her if she is to remain here will be long term foster care and so it is that by virtue of the strong connections she has with Lithuania this LA sensibly consider that the best outcome for her would be for her to be placed back in Lithuania. Thus it is clearly "in the best interests of the child" that this matter should proceed in Lithuania.

Transitional arrangements

39. Whilst I have determined that the court has no jurisdiction over D, I am able, pursuant to Article 20 BIIR, to make provision for temporary protective measures whilst arrangements are made for her return to Lithuania and accordingly the interim care order will continue.
40. I intend to give the LA a short time to make those arrangements with the Lithuanian authorities and will list this case to return within a few weeks by which time I hope to have information about those plans and when they are to be put into effect.