**4PB**, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

# LCG v RL [2013]

## [2014] 1 FLR 307; [2013] EWHC 1383 (Fam)

23/05/2013

**Barristers**
Henry Setright KC
Christopher Hames KC
Michael Gration KC

**Court**
High Court (Family Division)

**Practice Areas**
International Children Law

**Summary**
Application by a Spanish mother pursuant to the Hague Convention and Article 11 of the Council Regulation 2201/2203 for the return of her four children after they were wrongful retained by the British father after a holiday. Consideration given to the correct approach to the exercise of a court's discretion when an older child objects to the return. Application granted.

**Facts**
This was an application by a Spanish mother (LCG) under the Child Abduction and Custody Act 1985 (incorporating the Convention on the Civil Aspects of International Child Abduction 1980 ("The Hague Convention")), and under Article 11 of Council Regulation (EC) 2201/2003, for the return of her four children to Spain. The application was opposed by the father (RL), a British national. The children concerned were T, a girl who was 12, L, a boy who was 10, A, a boy who was 8 and N, a boy who was 4 years old.

Cobb J heard the case over three days and heard evidence from the parties on limited issues and from the CAFCASS officer who had prepared two reports. He noted that certainly from 2002 the family routine was that the mother would take the children to Spain for holidays during each summer without the father and T and N were bi-lingual in Spanish and English; L and A less so. In July 2012, L and A were attending the local junior school. T attended P senior school where she had obtained a scholarship and was said to be top of her class. Cobb J noted that T had experienced bullying at P school which reached its peak in April 2012 when T joined a week long residential school trip. This was relevant to the issues which fell to be determined.

The parties met when the mother came to live in England in the mid-1990s to study English and to work. The parties never married. The relationship was turbulent from 2000 and deteriorated significantly after L's birth in 2002/3. The relationship finally ended in early 2012 and both parents accepted that the

children were starting to suffer psychologically as a result of their exposure to the discord in the home. Cobb J found that the parties regularly discussed their long-term options in early 2012 albeit these discussions were fragmented and bad-tempered. On 6 June 2012 the mother purchased one-way tickets to Spain for herself and the children.

The mother maintained she proposed to separate from the father by returning to Spain and the father had agreed to this. The mother highlighted various actions taken by her including giving notice to the children's schools as evidence of this plan and the father's agreement to it. On 24 July 2012, the father drove the mother and children to Luton airport, from which the mother and children flew to Spain. It was the father's case (on paper) that he had agreed to the mother taking the children to Spain for the summer holiday albeit in evidence he accepted that he did not know when the children would be back.

The mother and children moved in with the maternal grandmother and steps were taken to redecorate and furnish their bedrooms. Arrangements were made for the children to commence bi-lingual school and the children settled well and made friends. The father provided financial support to the mother in Spain and sent out winter clothes and their favourite toys. He had limited contact with the children in the early days after their departure for Spain and his first visit took place in November 2012. It was agreed that the children would return to England to spend Christmas with their father and it was accepted that both parties expected the children to return to Spain on 5 January 2013.

The father asserted that shortly before 5 January 2013 the children hid their and the father's passports in an attempt to frustrate their departure. On the 5 January 2013 the father contacted the mother and indicated that the children did not want to return. The mother was clear that the children must return. The father in the words of Cobb J "stalled". On 10 January the mother received an e-mail from the father in which he indicated that he had commenced proceedings to secure protective orders in England. On 21 January 2013, the mother made her application seeking the return of the children to Spain. She made a 'without notice' application before Theis J on that day, and a range of customary directions and location orders followed. Further directions were given at the return date on 29 January 2013, including a direction for a CAFCASS report, given the ages of the children and their apparently strongly-held views (evidenced by the hiding of the passports referred to above) not to return to Spain.

The first issue for Cobb J to determine was the question of habitual residence. The mother submitted that the father had expressly agreed that the move to Spain would be best for the children and had agreed with the plan that she and children should relocate to Spain. The mother highlighted a number of pieces of evidence and/or factors which supported this assertion. These included T's unhappiness at school and the parents' growing realisation of the effect this was having on her and that this could not continue. In relation to the period since July 2012, the mother relied on the father's conduct (as detailed in the judgement) as evincing his earlier explicit acceptance and/or his agreement/acquiescence to the children being in Spain.

The father disputed that the children had acquired a habitual residence in Spain by the 5 January 2013 and asserted that the children were habitually resident in England & Wales at that date. He maintained that they had never been habitually resident in Spain, and he had not consented to the children permanently relocating to Spain in July 2012.

## Held

Cobb J set out a number of findings as to the state of affairs between the parties prior to and after July 2012 and in particular their intentions at these times. He found that i) with considerable misgivings, the father agreed with the mother that she could go to Spain, ii) the parents came to the conclusion in April 2012 that T was not able to remain at P school and for the mother it removed one of the last few

potential reasons for remaining in England, iii) the father did accept (and believe) that the mother and children were leaving 'indefinitely', iv) that the mother and father did tell L in June that he would be leaving permanently to live in Spain and v) that at the point at which the mother and children left England, the father genuinely did not know when he would see them again.

In respect of the period after July 2012 Cobb J accepted that the father did not object to the children's continued presence in Spain, nor did he ask the mother to bring the children back. Cobb J also accepted that the children had settled in their maternal grandmother's home, in school, had made friends (certainly T and L) and the case needed to seen in the context that they were Spanish National with a Spanish mother and Spanish extended family. Finally, Cobb J accepted that the father accepted the position of the children living in Spain, albeit perhaps resentfully at times.

Cobb J then turned to consider the applicable law as set out in the provisions of Article 3 of the Hague Convention. He noted that if he concluded on the evidence that there has been a wrongful retention of the children by the father, then he was obliged to "order the return of the child forthwith" (Article 12) unless one of the exceptions in Article 13 applies. To answer this question Cobb J accepted that he needed to be satisfied as to the mother's case that on 5 January 2013 the children were habitually resident in Spain. Determination of these questions were materially complicated in this case as the father did not have parental responsibility for T and L but had parental responsibility for N and A and in Cobb's view, the need to consider the different (albeit overlapping) approach of the English Courts and the European Courts to the evaluation of habitual residence, and the extent to which he should be governed by each.

Cobb J then accepted that if the children (or any of them) were determined to be habitually resident in Spain on the key date, he then had to consider whether any of the three older children objected to returning, and if so whether they were of an age or maturity at which their views should be taken into account. If an affirmative answer was revealed to those questions in respect of any of the children, he would then be required to exercise discretion to decide whether to return that child. Further, in light of the case being presented by the father, Cobb J also needed to consider whether any of the children would be placed in an intolerable situation by being required to return.

Cobb J accepted that the children lost their habitual residence in England on or shortly after 24 July 2012 and was satisfied that they acquired a habitual residence in Spain during the autumn of 2012 so as to be habitually resident in Spain by 5 January 2013. Cobb J reviewed the applicable case law in this area and highlighted in particular the broadly consistent application of the 'integration' European test (*Mercredi v Chaffe* (Case C497/10) [2011] 1 FLR 1293: see below) and the English test of a "person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration" (per *R v Barnet London Borough Council, ex parte Nilish Shah* [1983] 2 AC 309, and *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 sub nom *C v S (A Minor) (Abduction)* [1990] 2 FLR 442, at 578 and 454).

Cobb J accepted that the views of the father could be taken into account in the determination of whether there had in fact been a change of habitual residence, and given the position of the father in the family, he accepted that any such objection (though on his finding there had been no objection) would have weighed significantly. Cobb J noted that any agreement to a move needed to be clear but not necessarily adjudged by reference to the exacting standards applied to the test relevant to an Article 13(a) 'consent' case in *Re P-J (Abduction: Habitual Residence: Consent)* [2009] EWCA Civ 588 [2009] 2 FLR 1051 at §48. He was satisfied that the father's agreement to the move to Spain was clear, unconditional and was a true bilateral agreement. It was therefore less important for him to consider the 'integration' argument but in considering the approach of the court in *Re A (Area of Freedom, Security*

*and Justice*) (C-523/07) [2009] 2 FLR 1 at §44 and Mercredi v Chaffe. However, Cobb J was satisfied that the children had begun to be integrated into their new Spanish lives, establishing a relevant nexus between the children and their new home State. He acknowledged however that a move, particularly one involving a move of country, created a hiatus in the children's lives, and 'integration' had to be viewed in that context.

Cobb J concluded that even if he was wrong about the transfer of habitual residence the father's conduct viewed both before the departure for Spain and afterwards reflected at the very least an acquiescence in that state of affairs for the purposes of satisfying Article 10(a) BIIR and the test of acquiescence applicable to an Article 13(b) defence could be established in this case whether by reference either to the first three paragraphs of the test of Lord Browne-Wilkinson in *Re H (Abduction: Acquiescence)* [1997] 1 FLR 872 (at p.884), and the focus on "whether the applicant acquiesced in fact" or in any event in respect of the fourth paragraph of this test.

It therefore followed that the retention of the children on 5 January 2013 was in breach of the mother's rights of custody under the law of Spain and under Article 12, Cobb J was obligated to return the children unless he found that one of the exceptions under Article 13 existed.

The father submitted that the older children objected to a return to Spain and had attained the age and degree of maturity at which it was appropriate for their views to be taken account of. This was a question of fact uniquely for the discretion of Cobb J who adopted the principles summarised by the then President of the Family Division, Sir Mark Potter, in *De L v H* [2010] 1FLR 1229. In respect of the important distinction between the child's objections to remaining in the requested State with the Abductor, as against returning to the State of habitual residence, Cobb J also had regard to the decision of the Court of Appeal in *Re K (Abduction: Case Management)* [2011] 1FLR and *Re W* [2010] 2 FLR 1165.

Cobb J then moved on to consider the detailed evidence from CAFCASS as to the wishes and feelings of the older children and concluded that T was of an age and maturity at which account should be taken of her views. He also observed that T had many (negative) strong feelings about her mother at that time which were different from the objections she had to returning to Spain. However, he was satisfied that T did object to returning to Spain and in particular that objection was based on her view that the quality of education is inferior. In respect of L and A, they at 10 and 8 respectively, were thoughtful and intelligent boys, who had reached an age and level of maturity at which account should be taken of their views which in this case though fell short of a clear objection to returning to Spain.

In so far as the case for "intolerability" this was based upon an allegation by father that the children were essentially neglected in Spain and would be placed in a position of intolerability if returned to the same neglectful environment and/or a sibling split would create an intolerable situation. Cobb J rejected outright the argument in respect of the first limb and highlighted that the threshold for proving such an exception remains high notwithstanding the removal of judicial gloss on the words of the exception by the Supreme Court in the recent cases of *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2011] 2 FLR 758 and R*e S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 FLR 442. In respect of the second limb whilst acknowledging that in an appropriate case the separation of a sibling group can give rise to an Article 13(b) exception this was fact specific and in the present case this limb would not apply (see below).

In light of his finding that T objected to returning to Spain it was therefore open to Cobb J to decline to order her return to Spain while ordering the return of her younger brothers, and/or whether (if that were his view) the separation of the siblings would place them all in an intolerable situation. In considering how to exercise his discretion Cobb J followed the guidance set out in the speeches of the House of Lords

in *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2008] 2 FLR 251. He concluded that on the facts of this case it would not be right to give determinative weight to T's views and observed that among other factors, he attached weight to the likelihood that T would comply with the order of the court, the father would do his best to facilitate the return of the children in the most effective way and the heavy weight to be attached to the convention where there has been a wrongful retention following the conclusion of a holiday. Cobb J was also influenced by the desirability, if not the need, to maintain the sibling group together. He therefore ordered the return of the four children to Spain.