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Case No: ZE14C00278

IN THE FAMILY COURT AT EAST LONDON

East London sitting at Westferry Circus,
11th November 2014

B e f o r e :

HER HONOUR JUDGE CAROL ATKINSON

**In the matter of T (Habitual residence: Article 15
transfer)**

**Mr Richard O'Sullivan for the London Borough of Barking and Dagenham
Ms Collins for the 1st Respondent mother
Ms Kaler for the 2nd Respondent child through her Guardian**

Hearing date: 11th November 2014

HTML VERSION OF JUDGMENT

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HER HONOUR JUDGE ATKINSON:

1. T is a 12 ½ year old boy. He is a Romanian national. His mother (the mother) is Romanian and she has said that his father (the father) is Hungarian with Romanian nationality; the father lives in Romania.

2. T came to the attention of the London Borough of Barking and Dagenham (LA) on 8th July 2014 when his mother attended Ilford Police Station with him stating that they were homeless. The mother was not able to say how she intended to meet T's basic need for accommodation and why she was unwilling to leave him in the care of his half brother, C, who lived locally. T was made the subject of a Police Protection Order on 11th July 2014 and placed in foster care. T has remained in foster care ever since and with the express consent of his mother pursuant to s. 20 Children Act 1989. The LA issued proceedings on 22nd September 2014 when the mother revoked her consent to the s.20 accommodation. An interim care order was made on 8th October and remains in place.
3. I need to consider as a matter of urgency whether this court has jurisdiction over T. The questions that I need to address in determining that issue are as follows:
 - (1) was T habitually resident in this country when these proceedings began?
 - (2) if not, was he habitually resident in any other country?
4. If I answer the first of those questions in the affirmative then this court will have jurisdiction on the basis of T'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 am able to identify the country in which T was habitually resident at the time that the court was seized of this matter – in the present case there is no other contender than Romania – then the court does not have jurisdiction to deal with this matter and other than orders necessary to protect the child in the interim pursuant to Article 20 BIIR I am not empowered to interfere.
5. 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 Romania to assume jurisdiction pursuant to Article 15 BIIR.
6. The agreed facts are as follows. T is a Romanian National. His mother and father are also Romanian nationals. His mother is currently in this country. She came here with T in May 2014 in circumstances which I will detail in a moment. T's father remains in Romania. His mother has three older sons. Half brothers to T. The eldest two are married and have their own families. They live in Romania. Her third son is C. C came to this country when he was 18 years of age. He is now aged 26. He lives here with his partner, A. They have a very small baby, born late Spring this year.
7. Until October 2013, T had lived his whole life in Romania and for most of that time with his mother. His parents do not live together and I understand that his father has health problems which may prevent him from caring for his son. Nevertheless he has had regular contact to his father over the years.
8. T visited the UK in 2011. In October 2013 he came with his mother from Romania. The mother maintains that they came with the specific intention that he should remain here and access education. She brought him to London and he was placed into the care of his older brother, C. He was enrolled at a school. His mother returned to Romania. T was happy at first living with C but after a time he became unsettled. He missed his mother and he missed Romania. Such was his unhappiness that in May 2014 his brother took him back to Romania to live.
9. C left T with their mother and returned to England. Not content with that, T's mother promptly

boarded a bus with T and brought him back to London. She found herself temporary accommodation on their arrival back to London. For the 7 weeks or so between then and 8th July she took him to the school that he had been enrolled at by his brother. They moved home a number of times. Finally, on 8th July she took him to the local police station where she informed the officer on duty that they were effectively homeless. The LA accommodated T until, as I have said, the mother withdrew her consent. The LA has concerns regarding the apparent abandonment of T, concerns about possible neglect whilst in her care, especially in Romania, and concerns regarding the mother's mental health. Those concerns, they argue, found the threshold.

10. The case was first listed before DJ Davies on 8th October 2014 to deal with the CMH and the application for an ICO. She listed the matter before a Circuit Judge because of the outstanding jurisdictional issues. A letter written in Romanian had been sent to Mr Toth notifying him of the hearing. A copy of the same had also been sent to the Central Authority. On 21st October 2014 the Local Authority were notified that ICACU had submitted a request to the Romanian Central Authority.
11. Currently, in East London, contested matters of jurisdiction are referred to me as the Designated Family Judge for East London. As a result the case had to be squeezed into my list on 16th October at short notice and there was only time available for directions to be given in preparation for a hearing at which the jurisdiction issue could be properly aired. By that means it was listed before me on 6th November for 2 hours and as a result I lost 2 weeks of the timetable. This is something that will need to be addressed in the future. It is imperative that we identify these cases immediately and deliver a decision within days, not weeks. It had been anticipated that the hearing would proceed on submissions but it was apparent to me early on that oral evidence would have to be taken. I heard evidence and submissions and now hand down Judgment.
12. It is the LA's case, set out very succinctly in his skeleton argument by Counsel, Mr O'Sullivan, that this is a case in which there is no jurisdiction pursuant to Articles 8 or 13. I hope that I do no disservice to his well considered arguments if I summarise them as follows. He argues that T has been in the England for a short time by comparison with the time he has spent in Romania. Romania is evidently where he is habitually resident and the brief spell spent in England between October 2013 and May 2014 has done nothing to change that. If he is wrong about that he invites me to make an Article 15 request for transfer of these proceedings to Romania as the essential three conditions for transfer are satisfied.
13. The mother argues that both she and T acquired habitual residence in England from October 2013 and the court does have jurisdiction as a result. She disputes that the three conditions for transfer are met though seemed to suggest through her solicitor at the hearing that the case should be transferred in any event. I will proceed on the basis that she opposes transfer.

Evidence read and heard

14. I have heard brief oral evidence from the mother in order to clarify her intentions on coming to England in October 2013 and again in May 2014. I am bound to observe that her evidence has done little to clarify the situation. She has given me a number of differing accounts of her circumstances – sometimes in the same breath – with the result that I have to caution myself as to the reliance that I can place upon her evidence when making my findings as to her circumstances.
15. In her written statement her position is put as follows: "I am in England for the future of T. I believe that his future is better in England because in Romania there is not enough money to live. T will

have an education in English and I believe that this is best for him....I intend to remain living in England. I do not want to go back to Romania...."

16. In her evidence in chief she said that she arrived in England with T on Oct 2013 and that the purpose of the visit was to bring T here to go to school but also that she wanted to come here and settle. However, she went on to describe how, having left T with his brother she returned to Romania and although she returned to England between Oct 2013 and May 2014 she never went to see T. She maintained some contact with him over the phone in that time. In her statement she suggests twice a week but her oral evidence was in conflict with this at one point suggesting that she hardly had any phone contact with him for fear it would unsettle him.
17. She said that in May 2014, C had brought T back to Romania to be with her because he was crying for her. She said "but I told him that he cannot leave school in the UK so I brought him back and my plan was to stay here and go to work that is why I did not leave again and that is why I will not be leaving again." She was asked when she had decided that she would settle in England. At first she said she had decided in Oct 2013 when she first brought T here that she would settle here. Then she said she had taken that decision in Jan 2014 for reasons that were unclear and finally she suggested she took that decision in May 2014 when she had to bring him back to London to continue in his education. She said her intention was always to find a flat to live in with T and she has a job now and accommodation. The accommodation is temporary however and not really suitable for T.
18. She has no real support network here. She is estranged from C as a result of these matters and her only other relative who lives in England, her sister, she does not speak to as they have fallen out over an alleged debt owed to the mother.
19. She said that there is no one to care for T in Romania as his father has epilepsy and is unable to care for him as a result and the older brothers have their own families. In cross examination she agreed that when she returned to London in May 2014 with T she did so without making any plans for them thus they had no accommodation arranged. However, she did manage to ensure that T went back to school.
20. It was put to her that T wants to be back in Romania and in response she said over and over - "he said that before but he won't say it now". She confirmed that his first language is Hungarian, his second Romanian and third English. She conceded that T has more ties in Romania than here but insisted that his older brothers will not be interested in caring for him as they have their own families. She sought to minimize his contact and relationship with his father.
21. At the end of her evidence I asked her what she would do if I decided that there was no jurisdiction or I made a request for transfer which was accepted and T was sent back to Romania. Having said that T was her priority she told me she would stay here as this is where she wanted to live.
22. My clear impression throughout her evidence was that she was at pains to tailor it to whatever best suited her cause and her cause is, in my Judgment, ensuring that T remains here and accesses education – with or without her.
23. Other evidence that I must put into the balance comes from C and from T himself. C was interviewed by the independent social worker (ISW) assessing him and he has also spoken to the Guardian. He is committed to his brother and was quite prepared to offer him a home with himself and his partner provided they would not be interfered with by their mother. I make no comment upon the truth or otherwise of the allegations now made by T against his brother, save to observe

that they were made after T acknowledges that he was aware that a return to C's care is not what his mother would want.

24. I note that C has suggested that, contrary to the assertions made by the mother that the family is poor in Romania, his mother has a home in Romania and reasonable "wealth". C attended a boarding school in Romania, funded by his mother and he informed the ISW that his two older brothers have homes in Romania and their own businesses. C confirmed that T was placed in an orphanage in Romania for a period of 2 years. The mother maintains that she was unwell. C was largely cared for by his maternal grandmother, observing to the ISW that the mother had a tendency to abandon the parental role at around about the age of 12.
25. C also confirmed, however, that when the mother brought T to England in 2013 she did so with the intention of T remaining with them in England permanently. They told the ISW that T settled with them and remained for around 7 ½ months during which time he attended school and they attended to his health needs and his extensive dental needs. Concern was expressed by C that T was unduly medicated by his mother and in addition he needed a considerable number of teeth removing as a result, it is alleged, of neglectful care. C and his partner became his carers and received child benefit for him.
26. C told the ISW that T settled well into school and flourished in their care. However, he became homesick and stated a clear wish to return home to Romania. He missed his mother and missed seeing his father. C informed the mother of this and then travelled to Romania with T to reunite him with his mother as he wished. They left him in Romania with her and with £500 they had saved from his child benefit. From there they travelled to Hungary to visit family. Three days after their return to London, T and his mother arrived back in London too and asked whether they could stay. By this time C's partner was 8 ½ months pregnant and they could not spare the room.
27. I turn now to what T has said about his circumstances. When he met with the Guardian on 1st October, the Guardian reports that he was friendly and warm, if anxious. He told her that he "really" misses Romania. He said that he lived with his mother in Romania but would see his father every week. He was able to show the Guardian where he lived and where he went to school in Romania on the internet.
28. He told her that his first choice would be to live in Romania with his mother. He said that he did not want to live with her here in England because he was concerned they would be homeless. When asked if he would like to live with her here if she had accommodation he said he did not know. He confirmed to the Guardian that he had liked living with his brother but was worried about what his mother would think about that because she had not wanted him to live with his brother.
29. Since that meeting he has made allegations of over chastisement against his brother and has expressed a desire to live here but given what his mother has said in her evidence and what I assess to be her clear aim to ensure that he falls into line with her plans, I cannot be sure that these comments represent his true wishes and feelings. I note that the foster parents have confirmed that T is struggling at school socially in that he has no friends and tends to alienate people.

Jurisdiction

30. 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 T was habitually resident in the UK on 22nd September 2014 then this court has jurisdiction.

31. 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 T's habitual residence at 22nd September 2014 cannot be established, this court would have jurisdiction based on his presence under Article 13.

32. 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 T was at 22nd September 2014 habitually resident in Romania, it must declare that it has no jurisdiction.

33. 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 assumption of jurisdiction by the Romanian courts.

34. 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.

35. 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.

36. 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

37. On the evidence that I have heard and read I am satisfied on the balance of probabilities that the mother entered the UK with T in October 2013 intending that T would remain in London, living with his brother, C and partner, A, and accessing education here. That was understood by C and also by T.
38. In my judgment, at that point in time, it was not part of the plan that she would remain living with them. I do not accept the mother's evidence that from the moment she brought T here she intended to stay with him. That is not borne out by her actions. She returned to Romania and I find that she barely had any contact with her son between then and May 2014. Neither am I satisfied that she formed the intent in January 2014 to join him in England. She effectively handed over the parenting of T to his brother C and she did so willingly. Throughout this time C would have been aware that this is what his mother intended for him. What she did not bargain for is that her son would miss her and his country of origin quite as much as he did.
39. During the 7 ½ months between Oct 2013 and May 2014, T was enrolled in school and accessed much needed health and dental care. His carers made a claim for child benefit. He was integrated into English society as much as he could be in that relatively short period of time. What is more his contact with his mother and their former life in Romania was minimal during this period. Accordingly it is more likely than not that he became habitually resident in this jurisdiction. It matters not, it seems to me, that his mother was not herself habitually resident in the UK. Her intentions for him were clear; he must have been aware of this and indeed his early attempts at settling were no doubt in obedience.
40. In May 2014 T was returned to Romania by C. It was C's intention that he should remain living in Romania with their mother. By this means C made it clear that he was no longer willing to have T residing with him in England. During the course of the hearing I expressed the view that perhaps at that point he ceased to be habitually resident in the UK. There was no resistance expressed to this on behalf of the mother. However, on examining the evidence further I have since questioned that in my own mind.
41. Whilst C may have intended that his brother should return that is not what his mother intended. In keeping with that clear intention, once T is returned to her in Romania, what the mother does is march him straight back to the UK. Upon their arrival in London she has no accommodation, that much is true, but even so she ensures that he continues to attend at the school at which he has been enrolled. These actions are entirely in keeping with what I find to have been her intent throughout and that was to ensure that T remained in England to complete his education.
42. Is the fleeting return to Romania enough to bring the habitual residence in this jurisdiction established in the preceding 7 months to an end? I am not satisfied that it is. Particularly not when the most significant part of his social integration established during the 7 months stay, that is his schooling, was resumed with hardly any interruption. It is right that T no longer had secure

accommodation but that was not for want of trying on the mother's part. I accept also that it may not have been the mother's long term plan in Oct 2013 or Jan 2014 to remain in London with T but come May 2014 she had to remain with him because this was the only way she could achieve her long term plan that he should remain here and access an English education. I am satisfied that by May 2014 she had a settled intent to remain here not because she wanted to be here but because it was the only way she could achieve that aim.

43. The LA makes the point that the time spent by T in England is relatively brief in comparison with the time spent in Romania. That is true but it is not determinative. What is important is the degree of social and family integration achieved in that time and as I have already observed that was quite substantial.
44. What then of T's wishes and feelings which were certainly, at the point of his return, against the idea of remaining in England? I remind myself at this point of the Judgment of Lord Wilson in *Re LC* [2014]UKSC 1 in which he makes it clear that an older child's state of mind can be of relevance to the enquiry into whether the child himself or herself has integrated into his surroundings.
45. Whilst T's wishes and feelings may have been and may continue to be a desire to return to Romania, he has not demonstrated the "state of rebellious turmoil" described by Lord Wilson as possibly inconsistent with integration here. In my view, T abided by his mother's wishes for him and the evidence is that initially he was settled in the care of his brother. So whilst I take account of his expressed wish to be back in Romania I do not consider that this detracts from my assessment of his integration in London.
46. So it is that I am satisfied that at the point at which care proceedings were issued T was indeed habitually resident in England and had been since shortly after he arrived here in October 2013. That habitual residence has continued uninterrupted by his return to Romania in May 2014 for the reasons that I have given.
47. I should add that if I am wrong about that, I would nevertheless find jurisdiction upon an Article 13 basis. That is because I cannot be satisfied that the fleeting return to Romania in May 2014 was sufficient to revive his former habitual residence in that country. However much he wanted to be there he was not there for long and the person holding parental responsibility for him, his mother, did not want him to remain there. In accordance with those wishes she removed him to London immediately. He certainly did not reintegrate back into Romanian society; there was barely time for him to unpack.
48. Thus I am satisfied that I have the jurisdiction pursuant to Brussels IIR necessary to deal with the case.

Article 15

49. 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."

50. Article 15(3) sets out a list of the factual instances in which a child shall be considered as having "a particular connection" with another Member State such that a request could be made. For the purposes of this case it is significant that one of those instances is that the Member State in question "is the place of the child's nationality" and another is that it was "the former habitual residence of the child".

51. Article 15(5) provides;

"The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within 6 weeks of their seizure in accordance with paragraphs (1)(a) or (1)(b). In this case, the court first seized shall decline jurisdiction. Otherwise, the court first seized shall continue to exercise jurisdiction in accordance with articles 8 to 14"

52. The issue of making a request for transfer pursuant to Article 15 was considered in *AB v JLB (Brussels II Revised: Article 15)* [2009] 1 FLR 517 at paragraph 35, by Munby J., as he then was. In that case, the route to the exception of Article 15(1) was distilled into three essential questions:

"(1) First, it must determine whether the child has, within the meaning of Art 15(3), 'a particular connection' with the relevant other member state – here, the UK. Given the various matters set out in Art 15(3) as bearing on this question, this is, in essence, a simple question of fact. For example, is the other member state the former habitual residence of the child (see Art 15(3) (b)) or the place of the child's nationality (see Art 15(3) (c))?"

(2) Secondly, it must determine whether the court of that other member state 'would be better placed to hear the case, or a specific part thereof'. This involves an exercise in evaluation, to be undertaken in the light of all the circumstances of the particular case.

(3) Thirdly, it must determine if a transfer to the other court 'is in the best interests of the child.' This again involves an evaluation undertaken in the light of all the circumstances of the particular child."

53. Article 15 was considered more recently by the Court of Appeal in the case of *Nottingham City Council v LM* [2014] EWCA Civ 152 . This was an appeal from a decision by Mostyn J to make a request to the courts of the Czech Republic to assume jurisdiction. I distil from that authority the following:

a. The Article 15 exception to the general rule of jurisdiction only comes into play when all three of the essential questions to which I refer in the paragraph above are answered in the affirmative (per Ryder LJ para 15);

b. The question of whether a court of another Member State would be better placed to hear the case (or a specific part of the case) is an evaluation to be performed having considered all the circumstances of the case and that evaluation is "intimately connected" with the question of the best interests of the child (per Ryder LJ para 19);

c. The starting point for the evaluation of whether the other Member State is better placed to hear the proceedings is one of "comity and co-operation" between Member States and we are reminded that "the judicial and social care arrangements in Member States are to be treated by the courts in England and Wales as being equally competent"

d. Factors which may inform the courts evaluation of whether one court is better placed

to hear a case are factors such as – the availability of witnesses of fact, whether and by whom assessments can be conducted, the necessity for assessors to travel, whether one court's knowledge of the case (perhaps through judicial continuity) provides an advantage.

e. the best interests question asked by Art 15(1) is whether it is in the child's best interests for the case to be determined (or a specific part of the case to be determined) in another jurisdiction.

Discussion

54. It is conceded that T has a "particular connection" with the other member state, Romania, in accordance with Art 15(3). He is a Romanian national and Romania was his former habitual residence.
55. I turn now to the second and third questions. In her written argument Ms Collins suggested that the courts here would be best placed to hear this case because the allegations against the mother are best evidenced here. In her oral submissions Ms Collins appeared to change her position and concede this point. I have nonetheless considered it and I am quite satisfied that in fact the contrary is true. The LA concerns are prompted by the way in which the mother presented with T at the police station and her apparent failure to provide for his basic needs for accommodation. However, the concerns as to how she behaved here are, on the LA's case, the culmination of a series of events which have their roots in the family's Romanian history. Where they have lived in Romania and how they have lived there will be crucial to the decision making as to her abilities to care for him going forward. So too will the question of how his father features in his life and his other extended family members. That evidence is best sought, presented and understood in Romania.
56. The central issue in the case will be whether T's mother is able to care for him in the future and if not where his best interests demand his placement should be. There are only two options available to the court here as things currently stand – placement with his mother or placement in long term fostering. Placement with C is no longer an option. Placement with his mother awaits the conclusions of the parenting assessment. Placement in long term foster care in the UK severs his link with his extended family in Romania and with that country. Indeed, I have some concerns as to whether a placement in long term foster care in the UK would guarantee that T's mother would remain here as she will have achieved her main aim which is to ensure that he completes his education. There is every chance it seems to me that he will be in the care of the local authority here and she will be in Romania. Even if she remains this outcome would be hopelessly contrary to his dual wish to be with his mother in Romania.
57. However, in Romania whilst placement with his father may not be an option the possibility of a placement with extended family members in Romania – such as his older brothers – has not been investigated. A return to Romania does not remove this mother from consideration. Against these options there also needs to be considered the possibility of placement in public care in Romania where there will at least be the advantage of contact with his extended family, and the fact that he will be living in the country he misses even now.
58. It seems to me that it is in his best interests that those Romanian based options are properly considered alongside the possibility of a return to his mother and the member state best placed to make those decisions is in my Judgment Romania.
59. Accordingly, I intend to request that the court in Romania assumes jurisdiction of this case in

accordance with Article 15(5).

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