Residual risk

Catherine Maguire analyses the decision in AJ v DM, *which demonstrates the dangers of reliance on a sole domicile petition*

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'It is far easier to re-establish habitual residence in a country where the party in question has previously been habitually resident than in a new country.'

Cohen J's judgment in *AJ v DM* [2019] addresses the consequences for a petitioner of relying only on their domicile to found jurisdiction for a divorce petition, and serves as a timely reminder to practitioners of the importance of addressing jurisdictional considerations fully and consistently from the outset of the matter.

Background

The case concerned an Irish husband and English wife who had met in Australia, having each separately emigrated there and gained Australian citizenship (in addition to the citizenship which they already held). They married in December 2015 and returned to England and Ireland respectively. The parties and their infant child then moved to St Lucia in early 2017 for the husband to take up a job there. Cohen J accepted that it would have been the wife's preference to stay in England, but that she regarded the move as an acceptable compromise.

In April 2018, the wife returned to England with the child for what she accepted was intended to be a holiday. Return flights had been booked and the child was due to start nursery in St Lucia on their return from holiday. During the trip, however, the wife concluded that the marriage had come to an end and that she did not wish to return. She took legal advice, petitioned for divorce on the basis of her sole domicile (the residual jurisdiction under Art 7, Council Regulation (EC) No 2201/2003 (Brussels IIA)) and filed a financial application in Form A. The husband then applied for summary return of the child, and the wife returned to St Lucia with the child voluntarily, before launching leave to remove proceedings there. Those proceedings had not yet been concluded at the time of the hearing before Cohen J, and no final hearing had been listed.

In June 2018, the husband made a freestanding application for financial relief against himself in the Australian courts (an accompanying Australian divorce petition was not required). In light of the restrictions on the wife's claims flowing from her reliance on the residual jurisdiction (as explored further below), she then applied in July 2018 for permission to amend her petition in order to instead rely on the fact that the parties were last habitually resident in England and Wales and that she still resided there (indent 2, Art 3(1)(a), Brussels IIA).

Wife's habitual residence

In order to succeed in her application for the amendment of the petition, the wife needed to convince Cohen J that the provisions of indent 2 were satisfied as at the date the petition was issued. Cohen J concluded in that regard that the wife's amended application was 'doomed to fail', as it was plain on the facts that the parties were not last habitually resident in England and Wales. He applied the test of habitual residence, as summarised in *Tan v Choy* [2014] (at para 31), and referred to the guidance in *Marinos v Marinos* [2007]. (See also *Pierburg v Pierburg* [2019] for a recent exploration of the *Marinos* versus *Munro v Munro* [2007] debate as to the requirements of habitual residence versus simple residence for the purposes of indents 5

and 6, Art 3, Brussels IIA, albeit that this was a first instance decision and a determinative appellant decision is yet to take place.)

Cohen J noted the significance (per para 34 of *Marinos*) of the location of the matrimonial home. It was relevant that the family had a serviced apartment in St Lucia and all the comfortable trappings of the expat lifestyle, including a nanny/housekeeper. It was intended that they would be there for at least three years, and the wife accepted that they became habitually resident there.

The judge recognised that it is far easier to re-establish habitual residence in a country where the party in question has previously been habitually resident than in a new country and accepted that the wife's unhappiness in St Lucia must impact upon the depth of the roots that she put down there, and thus the ease with which they could be pulled up. However, it was significant that there was a contrast between the temporary circumstances of this wife's trip to England and those of the wife in *Marinos*, who had 'severed her links with Greece', had arranged schools for the children, had taken steps to obtain possession of the family home and returned to the UK with the children with the father's consent to them staying there.

While Cohen J accepted that in some cases, the centre of interests can change in a day (per *Nessa v The Chief Adjudication Officer* [1999]), further significance here lay in the fact that this was the antithesis of a pre-planned and purposeful relocation, and also in the fact that the wife had wrongfully retained the child in England. He therefore found that:

- the wife was not habitually resident in England and Wales at the time of the petition;
- as she could not make out the new ground for the amended petition, he would not allow the amendment; and
- as a result there was no jurisdictional basis for the making of a maintenance order.

Cohen J acknowledged that this did not prevent the wife from pursuing a financial claim based on entitlement rather than needs, but noted that this was academic in circumstances where there was nothing of substance in the case beyond the husband's income. She would therefore need to pursue a needs claim and, importantly, could do so within the Australian proceedings.

The wife's financial claims in AJ v DM *were thwarted as a result of her reliance on the sole ground of domicile within her petition.*

The wife's financial claims were therefore thwarted as a result of her reliance on the sole ground of domicile within her petition and the abundance of factual evidence which she had then provided within the proceedings to the effect that she was not habitually resident in England and Wales. This included the fact that, in the abduction proceedings, instructions to a single joint expert in May 2018 had recited that the parties and their child were habitually resident in St Lucia. Counsel for the wife had argued that the original domicile petition had been a mistake on the part of the wife's solicitors, although Cohen J considered that this was unfair to her solicitors.

It should nonetheless be noted that had the wife's solicitors adopted the common practice of ticking all jurisdiction grounds within the petition, her position would have been preserved in that regard and she would not have faced the additional legal hurdle of amending her petition on top of the factual hurdle of proving habitual residence. This serves as an important reminder to practitioners of the importance of considering the repercussions of a sole domicile petition, particularly in needs cases. The difficulties faced by the wife also illustrate the importance of a global approach to cases involving various sets of proceedings. Here, the wife's evidence and actions in the children proceedings had irretrievably damaged her case as to habitual residence for the purpose of the divorce proceedings. Care must be taken to avoid the adoption of inconsistent positions, whether that be across different jurisdictions or simply ancillary proceedings within the same courts.

Legal basis for the amendment of a petition

Counsel for the husband had argued that r7.13(3), Family Procedure Rules 2010 (FPR 2010) prevented the wife from amending her petition, as it provides that no amendment application can be made if an application under r7.19(1), FPR 2010 (application for decree nisi) has been made. On an obiter basis (having resolved the application on a factual determination that the wife did not satisfy the habitual residence hurdle), Cohen J indicated that he would not consider r7.13(3), FPR 2010 as fatal to her application. He noted that the wife's application for decree nisi had been rejected and that, in any event, r7.13(5), FPR 2010 allowed the r7.13(3), FPR 2010 restriction to be overcome with the permission of the court.

It is also to be noted that, even if the wife was obstructed from amending her petition, per *Chai v Peng* [2014], it would have been open to her to instead seek the dismissal of her original petition and to file a new petition relying on habitual residence grounds. Holman J indicated in *Chai* that he would not allow the wife in that case to retain two concurrent live petitions, but accepted that she was entitled to ask the court to dismiss her previous petition, thereby allowing her to file another.

Were the wife to do so, the question of her habitual residence would however then pertain to the date of the new petition. This would present further difficulties for her given that she was, at that stage, living in St Lucia. Counsel for the wife noted that it was open to the wife to file a fresh petition once she had obtained leave to remove and returned to England, at which point she would have gained habitual

residence. Cohen J acknowledged this, but observed that the argument was based on a series of premises which may not necessarily come about.

The evidence before the court was that the parties were not able to satisfy the St Lucian divorce requirements and the husband had not issued divorce proceedings in Australia (the question of whether this was possible was not addressed). As such, the wife was not facing any race to decree absolute, and might therefore consider the fresh petition route an attractive one.

Restrictions under the maintenance regulation

Cohen J also noted that the husband had argued that, where sole domicile is relied upon, Art 3(c) of the Maintenance Regulation prevented the English court from having jurisdiction irrespective of whether, at the date of issue, the petitioner was also habitually resident in the jurisdiction. Therefore, even if she was, on a factual basis, habitually resident at that stage, she could not rely on Art 3(b), Council Regulation (EC) No 4/2009 (the EU Maintenance Regulation), which states that jurisdiction lies with 'the court for the place where the creditor is habitually resident'. In arguing that she could do so, the wife had relied on the editorial notes to the EU Maintenance Regulation, which stated that the courts in England and Wales would not have jurisdiction to hear a claim for spousal maintenance in a sole domicile case 'unless Article 3(a) or (b) can be relied upon'. This had satisfied the recorder who had made a preliminary finding of habitual residence in the wife's favour in September 2017, albeit making clear that this was a preliminary view only and was not intended to be binding on Cohen J or any other judge.

Cohen J noted that he had not heard significant argument on this issue, as the focus of the hearing before him had instead been on the factual issue of whether the wife was actually habitually resident. He observed that he would need persuading that the provisions of Art 3, EU Maintenance Regulation allowed the difficulties of a sole domicile petition to be circumvented, but stated that he intended to 'skirt round' this issue, because a factual finding that the wife was not habitually resident would be the end of the matter.

Care must be taken to avoid the adoption of inconsistent positions, whether that be across different jurisdictions or simply ancillary proceedings within the same courts.

This issue will to some extent fall away in future cases in the event of a no-deal Brexit, in that the restriction on needs claims in domicile cases caused by the EU Maintenance Regulation will no longer be in place. Cases commenced before exit day will still be governed by the EU Maintenance Regulation, and so will still face the difficulty encountered by this wife; thereafter, the problems arising from a domicile petition will fall away, albeit that overseas enforcement issues may still be encountered. In the event that the UK leaves the EU with a deal in place, the situation will of course be governed by the precise terms of the agreement reached, and the extent to which the EU Maintenance Regulation continues to apply.

Practicality of proceeding in England and Wales

Counsel for the wife had argued that it was absurd for litigation to take place in three jurisdictions and that, as the parties could not satisfy the necessary criteria to divorce in St Lucia, the husband should consent to the divorce and full financial remedy proceedings taking place in England. Cohen J noted, however, that he could not bestow jurisdiction where it did not exist. It is also to be noted that parties seeking, whether by agreement or through ignorance of the rules, to circumvent the legal requirements for divorce risk their decree absolute being set aside (see *Rapisarda v Colladon* [2014], where the parties had intentionally defrauded the court as to its jurisdiction, and *M v P* [2019], where a court error led to a decree absolute being invalidated in circumstances where both parties had already remarried). As such, beyond the obvious fraud it would represent for the husband to agree to proceed on a petition he considered invalid, the parties would also risk the future invalidation of their divorce and any financial order made.

Conclusion

The consequences of reliance on a domicile-based petition can be far-reaching for a petitioner, particularly where there is insufficient capital for an entitlement rather than needs-based claim. Likewise, contradictory statements in ancillary litigation may serve to undermine a party's jurisdictional claims and the opportunity to amend a petition to expand jurisdictional grounds should not be assumed. Given the uncertainty surrounding the terms of, and indeed timeline for, Brexit, as well as the European enforcement position regarding financial orders based on domicile petitions post-Brexit, practitioners should take serious care to avoid this potential obstacle, the consequences of which could prove disastrous for a client. ■

AJ v DM
[2019] EWHC 702 (Fam)
Chai v Peng
[2014] EWHC 1519 (Fam)
M v P
[2019] EWFC 14
Marinos v Marinos
[2007] EWHC 2047 (Fam)
Munro v Munro
[2007] EWHC 3315 (Fam)
Nessa v The Chief Adjudication Officer & anor
[1999] UKHL 41
Pierburg v Pierburg
[2019] EWFC 24
Rapisarda v Colladon
[2014] EWFC 35
Tan v Choy
[2014] EWCA Civ 251