FAMILY COURT OF AUSTRALIA

COMMONWEALTH CENTRAL AUTHORITY & CAVANAUGH ***[2015] FamCAFC 233***

FAMILY LAW – APPEAL – CHILD ABDUCTION CONVENTION – REGULATIONS – Where, at the time of the hearing of the appeal, the children had been retained in Australia by the father – Where the Commonwealth Central Authority sought the return of the children to Finland – Where the trial judge found that the children were not habitually resident in Australia or Finland – Whether the trial judge erred in taking into account irrelevant considerations – Whether the trial judge erred by taking into account whether the children had retained a domicile – Whether the trial judge gave excessive weight to the absence of a settled common intention – Where the children resided in Finland for less than one year – Appeal allowed – Order made that the children be returned to Finland.

Family Law Act 1975 (Cth) s 117AA
Federal Proceedings (Costs) Act 1981 (Cth) s 9

Family Law (Child Abduction Convention) Regulations 1986 (Cth) reg 16

Cooper v Casey (1995) FLC 92-575
LK v Director-General, Department of Community Services (2009) 237 CLR 582
Re B (Minors: Abduction) (No 2) [1993] 1 FLR (UK) 993
Re F (A Minor) (Child Abduction) [1992] 1 FLR (UK) 548
State Central Authority & Camden (2012) FLC 93-501
Wolford & Secretary, Attorney-General's Department [2014] FamCAFC 197

APPELLANT:	Secretary of the Attorney-General's Department (The Commonwealth Central Authority)
RESPONDENT:	Mr Cavanaugh
FILE NUMBER:	CAC 702 of 2015
APPEAL NUMBER:	EA 127 of 2015
DATE DELIVERED:	11 December 2015
PLACE DELIVERED:	Sydney
PLACE HEARD:	Sydney
JUDGMENT OF:	May, Strickland &

	Aldridge JJ
HEARING DATE:	13 November 2015
LOWER COURT JURISDICTION:	Family Court of Australia
LOWER COURT JUDGMENT DATE:	6 July 2015
LOWER COURT MNC:	[2015] FamCA 1005
REPRESENTATION	
COUNSEL FOR THE APPELLANT:	Mr Berger
SOLICITOR FOR THE APPELLANT:	Australian Government Solicitor
COUNSEL FOR THE RESPONDENT:	Mr Anderson
SOLICITOR FOR THE RESPONDENT:	Dignan & Hanrahan

ORDERS

(1) The appeal be allowed.

(2) The orders made on 6 July 2015 be set aside.

(3) Paragraph 11 of the application made by The Commonwealth Central Authority on 12 May 2015 be allowed.

(4) The Registry Manager release the passports of the children:

(a) N born in 2002;

(b) X born in 2004; and

(c) Y born in 2008 ("the children")

to the possession of the mother (c/- Australian Government Solicitor).

(5) Subject to order 6, the father be and is hereby restrained from:

(a) Applying for any further passports for either of the children; or

(b) Applying for any travel documents, for or on behalf of the children other than travel documents necessary to give effect to order 6 below.

(6) The respondent father shall do all acts and things necessary to ensure that the Australian passport of X is renewed, including signing all necessary documents.

(7) The mother is hereby permitted to take any necessary steps, including obtaining any necessary airline tickets or travel documents to return the children to Finland AND IT IS REQUESTED that the Australian Federal Police give effect to this order by removing the names of the children from the Airport Watch List in force at all points of arrival and departure from the Commonwealth.

(8) The respondent father shall pay for one half of the costs of the children's economy class airline tickets to Finland within 14 days of a request by the mother.

(9) A sealed copy of the orders be served upon the Australian Federal Police.

(10) Each party bear their own costs of this appeal.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Commonwealth Central Authority & Cavanaugh* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT SYDNEY

Appeal Number: EA 127 of 2015
File Number: CAC 702 of 2015

Secretary of the Attorney-General's Department (The Commonwealth Central Authority)
Appellant

And

Mr Cavanaugh
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. The Secretary of the Attorney-General's Department ("the Commonwealth Central Authority") sought the return of the three children of Ms C ("the mother") and Mr Cavanaugh ("the father") to Finland under reg 16 of the Family Law (Child Abduction Convention) Regulations 1986 (Cth) ("the Regulations"). The only issue in the proceeding was whether, at the time of the children's retention in Australia in March 2015, they were habitually resident in Finland.

2. It is uncontroversial that the parents departed Australia for Finland on 16 June 2014. They had agreed to live there for at least a year. Together with the children, they returned to Australia in March 2015 for a family wedding. The father retained the children's passports thereby preventing the children's return to Finland.

3. On 12 May 2015 the Commonwealth Central Authority filed an application seeking the return of the children to Finland.

4. On 6 July 2015 Faulks DCJ dismissed the application of the Commonwealth Central Authority. His Honour found that on leaving Australia the parents and the children had abandoned habitual residence in Australia but that at the time of the children's retention in Australia they were not habitually resident in Finland. From this decision the Commonwealth Central Authority now appeals.

5. Regulations 16(1) and 16(1A) of the Regulations provide as follows:

> **16(1) [When court must order child's return]** If:
>
> (a) an application for a return order for a child is made; and
>
> (b) the application (or, if regulation 28 applies, the original application within the meaning of that regulation) is filed within one year after the child's removal or retention; and
>
> (c) the responsible Central Authority or Article 3 applicant satisfies the court that the child's removal or retention was wrongful under subregulation (1A);
>
> the court must, subject to subregulation (3), make the order.
>
> **16(1A) [Wrongful removal or retention]** For subregulation (1), a child's removal to, or retention in, Australia is wrongful if:
>
> (a) the child was under 16; and
>
> (b) the child habitually resided in a convention country immediately before the child's removal to, or retention in, Australia; and
>
> (c) the person, institution or other body seeking the child's return had rights of custody in relation to the child under the law of the country in which the child habitually resided immediately before the child's removal to, or retention in, Australia; and
>
> (d) the child's removal to, or retention in, Australia is in breach of those rights of custody; and
>
> (e) at the time of the child's removal or retention, the person, institution or other body:
>
> (i) was actually exercising the rights of custody (either jointly or alone); or
>
> (ii) would have exercised those rights if the child had not been removed or retained.

BACKGROUND

6. The mother is a citizen of both Australia and Finland. The father is an Australian citizen. They were married in Finland in 1996. In September 1996 they moved to the United Kingdom. Their first child was born there in 2002. Shortly after the birth of that child the mother and father spent four months

living in Finland. From November 2002 until June 2014 the parents lived in Australia. The second child was born in 2004 and the third in 2008.

7. The parents decided that they would live, for at least a year, in Finland. On 16 June 2014 the mother, father and the children travelled to Finland on one way tickets.

8. The parents retained their house in Australia and rented it out. At least some of their furniture was kept in the garage. The father retained his employment in Australia, taking leave for a year. The children's enrolment at their schools was maintained but deferred for a year.

9. Once in Finland the parents acquired a residence. The children, who were already fluent in Finnish, attended school. According to the trial judge they were happy at school and progressing satisfactorily. The mother acquired employment in Finland. The children were engaged in extra-curricular activities and had made friends.

10. The father undertook courses to advance his ability in the Finnish language and took some steps to find employment.

11. All members of the family became members of the Finnish National Health Insurance Scheme. The father, who had suffered some injuries before leaving Australia, had two operations performed under that scheme.

12. The parents received child benefits for each of the children from the Finnish Government. The middle child also received a disability allowance.

13. One of the significant issues between the mother and father was their intention in leaving Australia. Of the father's intention, the trial judge found:

> 17. …I accept and find that his intention was that he would go to Finland for a year and at the end of that time make a further decision about whether he and the family would remain in Finland or return to Australia.

14. As to the mother, the trial judge found:

> 19. When the family moved to Finland the mother's evidence was that they were going to Finland for **at least one year**. I accept and find that it was her desire to live in Finland permanently with the family…
>
> (Original emphasis)

15. On 13 March 2015 (that is some nine months after arriving in Finland) the family flew from Helsinki to Australia to attend the wedding of the father's brother in late March 2015. The family held return tickets for 31 March 2015.

16. On 29 March 2015 the mother and father separated. The children remained with the mother. The father had possession of the children's passports and

retained them so that the mother and the children were unable to return to Finland on 31 March 2015.

17. On that day the father filed an application in the Federal Circuit Court at Parramatta seeking orders to have the children placed on the Airport Watch List.

18. On 8 April 2015 the father sought a recovery order and the proceedings were transferred to the Family Court of Australia on 12 May 2015.

19. On 3 April 2015 the mother commenced proceedings in the Helsinki District Court for divorce, interim sole custody and the immediate return of the children to Finland.

20. Finland requested the return of the children and on 12 May 2015 the Commonwealth Central Authority commenced the proceedings the subject of the appeal.

REASONS OF THE TRIAL JUDGE ABOUT INTENTION

21. The trial judge found that when the mother and father left Australia on 16 June 2014 both parents were agreed that they were abandoning Australia as their habitual residence for at least the time being. That finding was not challenged.

22. The trial judge then continued:

> 57. The evidence of the parties includes their contrasting evidence about their respective intentions. As appears from *LK* for the children of parents to acquire a habitual residence requires more than the unilateral act of one parent if the parents are together. It would seem in this matter from the contrasting evidence of the parents that their intentions were not necessarily the same beyond one year. At the end of the year if there was a decision to return to Australia no doubt the parties would thereafter have acquired at some point a habitual residence again (anew) in Australia. If they remained in Finland they would probably from that time in the light of their intention and their continued residence there have become habitually resident in Finland.
>
> 58. Acknowledging that the intention of the parents is not the determining factor but also acknowledging that a common intent is a necessary factor if it is to effect the children in my opinion, it cannot be said that the parents (and hence the children) had acquired at the time of the alleged wrongful retention in Australia an habitual residence in Finland. It seems to me that this was a case where the parents having abandoned their habitual residence in Australia had not yet acquired a habitual residence anywhere else.

> 59. In the light of all of the circumstances although the parents may have been approaching a situation where it might have been appropriate to regard their residence in Finland as habitual (as contrasted perhaps with a family travelling around Finland by caravan and not stopping at any place or become immersed in the culture, or attending educational institutions or obtaining employment or any of the other matters that these parents did) there was no settled common intent sufficient in all of the circumstances to permit of the description of their residence in Finland as a habitual residence.
>
> 60. In coming to that conclusion I am conscious of the fact that it is not necessary as it would be in the case of a consideration of whether a domicile had been established, to find an intention to live indefinitely or permanently in a country. However, the nature of the circumstances of the parents and the children and in particular the potentially disparate intentions of the parents are such that in my opinion it could not be said that whatever may have been the appropriate "settled purposes" or "settled intention" it was such as to allow a finding of habitual residence.
>
> (Footnotes omitted)

23. The only issue before the trial judge was whether, at the time of the father's retention of the children in Australia, the children were habitually resident in Finland. If not, reg 16 of the Regulations, and thus the Abduction Convention, had no operation.

24. The concept of habitual residence, for the purposes of that regulation, was extensively discussed by the High Court in *LK v Director-General, Department of Community Services* (2009) 237 CLR 582. At 593, the High Court found that the use of the term "habitual residence" amounted to a rejection of domicile as the relevant connecting factor between a person and a particular municipal system of law. This was, the court said, significant because, "…in considering acquisition of a domicile of choice, questions of intention loomed large, and the relevant intention had to have a particular temporal quality (an intention to reside permanently or at least indefinitely)".

25. We pause to mention that the trial judge engaged in a discussion of domicile under the heading "DOMICILE-illustrative". That led to the trial judge considering that the parents had retained a domicile in Australia. His Honour returned to the discussion on domicile at occasions later in his reasons.

26. As his Honour observed on more than one occasion, domicile is not the question. That being so, there was no need to discuss it. As appears later in these reasons, however, the concept of domicile seems, nonetheless to have played a role in his Honour's determination of whether or not the children were habitually resident in Finland.

27. Returning to *LK*, the court found at 594 that a person "…may abandon a place as the place of that person's habitual residence without at once becoming habitually resident in some other place…" but that the purpose of the Regulations "…may tend in favour of finding that a child does have a place of habitual residence…". The High Court then said:

> 25. …So, for example, a person may abandon a place as the place of that person's habitual residence without at once becoming habitually resident in some other place; a person may lead such a nomadic life as not to have a place of habitual residence.

28. The High Court then undertook a survey of authority from many jurisdictions before concluding at 599:

> 44. It is, however, not necessary to examine the decision in *SK* in detail. Rather, it is sufficient to observe that in *P v Secretary for Justice*, the effect of the decision in *SK* was described in the plurality reasons of the Court of Appeal of New Zealand (Anderson P, Glazebrook, William Young and O'Regan JJ) as holding that the inquiry into habitual residence is "a broad factual inquiry". The plurality went on to say in *P*:
>
> > "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. It should not in itself override what McGrath J called at [22], the underlying reality of the connection between the child and the particular state."
>
> As the plurality rightly said, the search is for the connection between the child and the particular state. That being the nature of the search the plurality's references to settled purpose are to be read as directing attention to the intentions of the parents. But as explained earlier in these reasons, the relevant criterion **is a shared intention that the children live in a particular place with a sufficient degree of continuity to be properly described as settled.** So understood, there is no disconformity between the approach of the New Zealand courts and the need, identified by Lord Brandon in *In re J*, to decide the question of habitual residence "by reference to *all* the circumstances of any particular case" (emphasis added).

(Footnotes omitted and bold emphasis added)

29. To this we would add just two matters. The Regulations tend in favour of finding that a child has habitual residence because otherwise the child cannot be protected from abduction. In *Re F (A Minor) (Child Abduction)* [1992] 1 FLR (UK) 548 at 555, Butler-Sloss LJ said:

> …it is important for the successful operation of the Convention that a child should have, where possible, an habitual residence, otherwise he cannot be protected from abduction by a parent from the country where he was last residing...

30. In *Cooper v Casey* (1995) FLC 92-575 at 81, 696 Nicholson CJ said:

> …the making of a finding that a child has no habitual residence could easily operate to defeat the purpose of the Convention and leave children open to the possibility of repeated abductions by both parents…

31. The other point that we would wish to make is that the finding of an intention or settled purpose is not dispositive of the issue of habitual residence. There is but one finding to be made which is of "habitual residence", taking into account all relevant matters (*State Central Authority & Camden* (2012) FLC 93-501 at 86, 408).

THE APPEAL

32. The Commonwealth Central Authority raises three challenges to the reasons of the trial judge.

33. The first is that the trial judge did not give any or any sufficient weight to regs 1A(2)(a) and (b) of the Regulations.

34. Those regulations provide:

> (2) These Regulations are intended to be construed:
>
> (a) having regard to the principles and objects mentioned in the preamble to and Article 1 of the Convention; and
>
> (b) recognising, in accordance with the Convention, that the appropriate forum for resolving disputes relating to a child's care, welfare and development is ordinarily the child's country of habitual residence; and
>
> …

35. We have already referred to the authorities that indicate a court should be slow to find that children do not have an habitual place of residence.

36. The trial judge does not refer to this consideration. In this case it was a matter of some relevance. Nonetheless, as is also made clear by the authorities, it is quite possible for children not to have an habitual place of residence. It all

depends on the facts to which we shall now turn in considering the next challenge.

37. The second challenge of the Commonwealth Central Authority has two aspects. First it is submitted that the trial judge gave "decisive or, alternatively, excessive, weight to the absence of a settled common intention on the part of the parents to remain in Finland beyond one year". Secondly it is submitted that the trial judge gave insufficient weight to the settled common intention of the parents to remain in Finland for at least one year.

38. Under the heading "INTENTION", the trial judge said:

> 23. The extent to which intention is to form a part of a consideration of whether the parties were **habitually** resident in Finland complicates rather than resolves the issue. Attempts to identify what sort of intention was necessary (bearing in mind that it should be contrasted with the intention to acquire a domicile) had resulted in some courts referring to the "settled purpose" (of, one presumes, both parents). However, in this case the question might be further refined to indicate whether the parties had a settled purpose to live in Finland permanently **or for a year**. If the former, it would seem that there was no common purpose whether settled or not between mother and father. If the latter, it would appear there was a common purpose that the parents would remain in Finland for a year. That was the evidence of both parents in the course of cross-examination.
>
> 24. The issue therefore would seem to be whether it is sufficient that there should be a settled purpose (coupled with the other relevant indicia of habitual residence) to live in Finland for a period - such as twelve months - or whether it had to be on a **permanent or indefinite basis**.
>
> (Original emphasis)

39. It can immediately be seen that these paragraphs indicate that the trial judge thought that there was a dichotomy between living in Finland permanently or indefinitely, or for a year.

40. This question posed by the trial judge does not identify the relevant enquiry. As indicated by the High Court in *LK* at 598, in adopting what was said by Waite J in *Re B (Minors: Abduction) (No 2)* [1993] 1 FLR (UK) 993 at 995, the relevant inquiry is whether there is an "abode in a particular place or country which they have adopted *voluntarily and for settled purposes* as part of the regular order of their life for the time being, whether of short or of long duration" and that "[a]*ll that the law requires for a 'settled purpose' is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled*" (original emphasis).

41. The trial judge said:

> 50. In my opinion, it could not be said that there was a settled purpose or intention on the part of both parents to live indefinitely in Finland. There is no doubt that that could have been something which happened in the future, perhaps at the end of one year. It was not however the settled purpose of both the parents at any time either before they left Australia or while they were living in Finland…

42. This view is also conveyed by what the trial judge said at [59] which, for convenience, we shall repeat:

> 59. In the light of all of the circumstances although the parents may have been approaching a situation where it might have been appropriate to regard their residence in Finland as habitual…there was no settled common intent sufficient in all of the circumstances to permit of the description of their residence in Finland as a habitual residence.

43. These findings seem to flow from the inquiry that the trial judge undertook as to intention which was directed to the parents' intention as to where the family would live after one year in Finland.

44. There are two difficulties with this. First, as we have said this gives excessive weight to the lack of a common purpose or intention to reside in Finland permanently or indefinitely and has overtones of a consideration of domicile.

45. Secondly, it ignores whether in moving to Finland for a period of 12 months with a common settled purpose of doing so, of itself, was sufficient to acquire habitual residence for the children. The trial judge seems to have posed the question as a dichotomy between living for 12 months on the one hand and permanently or indefinitely on the other. That dichotomy is based solely on the trial judge's finding of intention and entirely ignores the possibility that in the circumstance of this case there could have been habitual residence acquired by less than 12 months residence taking into account a common settled purpose of the parents of residing in Finland for that time.

46. There is force in the submission of the Commonwealth Central Authority that the trial judge gave at least excessive weight to the parents' lack of settled common intention to stay in Finland beyond one year and insufficient weight given to the common intention of the parents to live in Finland for at least a year.

47. We are satisfied that the trial judge erred in the manner asserted by the Commonwealth Central Authority and these aspects of the second challenge have been established.

48. The third challenge was that the trial judge failed to take into account the following facts:

    a. the children were receiving Child Benefits (Lapsilisä) and the middle child [X] was receiving a Disability Allowance (Vammaistuki) from the Finnish Government…

    b. the children had significant connections with their family (including their maternal grandmother, aunt and cousins) in Finland…

    c. the children had Finnish citizenship…

    d. the parents and the children were enrolled in the Finnish National Health Insurance Scheme (KELA) and had Finnish health care cards…

    e. the mother was paying income and property tax in Finland and the father was registered for income tax purposes in Finland…

    f. the father had residency status and a full working permit in Finland…

    g. the children had been residing in Finland for over 9 months…

49. The trial judge did undertake a consideration of the parties' circumstances in Finland. His Honour said:

    48. Applying that to the current situation it seems that the following matters would be supportive of the contention that the parties were habitually resident in Finland:

        a) The children and the parents had physically moved to Finland and had established initially one residence and thereafter another. There had been discussions between the parents about a more permanent residence which they might acquire in the future.

        b) The children were attending school, were progressing satisfactorily at school and were apparently happy at their schools. The children were coping with the Finnish language and receiving additional tuition in the Finnish language.

        c) The father was acquiring knowledge of the Finnish language himself and made some attempts to obtain employment.

        d) The mother had acquired employment in Finland.

        e) The children were engaged in extra-curricular activities and had made friends in Finland.

f) I have already discussed the nature of the intention of each of the parents about what would happen in Finland for a year and what would be likely to happen thereafter.

50. The facts raised by the Commonwealth Central Authority are all facts which support these findings of the trial judge. They also raise other matters such as the government benefits which were not referred to by the trial judge. A judge is, however, not obliged to refer to every piece of evidence in his or her reasons. We are not satisfied that these facts were ignored by the trial judge. This challenge does not succeed.

51. It is necessary now, to return to the first challenge.

52. The parents' shared intention was to live in Finland for at least a year. In travelling to Finland they ceased to be habitually resident in Australia (a finding made by the trial judge and not challenged). This is significant and we bear in mind that a court should be slow to find that children have no habitual place of residence. This is the effect, however, of his Honour's findings.

53. By the time of their retention in Australia, the children had lived in Finland for nine months. They attended school, at which they were progressing well, and engaged in extra-curricular activities. They made friends. Benefits and allowances for them were received from the Finnish Government.

54. The parents had established a home. The mother had a job. The mother had friends and relatives living nearby. The family was enrolled in the local health scheme and received treatment under it.

55. A finding that the children were habitually resident in Finland at the time of the retention could be drawn from these facts. That finding could be drawn more readily when the loss of habitual residence in Australia is taken into account. It was therefore a relevant consideration which the trial judge did not take into account.

56. The first challenge raised by the Commonwealth Central Authority is also established and the orders made by the trial judge must be set aside. Both parties were agreed that if that was the court's finding, then this court should determine whether the children should be returned to Finland.

CONCLUSION

57. We take into account that the parents had a shared common intention to travel to Finland for at least a year and to live there as if they were living there permanently. That is to say the family was not travelling around Finland on holiday, rather they became settled in the usual way.

58. We take into account the matters referred to in [7] – [14], [48], [49] and [55] above. These factors support a finding that the children became habitually resident in Finland.

59. Against that is the fact that the parents, at the least, left open the possibility of their return to Australia after one year. They retained the family home in Australia, they kept open the children's enrolment at their schools and the father did not resign from his employment, but took a year's leave.

60. Weighing up all these matters we conclude that at some time after the family arrived in Finland, the children became habitually resident there and remained so until the time of their retention in Australia. It follows therefore that the children were improperly retained in Australia and should be returned to Finland in accordance with the Regulations.

61. The court has been provided with draft Minutes of Order in the event the court took that view. Save for two matters, there was no issue taken as to the draft minutes. First, the father objected to paying one half of the mother's return airline ticket to Finland. That is an appropriate objection. Secondly, the orders provided for each party to bear their costs of the appeal and the proceedings below. As no costs order was made by the trial judge, the latter part of that order is unnecessary. We have also amended the orders to recognise that the children's passports are being held by the Registry Manager and not a registrar and to make some minor alterations of form.

62. There should also be an order providing for the return of the children to Finland in accordance with paragraph 11 of the Application filed by the Commonwealth Central Authority on 12 May 2015.

63. Therefore, we will make orders in accordance with the draft Minutes of Order provided by the Commonwealth Central Authority amended as just discussed.

COSTS

64. The father sought a certificate under s 9 of the *Federal Proceedings (Costs) Act 1981* (Cth). It is clear that the section applies as no order for costs has been made on the appeal and the appeal was allowed as a result of an error of law on the part of the trial judge.

65. The errors of law arose in significant part from the trial judge accepting the submissions of the father who sought to maintain those submissions before us. It is therefore not appropriate that part of his costs be borne by the tax payer.

I certify that the preceding sixty-five (65) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court (May, Strickland & Aldridge JJ) delivered on 11 December 2015.

Associate:

Date: 11 December 2015