YORDANOV V VASILEV AND ATANASOV V VASILEV [2024] EWHC 1496 (KB)

Ian Denham, Outer Temple Chambers

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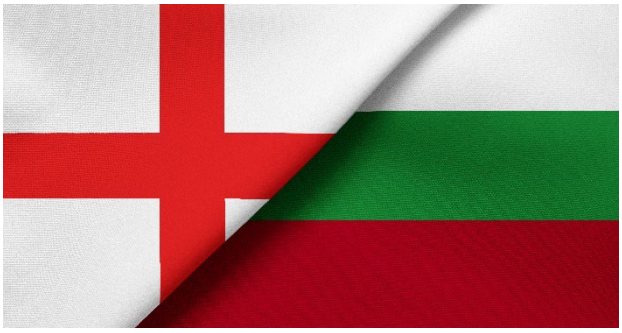

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Ian was instructed to act for Mr Atanasov in Yordanov v Vasilev and Atanasov v Vasilev [2024] EWHC 1496 (KB). He was instructed by Siobhan McIvor, Partner, at Osbornes Law.

The claim involved arguments as to whether Bulgarian or English law should apply to the claim brought by Yordanov.

In her judgment, Annabel Darlow KC, sitting as a Judge of the High Court, provided helpful analysis of the scope of article 4 of the Rome II regulations, which determine which law applies to a negligence claim.

Background

On 31 July 2019, two cars raced down a country lane in Sussex at speeds approaching 80mph. The vehicles were driven by a Mr Angelov and Mr Atanasov. The two cars collided resulting in the death of Mr Angelov and with Mr Atanasov and the occupants of the vehicle driven by Mr Angelov sustaining serious injury. Both drivers were found equally culpable for the collision.

The applicable law issue

The claim involved a dispute as between the Fifth Defendant (a Bulgarian motor insurer) '**D5**', on the one hand, and Yordanov and the First and Third Defendant '**D1/D3**', on the other, as to the applicable law in relation to the claim. D5 submitted that the applicable law should be that of Bulgaria and all other represented parties to the 'Yordanov claim' submit the applicable law should be that of England.

In respect of the Atanasov claim, the parties had reached a prior agreement that the law applicable to the claim should be that of England.

D5 asserted that the 'person claimed to be liable', namely Atanasov and 'the person sustaining damage', namely Yordanov, were both habitually resident in the same country, namely Bulgaria, at the time of the accident. Thus Article 4(2) should displace Article 4(1), which would indicate that English law should apply, consistent with England being the country where the damage occurred. Consequently, the court should apply the law of Bulgaria.

In the alternative, the court should determine under Article 4(3) that the tort was manifestly more closely connected with Bulgaria.

These contentions were opposed by the Yordanov and D1/D3, who disputed as a matter of fact that Yordanov and Atanasov were both habitually resident in Bulgaria on the date of the accident. In the alternative, they ask the court to conclude, under Article 4(3), that there is a manifestly closer connection between the tort and England than with Bulgaria.

Determination of Habitual Residence for the purposes of Article 4(2).

The Judge directed herself that:

"34. Article 23 of Rome II provides a definition of habitual residence, but only in respect of companies and other bodies and a natural person acting in the course of his business. It does not otherwise include a definition of habitual residence in relation to individuals.

35. Settled case law has established that the terms of a provision of European Union law, which makes no express reference to the law of member states, must normally be given an independent and uniform interpretation throughout the European Union, to ensure a uniform application of European Union law and the principle of equality; (see Mercredi v Chaffe (Case C-497/10 PPU) (2012) Fam.22 at para 45).

36. My attention has helpfully been drawn to a number of authorities in which the concept of habitual residence has been considered by the European Courts of Justice and to decisions of the courts of England and Wales. From these authorities, the following key propositions may be distilled:

i. 'Habitual' denotes a residence that has a certain permanence or regularity (Mercredi, ibid [44]).
ii. Habitual residence must be established on the basis of all the circumstances specific to each individual case (A (Case C-523/07), (2010) Fam 42[1] at paragraph 37.) Factors to be taken into account include duration, regularity, conditions and reasons for the stay; nationality, linguistic knowledge and manifestation of an intention to settle permanently through the purchase or lease of a residence or application for social housing (A, ibid, [38-40]) .
iii. A peripatetic life, over a short period was liable to constitute an indicator that the individual in question did not habitually reside in the state in question (A ibid, [41]).
iv. The mere fact of residence in a particular country is insufficient; habitual residence is the location where the person has established his permanent or habitual centre of interests, with all relevant factors being taken into account (M v M (2007) EWHC 2047, as cited in the judgment in Winrow and Hemphill and another (2014) EWHC 3164 (QB) [12]).[2]
v. The intention of the parties as to future residence is not a determinative factor; in Re LC (Children) (2014) 2 WLR 124[3], Baroness Hale, with whom Lord Sumption agreed, held: 59. The first principle is that habitual residence is a question of fact: has the residence of a particular person in a particular place acquired the necessary degree of stability (permanent is the word used in the English versions of the two CJEU judgments) to become habitual? It is not a matter of intention: one does not acquire a habitual residence merely by intending to do so…[4]

37. Whilst a number of the judgments of the European Court place a certain emphasis on the degree of integration into a social and family environment, these observations should be contextualised as relating in particular to the habitual residence of children. Many of the standard metrics which might denote habitual residence in the case of adults; for example, purchase or rental of accommodation in a particular location and place of work, cannot readily be applied to determine habitual residence of a child. Thus, factors such as integration might assume a proportionately greater importance in respect of a child than they might when determining habitual residence for an adult."

Analysis of Article 4(3)

The Judge observed that:

"39. In order to displace the law indicated by Articles 4(1) or (2), it is thus necessary to show that the 'centre of gravity' of the case is with the suggested applicable law. The test under Article 4(3) has been described as 'stringent'; it requires that it be clear from all the circumstances of the case that the entire tort and not just a specific issue arising from it, is manifestly more closely connected with a country other than that indicated by Article 4(1) or (2). There must be a clear preponderance of factors pointing to the country in question. It is not, however, necessary to demonstrate

1 https://www.bailii.org/eu/cases/EUECJ/2009/C52307.html

2 https://www.bailii.org/ew/cases/EWHC/QB/2014/3164.html

3 https://www.bailii.org/uk/cases/UKSC/2014/1.html
4 As cited in *Winrow* at paragraph 40.

the absence of any 'real' or 'genuine' connection with the country whose law is otherwise applicable."

She also accepted that the burden of establishing that Article 4(3) rests on the party seeking to disapply Article 4 (1) or (2) and the standard required to satisfy the test is high.

The Court proceeded to consider the circumstances be considered in determining whether Article 4(3) displaces either of Article 4(1) or (2) as set out by Slade J in Winrow v Hemphill:

i. "The country in which the accident and damage occurred and the habitual residence of the parties remained to be taken into account, notwithstanding that each was the determinative factor for the purposes of Articles 4(1) and (2) respectively (paragraph 43)
ii. The habitual residence of the claimant at the time that any consequential loss is suffered, may also be relevant (at paragraph 43).
iii. The 'centre of gravity' referred to that of the tort, not that of the damage and consequential loss caused by the tort (at paragraph 45) but the link between the consequences of the tort and a particular country remained to be considered as a relevant factor (paragraph 50).
iv. The nationality of the claimant and defendant (at paragraph 54).
v. Place of residence after the accident, although this is to be viewed in the context of residence and length of residence at the time of the accident (at paragraph 56).
vi. The country in which the greater part of the loss and damage are suffered (at paragraph 59).
vii. The country in which the vehicle driven by the Defendant was insured and registered, albeit that neither were deemed strong connecting factors (at paragraph 60).
viii. The pursuit of proceedings before an English court was to be taken into account but was not a strong connecting factor (at paragraph 61)."

The Court also noted the judgment of Dingemans J (as he then was) in Marshall in which it was observed that many of the potential problems associated with multi-party claims might be addressed by a proper approach to Article 4(3). In this context, he noted that; "it would be an unusual result of choice of laws provisions if at the moment that Mr Marshall was hit by the Peugeot motor car his claims against Ms Bivard and Mr Pickard were subject to two different governing laws."

The Court considered the factors indicated by Linden J in Owen v Galgey as potentially relevant to the application of Article 4(2) determination. These included:

- the country in which any insurer defendants were registered at the time of the tort and damage;
- whether the parties had a significant and long-standing connection to a particular country;
- the connection between the tort and the place of the harm; and
- ownership of property in the country in question.

The applicable law under Article 4(2)

The Judge first considered the application of Article 4(2) and held that:

"The factors of duration, regularity, conditions and reasons for the stay in a particular country also indicate that in the specific circumstances of each, the habitual residence of both was in Bulgaria and not England. Each regularly returned to Bulgaria when not working abroad, to the same place of residence on each occasion. Their residence in Bulgaria did not depend upon availability of employment but was rooted in a far wider centre of interests; each was a Bulgarian national with close family in Bulgaria."

Thus, the application of Article 4(2) displaced Article 4(1) and accordingly the law of Bulgaria applied.

The application of Article 4(3)

However, matters did not rest there and the Court considered the application of Article 4(3).

The Court observed that there were *"a significant number of circumstances indicative of a close connection between the tort and England. Firstly, the accident occurred on an English road, in England and involved a third and fourth vehicle, both registered in England. The immediate damage and the primary consequences of the damage all occurred in England; the accident was attended by the emergency services and investigated by the police of this jurisdiction and both Atanasov and Yordanov received significant medical care in English hospitals. In particular, Yordanov was hospitalised for several weeks after the accident, two of which were spent in a coma and received medical care in England for many months thereafter."*

The Court directed itself that, *"the court must apply English road traffic regulations and English mandatory road safety rules. There is thus a very close connection between the tort itself and English law; the connection is*

of relevance to the determination of the issues and is not mere happenstance, or background. The proceedings have been brought before an English court."

Further, whilst acknowledging that both Yordanov and Atanasov were habitually resident in Bulgaria within the meaning ascribed in European case law, they nevertheless each had close and significant relations with England. Both were living and working in England at the time of the collision. Atanasov, in particular had paid tax in England for several years and had a regular and established connection with England. The vehicle in which Yordanov was travelling at the time of the accident was acquired and registered in England and was insured by an English-registered insurer.

In balancing the various factors and the degree of connection the Court concluded that Yordanov had crossed the high hurdle set by Article 4(3) and proved that the tort is manifestly more closely connected with England than Bulgaria and it is in the former country that the centre of gravity is located.

Thus, in terms of reaching a decision as to what law applied, the Court first considered that Article 4(2) (the law habitual residence, namely that of Bulgaria) displaced 4(1) the law of the place of harm, namely England.

However, the Judge went on to find that Article 4(3) disapplied the of Bulgaria and applied English law as being that which was most closely connected with the tort.

More information

For further analysis of this case please see 'Applicable law: the step-by-step approach necessary under article 4 of the Rome II Regulation' by Alistair Kinley of Clyde & Co.

A copy the judgment can be found here.