Neutral Citation Number: [2020] EWCA Civ 1105

Case No: B4/2020/0592

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
HHJ WALLWORK
FD19P00499

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/08/2020

Before:

LORD JUSTICE MOYLAN
LADY JUSTICE SIMLER
and
SIR STEPHEN RICHARDS

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M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)

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Mr J Turner QC and Miss K Chokowry (instructed by **The International Family Law Group LLP**) for the **Appellant mother**
Mr H Setright QC and Mr M Gration (instructed by **Sills and Betteridge LLP**) for the **Respondent Father**

Hearing date: 16th June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am 25th August 2020.

Lord Justice Moylan:

1. The mother appeals from a return order made under the 1980 Hague Child Convention ("the 1980 Convention") on 21 February 2020 by His Honour Judge Wallwork, sitting as a Deputy High Court Judge. She contends, principally, that the judge was: (a) wrong to decide that the children were habitually resident in Germany at the date of their wrongful retention by the mother in England at the end of July 2019 and should have decided that they were habitually resident in England at that date; and (b) wrong to decide that the mother had not established the exception under Article 13(b).

Background

2. In this section, quotations are from HHJ Wallwork's judgment.

3. The children who are the subject of the application are aged 6 and 8. They and their parents were all born in Germany. One of the children (who, for the purposes of anonymisation, I will call T) has significant additional care requirements. The parents married in 2014 and separated in 2017. The father has always lived and continues to live in Germany. For ease of reference I will call the place in which he lives, Stadt. The mother and the children remained living in Germany until July 2018 when they moved to live in England. The judge described the mother as having been the children's "primary carer throughout their lives".

4. In July 2018 the mother wanted to move with the children to England and sought the father's agreement to this. This was "envisaged to be for 12 months or so". The mother "was in a serious relationship and … intended to live, together with [the children], at the home of her then boyfriend". The mother had obtained a contract "to work on a particular project" in the same town where her partner lived. They have since married and have a child born in 2020.

5. The parents mediated and signed a "letter of intent". It was agreed that the children would come to live in England with the mother and her partner. It was also agreed that they would stay in England "until approximately 2019" and that, in December 2018, the parents would "evaluate the situation regarding the rotation between [the mother's home] and [the father's home] and will adjust the current situation and implement improvements". The children were to spend "nearly equal" time with each parent. In addition, the letter said, baldly, that the "children's home will remain in [Stadt]".

6. The children began attending school in England in September and, as set out in the judgment below, "settled quickly". They had "previously stayed there on holiday and loved" the local environment. T received additional support at school. The children were also registered at a local GP practice and the mother ensured that T's medical needs were met through a local paediatrician and other medical services as required.

7. The parents did not agree about the amount of time the children spent with the father in Germany after they moved here in July 2018. The father produced a table which suggested that, over a 12 month period (I assume from July 2018) they had spent 111 days with him in Germany. The mother produced a table which suggested that, over the same period, they had spent 96/97 days with the father. The judge was not in a position to resolve this difference but, in either event, it is clear that the children were predominantly living in England between July 2018 and July 2019.

8. In December 2018 the parents, as had been agreed, reviewed the situation through mediation. The judge records that they disagreed what precisely had been agreed but "the main thrust" was that the children would return to Germany with the mother at "some point in the summer" of 2019. The judge rejected the father's case that the mother had been disingenuous at that time and had not intended to abide by this agreement. He was not persuaded that the mother "had been acting in bad faith".

9. In July 2019, the mother found out that she was pregnant. This led her to "consider the arrangements that the parents had made" and to decide that she would not return to Germany. She sent an email to the father saying that "she intended to remain with the [children] in England".

Judgment

10. The judge found that the mother had retained the children, in breach of the agreement between the parents, at the end of July 2019. The father had contended, alternatively, that the wrongful retention had occurred in September 2018 but this was rejected by the judge.

11. The principal issues the judge had to decide were: (i) where were the children habitually resident at the end of July 2019, for the purposes of determining whether their retention was or was not wrongful; and (ii) had the mother established the Article 13(b) exception. He decided that the children had not "lost" their habitual residence in Germany by July 2019 so remained habitually resident there. He also decided that it would not be intolerable for the children to return to Germany. Accordingly, he made an order that the children should be returned to Germany on a date in April 2020.

12. On the issue of habitual residence, the judge correctly identified the, non-contentious, starting point that before the children came to England in July 2018 they were habitually resident in Germany. The judge also referred to the fact that they had always lived in Germany and that members of their extended family were in Germany.

13. The judge's focus, in that part of his judgment in which he dealt with the issue of habitual residence, was significantly on the children's continuing connections with Germany. This was because, as referred to below, he considered that the question he had to answer, when determining where the children were habitually resident, was "have they lost their German habitual residence". He identified that they "were spending regular periods of time in Germany with" the father and went through the dates on which they were in Germany. They had attended kindergarten in Germany for "part of the time they were there". This was part of the "overall network" which included staying with their paternal grandparents and which "one has to consider when considering the position of the children and the extent to which they may or may not be integrated in a particular society".

14. The judge referred to parental intention as being "relevant … but not determinative". In that respect, he noted, and clearly placed significant weight on, the fact that the mother had still been intending to return to Germany until she changed her mind in July 2019.

15. There is a key section in the judgment which, in my view, shows the approach taken by the judge when determining the issue of habitual residence. It starts with the following paragraphs:

> "[39] The degree of connection which a child has with a particular environment is clearly something that has to be weighed. In relation to that, in para.viii of the summary, [in *Re B (A Child: Custody Rights, Habitual Residence)* [2016] EWHC 2174 (Fam) and [2016] 4 WLR 156] Hayden J records:
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> > 'In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move.'
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> [40] In relation to that matter - and I will come to Lord Wilson's very visual and vivid description of the see-saw - there cannot be two habitual residences. If habitual residence is gained in one location, it will be lost in another, and the question in this particular case, which is of considerable relevance - and it is perhaps unusual and not something that one sees in many cases - is that it is undoubtedly the case that the children were developing relationships in this country, they were learning the language, they were having a life here, but had those factors displaced the fact that they had the connection with Germany, the relationship with their family there, the life that they had in that jurisdiction, and so on?
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> [41] What one sometimes sees is there is a complete severance of the relationship that a child has in one location and an adoption of a completely new life. To take a rather extreme example: if a child is removed, for example, from here to Australia, then there is rarely the opportunity to keep alive the life that one had at such a distance. In this case, what we have is a situation where the children have one life, the life that they had always had in Germany, and a new life which is developing elsewhere, and the difficult task for this court is to evaluate whether they had lost that connection with Germany as they gained the position in the United Kingdom, and as I say, if it is a question of intention, the application before this court came hard on the heels of the email from the mother in which she said at that point that she did not intend to abide by the original agreement. In short, until the end of July – if I accept the mother's evidence - it was the position that she was adhering to the agreement but that at the end of July, that position had changed."

16. The judge then again referred to the fact that, until July 2019, the parents' intention had been that the children would return to Germany. Adding that, "in any event … they had spent time in Germany … so their links in Germany were still being kept alive" and were still "very much ongoing".

17. The judge continued his assessment of habitual residence in the following paragraphs:

> "[43] The degree of connection, as I have indicated, is another matter for the court to consider, but the degree of connection with Germany was ongoing and whilst the shared arrangement between the parents - one speaks of qualitative and quantitative differences - the quantity is not as significant as the quality, and if there was a good quality time spent with their father in Germany then *the question of whether they had lost their habitual residence with the father arises*. It is the stability of a child's residence, as opposed to its permanence, which is relevant, and as I have just said, it is qualitative, not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time the child spends there.
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> [44] It is said that the relevant question is whether a child has achieved some degree of integration in social and family life. It is not necessary for the child to be fully integrated before becoming habitually resident. This has been a particularly difficult case for this court to determine. There is little doubt that the boys have clearly developed a new aspect to their life, that they seem to have become very popular in their school, and I accept what I have read in the mother's statement that they were popular within the school, they were having sleepovers. She feels that [T] was accepted in the school, which was one that is particularly suited to his needs, and which had not been the case previously, and that the boys were clearly very happy there. They are living in an environment where there is perhaps more fresh air than in [Stadt], that they go out, they go bird-watching, they love the beach. In many ways the description of their life here is one that is most attractive and one where I am satisfied that what the mother has to say is that they are happy, but, as I have indicated, although there is a degree of integration, certainly something that is happening for them, *the question is have they lost their German habitual residence*? That is where one has to consider the see-saw with which Lord Wilson so graphically illustrated the question which the court has to determine. As the children lose their connection with the place of origin and their initial habitual residence, that will happen as they gain habitual residence elsewhere, and so the see-saw tips, the balance tips in one direction and as it tips towards their new location, they lose the connection with the other location." (my emphasis)

18. The judge concluded, "with some degree of sadness", that the children's habitual residence had "not shifted to England" but remained in Germany. He referred to that fact that "in June, that intention [that the children would return to Germany] was still being expressed as the intention of both parents". He then, at [46], summarised his conclusion as follows: "given that those intentions were still alive in June 2019, given that [the children] were still spending time with family in Germany in July [and] that

they still had a life there … I have concluded that the habitual residence has not shifted to England"; "The position in Germany having kept alive throughout that period, they have therefore not lost that, and in those circumstances they had not gained habitual residence in this country".

19. The judge's regret at having to reach this conclusion can be seen from his observation that the children "remained habitually resident in Germany despite the obvious time that they were spending in England and the very many benefits that were accruing to them" here. He returned to the latter point later in his judgment when he said, at [52], that he "was impressed with what the mother had to say about the way in which [the children] related to friends at school; [and] the matters that have been raised in terms of their life here".

20. However, despite his regret the judge clearly felt compelled to decide that the children's habitual residence had not "shifted" to England because, I repeat, the "position in Germany having been kept alive throughout that period, they have therefore not *lost* that, and in those circumstances they had not gained habitual residence in this country" (my emphasis). The judge's approach to this issue can also be seen from his subsequent observation that, if the children "had had no contact with their father during the intervening period, then it may be that a change in terms of their integration and their habitual residence would have been found by this court, I cannot say".

21. It is clear from the above that the judge's key focus was on whether the children had lost their habitual residence in Germany. This can be seen, for example, from his saying, at [42], that the question arose of "whether they had lost their habitual residence with the father"; and, at [44], that "although there is a degree of integration [in England] …, the question is have they lost their German habitual residence". This led him, in turn, to focus on the extent to which the children had lost or maintained their connections with Germany and whether those connections had been "displaced". The judge's perspective was clearly driven by, or based on, his understanding of the need to apply Lord Wilson's "see-saw" analogy from the case of *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 606, at [45].

22. The judge also decided that Article 13(b) was not established. He accepted that returning to Germany would "create very considerable difficulties for the mother" especially as she was about to give birth and also because she had no accommodation there. He also had "no doubt that there will be considerable disruption for the" children. He concluded as follows: "In terms of the position, however, as to whether it would be intolerable for the boys, I bear in mind that the boys spend regular periods in Germany with their father and that although the position may be that they will be there for longer than is usual, nonetheless, going to their father is not something that is strange or unusual for them, and so I cannot see that that in itself is something that would be intolerable".

Submissions

23. On behalf of the mother, Mr Turner QC and Ms Chokowry made three broad submissions: (a) that the judge failed properly to analyse the issue of habitual residence and, if he had, he would have concluded that the children were habitually resident in England at the end of July 2019; (b) that the judge was wrong to find that returning the children to Germany would not place them in an intolerable situation; and (c) that, if

neither (a) nor (b) succeeded, then, exceptionally, the implementation of the return order should be postponed to enable the mother to make a relocation application in Germany.

24. Mr Turner started his submissions by pointing to the fact that, as referred to in the judgment, the mother has been the children's primary carer throughout their lives. He also reflected on the unhappy consequences of the proceedings in that, prior to their commencement, the children had been having extensive contact with the father but that, since then, contact has been far more limited with significantly less direct contact.

25. (a) In respect of habitual residence, Mr Turner submitted that the judge's approach was legally flawed in that he did not apply the approach approved in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2014] AC 1. This was because the judge appeared to have been misled by Lord Wilson's see-saw analogy from *In re B* into taking the key question as being whether the children had lost their habitual residence in Germany. He submitted that the latter decision had not changed the principles applicable to the determination of habitual residence in that Lord Wilson was not saying, as the judge seemed to consider, that continuing links on the part of a child with the "old" country would prevent that child from acquiring habitual residence in the "new" country, even if an appropriate degree of integration and stability of life in the new country had been acquired.

26. Mr Turner also submitted that the judge's approach was not consistent with the important policy objective of the 1980 Convention. The Convention is designed to achieve the prompt "reinstatement of the status quo ante" for children because it is presumed to be in their best interests to be returned to the state where they are habitually resident. In the present case, a return would not effect a rapid "reinstatement" because, Mr Turner submitted, the children were integrated in England by July 2019.

27. The judge's apparent misunderstanding of *In re B* led him to focus on whether the children had lost their habitual residence in Germany, based on their continuing links with Germany, rather than on the relevant question of whether their residence in England had acquired the requisite degree of integration and stability. This had also meant that the judge had given inadequate consideration to whether, and the extent to which, the children were integrated in England. There was, Mr Turner submitted, little analysis of this highly relevant factor.

28. Mr Turner pointed to passages in the judgment which supported his submission that the judge had failed properly to apply the approach set out in *A v A*. He emphasised that, as set out in the authorities, all that is required for the purposes of habitual residence is "some" degree of integration in the new state. He also referred to Lord Hughes' observation, at [12], in *In re C and another (Children) (International Centre for Family Law, Policy and Practice Intervening)* [2019] AC 1, when reflecting on whether a child might have become habitually resident in the "destination State" by the date of the wrongful removal or retention:

> "It is perhaps improbable in the case of removal, but it is not in the case of retention. It may particularly happen if the stay in the destination State is more than just a holiday and lasts long

> enough for the child to become integrated into the destination State."

29. Mr Turner also submitted that the judge's approach to the parents' intentions was flawed. The judge referred on a number of occasions to the parties' initial agreement and their continuing intention that the children and the mother would return to Germany. Intention is a relevant factor but the judge, he submitted, also elevated this above the more important factor of the children's integration in England.

30. If the judge had asked whether the children, who were not just visiting but were living in England with their primary carer, had achieved the requisite degree of integration in England to be habitually resident here, he would have inevitably have determined that they had and, as a result, it would also inevitably follow that they had lost their habitual residence in Germany.

31. (b) As to Article 13(b), Mr Turner submitted that, as set out in the Grounds of Appeal, the judge's reasoning was flawed and/or his analysis was unduly superficial. He had failed to consider, in particular, the complex needs of T and the likely effect on him of moving to live in Germany with the inevitable disruption to his healthcare and to his education. Nor, he submitted, had the judge considered the extent to which the children and the mother were settled in England and, as a result, the likely detrimental impact on them of being required to move to Germany. In addition, he submitted that the judge had failed to look at the mother's and the children's situation at the date of the hearing. He pointed to the judge referring, again, to the fact that in June 2019 the mother had said that she intended to return to Germany.

32. (c) As very much a fall-back position, Mr Turner submitted that, having regard to the length of time the children have been living in England, to the extent to which they are settled here and to the likely disruptive effect of a return to Germany, the implementation of any return order should be delayed to enable the mother to make an application to the German courts for permission to remain in England.

33. In response, Mr Setright QC and Mr Gration submitted that the judge directed himself correctly as to the relevant law and had reached a decision that was open to him both as to the children's habitual residence and as to Article 13(b).

34. (a) In respect of habitual residence, Mr Setright submitted that there is no basis for this court interfering with the judge's decision. He relied on Lord Reed's observation as to the "limited function of an appellate court in relation to a lower court's finding as to habitual residence", at [18], in *In re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 76.

35. The judge in the present case had not fallen into error as suggested by Mr Turner but had applied the correct legal principles. He had been correct to focus on Lord Wilson's judgment in *In re B* in part because both counsel had invited him to treat that decision as being of particular relevance to this case and in part because the question the judge had to decide was whether the children had lost their habitual residence in Germany and acquired one in England.

36. The task for the judge was to consider the integration that the children had in Germany against the integration that they had begun to acquire in England and determine

whether, and if so when, the balance had tipped so that their integration in England outweighed their integration in Germany. This, Mr Setright submitted, was the effect of Lord Wilson's see-saw analogy which requires a comparative analysis as referred to in *Re G-E (Children) (Hague Convention 1980: Repudiatory Retention and Habitual Residence)* [2019] 2 FLR 17, at [59].

37. Mr Setright submitted that the court's determination as to whether there has been a transfer of habitual residence will depend on the following: (a) the extent of the roots put down in the country of physical presence; (b) in the context of the time spent there; (c) also in the context of the stability of the arrangements and the intention of those who have made them including the parent or parents with care of the child; (d) the extent of the continuing roots in the country of habitual residence before the physical move; (e) the extent to which those roots have been sustained; (f) a comparative/balancing exercise determining whether the roots in the latter country are sufficiently displaced by the acquisition of roots in the other country. The degree of integration in the new country has to be sufficient - to a "requisite degree" - to displace the previous habitual residence. In his submission, the judge had sufficiently analysed these factors and had undertaken a sufficient balancing exercise to support his conclusion that the children were habitually resident in Germany.

38. Mr Setright specifically addressed the judge's comment, at [44], that "although there is a degree of integration [in England] … the question is have they lost their German Habitual residence?". In his submission, what the judge meant by this was whether the degree of integration in England was sufficient in comparative terms. The judge accepted that there was integration in England but determined that this was not sufficient, or not to the requisite degree, to displace their integration in Germany

39. Accordingly, Mr Setright submitted that the judge had balanced the factors which demonstrated the children's continuing connection with Germany with those demonstrating their integration in England. The fact that the children returned to Germany "frequently and for long periods" was of "great significance" in the balancing exercise. The judge was also, Mr Setright submitted, entitled to treat as a significant factor the joint parental intention that the children would return to Germany in July/August 2019. The judge had taken into account the children's integration in England and, he submitted, had not "underplayed" their lives in England. Based on this assessment, the judge had reached the decision that the see-saw had not tipped and that, as a result, the children remained habitually resident in Germany.

40. (b) As for Article 13(b), Mr Setright submitted that the judge was plainly entitled to decide that this exception had not been established. It was relevant that the mother was still intending to return in June 2019 because, even at that late stage, she must have considered that any disruption for her and the children was manageable. Mr Setright also referred to the fact that T had continued to receive some of his medical care in Germany and that arrangements had been made for the children's return in terms of schooling.

41. (c) In respect of the submission that the implementation of any return order should be stayed, Mr Setright accepted that there were "a very limited number" of first instance authorities which supported the existence of such a power, it was a power which should only be exercised in exceptional circumstances, which did not exist in this case.

Law

42. Habitual residence has been debated in a number of cases, including five, or perhaps more, in the Supreme Court. In some respects this is surprising given that it is an issue of fact and one which it has been said "should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce": Lady Hale, at [54], in *A v A*. This probably reflects the importance of the concept not only because it is "the main connecting factor in all the modern Hague Children's Conventions" (*Note on Habitual Residence and the Scope of the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption*, 2018, The Hague Conference on Private International Law, Permanent Bureau, at [5]); but also because: "A child's habitual residence in a state is the internationally recognised threshold to the vesting in the courts of that state of jurisdiction to determine issues in relation to him (or her)", Lord Wilson, at [27], *In re B*.

43. However, there is clearly a risk that the number of decisions available to be deployed by parties might by itself distract the court from the essential factual enquiry. It must also be remembered that the situations being considered by the court will vary enormously so that general observations made in these decisions have to be applied with care. They have to be applied with care to ensure that, as Lady Hale said (and I repeat), legal concepts or glosses do not lead the court to make a different decision to that which the "factual enquiry" would have produced.

44. Bearing these preliminary observations in mind, I do not want to add to the existing jurisprudence because, in my view, there is no need further to elaborate on what habitual residence means. However, in order to address the central submission advanced on behalf of the mother, namely that the judge did not undertake the required factual enquiry and that, if he had, he would necessarily have concluded that the children were habitually resident in England at the end of July 2019, I must deal with the law in some detail in part to put Lord Wilson's see-saw analogy in *In re B*, which it appears the judge sought to apply, in context.

45. It has been established for some time that the correct approach to the issue of habitual residence is the same as that adopted by the Court of Justice of the European Union ("CJEU"). Accordingly, in *A v A*, at [48], Lady Hale quoted from the operative part of the CJEU's judgment in *Proceedings brought by A* [2010] Fam 42, at p.69:

> "2. The concept of 'habitual residence' under article 8(1) of Council Regulation (EC) No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case."

46. It is also relevant to note that the factors listed in paragraph 2 (quoted above) were taken verbatim from the judgment, at [39]. Their purpose or objective appears from the preceding paragraph:

> **"**[38] In addition to the physical presence of the child in a member state, other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment."

The need for some degree of integration (as again referred to in *A v A*, drawing on Sir Peter Singer's analysis of the CJEU's decision in *Mercredi v Chaffe* (Case C-497/10 PPU) [2012] Fam 22) is, therefore, to distinguish habitual residence from temporary or intermittent presence. It is for the purposes of assessing what Lord Wilson described in *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038 at [1] as, "the nature and quality of that residence". Another expression used, again derived from the European authorities, is the "stability" of the residence.

47. Accordingly, as summarised by Lord Wilson in *In re LC*, at [1], "it is clear that the test for determining whether a child was habitually resident in a place is whether there was some degree of integration by her (or him) in a social and family environment".

48. What is meant by "some degree" of integration? As Lord Wilson said in *In re B*, at [39], there does not have to be "full integration in the environment of the new state … only a degree of it". He also said: "It is clear that in certain circumstances the requisite degree of integration can occur quickly". In *In re LC*, Lady Hale, at [60], referred to the "essential question" as being "whether the child has achieved a sufficient degree of integration into a social and family environment in the country in question for his or her residence there to be termed 'habitual'".

49. As referred to above, another relevant factor when analysing the nature and quality of the residence is its "stability". This can be seen from *In re R* in which Lord Reed referred to both the degree of integration and the stability of the residence. In that case the mother (who was Scottish) and the children, with the father's agreement, had moved from their home in France (the father was French) to live in Scotland for a year. The issue was whether, having arrived in Scotland in July 2013, the children were habitually resident in France or Scotland in November 2013. At first instance they were found still to be habitually resident in France. On appeal, this decision was overturned and they were found to be habitually resident in Scotland.

50. As explained by Lord Reed, at [9], an Extra Division of the Inner House of the Court of Session had overturned the lower court's determination because the judge had treated "a shared parental intention to move permanently to Scotland as an essential element" when considering whether the children were habitually resident in Scotland. This decision was upheld by the Supreme Court because, applying *A v A*, it was "the stability of the residence that is important, not whether it is of a permanent character", at [16]. There was "no requirement that the child should have been resident in the country in question for a particular period of time" nor was there any requirement "that there should be an intention on the part of one or both parents to reside there permanently or indefinitely".

51. Lord Reed summarised, at [17], what Lady Hale had said in *A v A*, at [54], emphasising that: (i) habitual residence is a question of fact which requires an evaluation of all relevant circumstances; (ii) the focus is on the child's situation with the "purposes and intentions of the parents being merely among the relevant factors"; (iii) "it is necessary to assess the degree of integration of the child into a social and family environment in the country in question"; (iv) the younger the child, the more their social and family environment will be shared with those on whom the child is dependent, giving increased significance to the degree of integration of that person or persons.

52. Later in his judgment, at [21], again applying *A v A*, Lord Reed referred to the important question as being "whether the residence has the necessary quality of stability, not whether it is necessarily intended to be permanent". The judge at first instance, by focusing on the parents' intentions, had failed "to consider in his judgment the abundant evidence relating to the stability of the mother's and the children's lives in Scotland, and their integration into their social and family environment there".

53. It is also interesting to note the way in which Lord Reed rejected the father's case, at [22], that the Extra Division "had erroneously focused only on the children's circumstances in Scotland, and had left out of account the agreement between their parents as to the limited duration of the stay in Scotland, and their parents' intentions". He said:

> "[23] I do not find that submission persuasive. The Extra Division … proceeded on the basis that the stay in Scotland was originally intended to be for the 12 months' maternity leave, that much being uncontroversial. They therefore assumed, in the father's favour, that the stay in Scotland was originally intended to be of limited duration. Their remark that the real issue was whether there was a need for a longer period than four months in Scotland, before it could be held that the children's habitual residence had changed, followed immediately on their statement, at para 14:
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> 'If the salient facts of the present case are approached in accordance with the guidance summarised earlier, the key finding of the Lord Ordinary is that the children came to live in Scotland.'
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> "In other words, following the children's move with their mother to Scotland, that was where they lived, albeit for what was intended to be a period of 12 months. Their life there had the necessary quality of stability. For the time being, their home was in Scotland. Their social life was there. Their family life was predominantly there. The longer time went on, the more deeply integrated they had become into their environment in Scotland. In that context, the question the Extra Division asked themselves did not indicate any error of approach."

54. I now turn to consider *In re B*. In that case one parent had clandestinely removed the child from England to Pakistan on 3 February 2014. The court had to determine whether the child remained habitually resident in England on 13 February 2014, being

the date on which the other parent had commenced proceedings under the Children Act 1989. Hogg J found that the child had lost her habitual residence in England although she had probably not become habitually resident in Pakistan. This decision was upheld by the Court of Appeal but overturned by the Supreme Court which decided, by a majority, that the child remained habitually resident in England on 13 February 2014.

55. As described by Lord Wilson, who gave the majority judgment, at [32], the central issue in the case concerned "a third aspect of the concept of habitual residence, namely the circumstances in which [a child] loses" his or her habitual residence and, in particular, "whether the longstanding domestic analysis of those circumstances, yet again heavily dependent on parental intention, is consonant with the modern international concept". This analysis derived from Lord Brandon's speech in *In re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 in which he made a third preliminary point, at p 578H, namely that "there is a significant difference between a person ceasing to be habitually resident in country A and his subsequently becoming habitually resident in country B". For reasons set out in his judgment, Lord Wilson concluded, at [47], that this point "should no longer be regarded as correct".

56. In arriving at this conclusion, Lord Wilson made clear, at [32], that "the interpretation of habitual residence should be consonant with its international interpretation". He set out, what is now, the established approach to the determination of habitual residence derived from *Proceedings brought by A*, *Mercredi v Chaffe* and *A v A*. He summarised the effect of *A v A* as being, at [38], that:

> "… this court held that the criterion articulated in the two European authorities ("some degree of integration by the child in a social and family environment"), together with the non-exhaustive identification of considerations there held to be relevant to it, governed the concept of habitual residence in the law of England and Wales: para 54(iii)(v) of Baroness Hale of Richmond DPSC's judgment, with which all the members of the court (including Lord Hughes JSC, at para 81) agreed. Baroness Hale DPSC said at para 54(v) that the European approach was preferable to the earlier English approach because it was "focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors".
> "

He then added (part of which I have quoted above):

> **"**[39] It is worthwhile to note that the new criterion requires not the child's full integration in the environment of the new state but only a degree of it. It is clear that in certain circumstances the requisite degree of integration can occur quickly. For example, article 9 of Regulation B2R, the detail of which is irrelevant, expressly envisages a child's acquisition of a fresh habitual residence within three months of his move. In the *J* case, cited above, Lord Brandon suggested that the passage of an "appreciable" period of the time was required before a fresh habitual residence could be acquired. In *Marinos v Marinos*

> [2007] 1 FLR 1018, para 31, Munby J doubted whether Lord Brandon's suggestion was consonant with the modern European law; and it must now be regarded as too absolute. In *A v A*, cited above, at para 44, Baroness Hale DPSC declined to accept that it was impossible to become habitually resident in a single day."

57. The above summary of the current approach to habitual residence provided the foundation for Lord Wilson's consideration, at [40], of "the object of central relevance to this appeal, namely the point at which habitual residence is lost". Although this was of central relevance in that case, it is clear from his judgment that he did not intend to change or replace the clear guidance given in *A v A* and other cases as to the approach the court should take to the determination of habitual residence.

58. Further, it is also clear that Lord Wilson's analogy and his other observations were directed simply to the expectation that the acquisition of a new habitual residence would be likely to coincide with the loss of the previous habitual residence. He did not intend to alter the key question which, in every case, is: where is the child habitually resident? Even though the acquisition of a new habitual residence can be expected to coincide with the loss of the previous one, hence the see-saw analogy, this issue is not determined by asking simply the question whether a child has lost their habitual residence. In addition to the passages I have quoted above, this is clear from his observation, at [46], that "the identification of a child's habitual residence is overarchingly a question of fact" and from the balancing exercise he undertook, at [49] and [50].

59. Lord Wilson's conclusions were, in full, as follows:

> "[45] I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it.
>
> [46] One of the well-judged submissions of Mr Tyler QC on behalf of the respondent is that, were it minded to remove any gloss from the domestic concept of habitual residence (such as, I interpolate, Lord Brandon's third preliminary point in the *J* case [1990] 2 AC 562), the court should strive not to introduce others. A gloss is a purported sub-rule which distorts application of the rule. The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him: (a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in

> the new state; (b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."

In summary, the "expectations" referred to by Lord Wilson were clearly just that and were expressly not intended to alter the established approach to the determination of the issue of habitual residence. He made clear that they were *not* glosses on the concept of habitual residence nor, as Mr Turner submitted, did they represent an alternative approach to that set out in *A v A*. They were, at most, suggestions of what the "fact-finder may well find" at the conclusion of his factual enquiry and were *not* the objective of the factual enquiry.

60. Finally, we were referred to *Re G-E* in which I noted, at [59], both the global analysis required and the comparative nature of the exercise which may be required when there are two states in which a child may be habitually resident. The latter was demonstrated by the exercise Lord Wilson undertook in *In re B* when he analysed, at [49] and [50], the factors which pointed to the child having "achieved the requisite degree of disengagement from her English environment" and those which pointed to the child having "achieved the requisite degree of integration in the environment in Pakistan".

61. In conclusion on this issue, while Lord Wilson's see-saw analogy can assist the court when deciding the question of habitual residence, it does not replace the core guidance given in *A v A* and other cases to the approach which should be taken to the determination of the habitual residence. This requires an analysis of the child's situation in and connections with the state or states in which he or she is said to be habitually resident for the purpose of determining in which state he or she has the requisite degree of integration to mean that their residence there is habitual.

62. Further, the analogy needs to be used with caution because if it is applied as though it is the test for habitual residence it can, as in my view is demonstrated by the present case, result in the court's focus being disproportionately on the extent of a child's continuing roots or connections with and/or on an historical analysis of their previous roots or connections rather than focusing, as is required, on the child's *current* situation (at the relevant date). This is not to say continuing or historical connections are not relevant but they are part of, not the primary focus of, the court's analysis when deciding the critical question which is *where* is the child habitually resident and not, simply, *when* was a previous habitual residence lost.

63. In many cases, as in the present case, the parties and the court have used the summary of the law set in by Hayden J in *Re B*, at [17]. I agree that this is a helpful summary save that, for the same reasons given above, what is set out in sub-paragraph (viii) (which I quote below) might distract the court from the essential task of analysing "the situation of the child" *at* the date relevant for the purposes of establishing jurisdiction or, as in the present case, whether a retention was wrongful. Accordingly, in future I would suggest that, if Hayden J's summary is being considered, this sub-paragraph

should be omitted so that the court is not diverted from applying a keen focus on the child's situation at the relevant date:

> "(viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (*In re B* - see in particular the guidance at para 46)."

64. The law on Article 13(b) was not in dispute in this case and I do not need to set out the cases which establish that it has a high threshold because of the need for the risk to be "grave" and for the circumstances for a child to be "intolerable".

65. I also do not propose to deal with the law relating to Mr Turner's third point (c), namely deferring the implementation of a return order because, for the reasons set out below, it does not arise in this case.

Determination

66. It is clear, as submitted by Mr Turner, that the judge considered the question he had to answer was whether the children had *lost* their habitual residence in Germany. I suppose, in some respects, it may not matter how a judge phrases the question he has to ask provided it is clear that he has correctly approached the issue as being, to adopt what Lord Wilson said in *In re B*, the "identification of a child's habitual residence". What is important is whether the way in which the question has been phrased leads to the judge failing to apply the proper approach and, again to adopt what Lord Wilson said, applying a "gloss", namely an approach which "distorts [the] application of" the proper approach to the determination of a child's habitual residence.

67. In my view, to adopt, alternatively, what Lady Hale said in *A v A*, the judge in this case was led to make a different decision to that which a "factual enquiry" would have produced by his focus on the question of whether the children had lost their habitual residence in Germany. It does not matter what led the judge to take this path but it seems likely that it was, what appears to have been, his understanding of some of Lord Wilson's comments in *In re B* and, in particular, the see-saw analogy.

68. As set out above, Lord Wilson's see-saw analogy was not intended to deflect the court from applying the established approach. Habitual residence is, I repeat, a question of fact which requires a global analysis of all the relevant circumstances in order to identify the child's habitual residence *at* the relevant date, namely the date of the wrongful abduction or the wrongful retention. In my view, the judge reached a different decision to that which a factual enquiry would have produced as a result of asking, not where the children were habitually resident as at the end of July 2019 but whether they had by then lost their German habitual residence. This resulted in the judge's analysis having the wrong focus.

69. This can be seen from the following. At [41], the judge identified as the "difficult task" for him as being "to evaluate whether [the children] had lost [their] connection with Germany as they gained the position in" England. As Mr Turner submitted, this gives the impression that the judge considered that the children had to have lost their connection with Germany before they could become habitually resident in England.

This can also be seen from the judge's later observation, at [52], that if there had been "no contact with the father … then it may be that a change in terms of their integration and their habitual residence would have been found".

70. In addition, the judge, more than once, phrased the key question he had to answer as being whether the children "had lost their German habitual residence". As Mr Turner acknowledged, the judge had recognised, at [44], that the "relevant question is whether a child has achieved some degree of integration" and did not need to be "fully integrated". However, although the judge did then briefly address some aspects of the children's lives in England, he went back to the same key question: "as I have indicated, although there is a degree of integration, certainly something that is happening for them, the question is have they lost their German habitual residence".

71. I have taken the whole judgment into account, but in my view the judge's approach to the issue of habitual residence is encapsulated in his summary of the key factors, at [46], as being: that the parents' intentions in June 2019 continued to be that the mother and the children would be returning to Germany; and that the children were "still spending time with family in Germany in July and … still had a life there". There is no reference to the fact that they had, at least, some degree of integration in England and whether, as a result, they were habitually resident here.

72. If the judge had asked himself the "essential question" as referred to by Lady Hale in *In re LC*, at [60], namely whether the children, as at the end of July 2019, had achieved a sufficient degree of integration into a social and family environment in England such that their residence here was habitual, I have no doubt that he would have concluded that they had.

73. The children had moved here with their primary carer in July 2018. They established their home here with her. They intended to stay for "12 months or so". They went to school in England. They "settled quickly" in part because they were familiar with the place to which they had moved and "loved" the local environment. They spent significantly more of the year up to July 2019 in England than they did in Germany. They clearly became integrated not to "some degree" but to a very substantial degree in a social and family environment in this country.

74. In my view, there would have to be some powerful countervailing factors to lead to the conclusion that the children were not habitually resident here by July 2019. The factors relied on by the judge were, in summary, the parents' intentions and the time the children were spending with their father and other family members in Germany thereby maintaining their connections with Germany. These are important factors but, in my view, they do not counterbalance the degree of integration that the children had established in England. I would want to emphasise that this is not to diminish the importance for the children of their continuing connections with Germany. Rather, it is that they are not sufficient to mean that the children were not habitually resident in England because of the powerful factors demonstrating the extent of their integration and the stability of their life with their mother in England.

75. Accordingly, in my view, the appeal must be allowed. Further, because it is clear to me that, on any proper application of the appropriate test, the children were habitually in England at the date of their retention, the father's application under the 1980 Convention must be dismissed.

76. It is not, therefore, necessary for me to address the other issues raised on behalf of the mother. I would simply say that there is some force in Mr Turner's submission that the judge did not sufficiently consider the likely effect on the children of returning to Germany. However, it is not necessary to decide whether this would have been sufficient to overturn the judge's conclusion that Article 13(b) was not established, although I doubt whether it would have been.

Lady Justice Simler:

77. I agree.

Sir Stephen Richards:

78. I also agree.