Trinity Term
[2013] UKSC 60
On appeal from: [2012] EWCA Civ 1396 & [2013] EWCA Civ 232

JUDGMENT

In the matter of A (Children) (AP)

before

Lady Hale, Deputy President
Lord Wilson
Lord Reed
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

9 September 2013

Heard on 22 and 23 July 2013

Appellant
James Turner QC
Alistair Perkins
Hassan Khan

(Instructed by Dawson Cornwell)

Respondents
Henry Setright QC
Manjit Gill QC
Edward Devereux
David Marusza
(Instructed by Thompson & Co)

Intervener (Reunite International)
Richard Harrison QC
Peter Newman

(Instructed by Bindmans LLP)

Intervener (Children and Families Across Borders)
Alex Verdan QC
Jacqueline Renton
Michael Gration
(Instructed by Farrer & Co LLP)

Intervener (The Centre for Family Law and Practice)
Baroness Scotland QC
Ruth Kirby
Rachel Chisholm
Maeve O'Rourke
(Instructed by Hodge Jones & Allen)

LADY HALE (with whom Lord Wilson, Lord Reed and Lord Toulson agree)

1. The issue in this case is whether the High Court of England and Wales has jurisdiction to order the "return" to this country of a small child who has never lived or even been here, on the basis either that he is habitually resident here or that he has British nationality.

The facts

2. The child, whom I shall call Haroon, was born on 20 October 2010 in Pakistan. His father (born in 1973) is one of five siblings, who were all born in England to parents who came here to live from Pakistan in the 1960s. His mother (born in 1978) is the father's first cousin. She was born and brought up in Pakistan and entered into an arranged marriage with the father in Pakistan in 1999. She joined the father here the following year and they lived together in a property shared with other members of the father's family. The mother and father have three children together who were born here: a daughter born in 2001, who is now 12, a second daughter born in 2002, who is now 10, and a son born in 2005, who is now eight. The father and children have dual British and Pakistani nationality and the mother has indefinite leave to remain here. This much is uncontentious.

3. The subsequent history was in dispute at the fact-finding hearing before Parker J in the High Court. However, the father had remained in Pakistan throughout, had never made a witness statement, and was neither present nor (by the final day) represented at the hearing. His version of events was put forward by his brother. The judge ordered him to take part by telephone but he could not be reached at the number through which he had previously been reached. The judge had no doubt that the telephone had been deliberately turned off. Nevertheless, she insisted that the mother give evidence and put the father's version of events to her "quite forcefully". She found the mother to be an "intelligent, careful and precise witness" and accepted her evidence. The following are therefore the facts as found by the judge.

4. The marriage was happy until 2006, when the father began to spend a good deal of time in Pakistan. In 2008, the mother complained of physical abuse by the father and moved with the three children into a refuge. Early in 2009, they moved into a flat owned by the father's brother, PA, for which the mother paid rent. The mother planned to take the children on a trip to Pakistan in the autumn to visit her father. She obtained Pakistani identity cards for them, was given leave of absence from their school, and travelled out with them on 13 October 2009, with tickets to

return early in November. She did not know that the father was going to be in Pakistan at the same time.

5. While they were staying at her father's home, the father, his mother and another brother arrived and, together with her own father, insisted that the parents reconcile. The mother felt that she had no choice: there was physical and emotional coercion. She returned with the father to his family home in Pakistan and was forced to give up her own and the children's passports, although she later managed to retrieve her own. But she made it clear that she wanted to return with the children to England. The judge did not find it necessary to make "any specific finding about violence". She was "quite satisfied that such pressure was put on the mother that she had no choice in her own mind, particularly because she did not want to leave her children and that she was frightened of the consequences".

6. In February 2010, the mother became pregnant with Haroon. The refuge in England confirmed that, from that month, she was making telephone calls to them asking for their help to return with the children to England. After Haroon was born, the father brought proceedings for custody of the children in Pakistan. In December 2010, the mother's father brought proceedings, as the judge termed it, "essentially for habeas corpus" of the mother and the four children. It appears that both sets of proceedings were dropped. Eventually, in May 2011, the mother's father sent elders round to the father's family to persuade them to let the mother leave for a few days to stay with relatives. She was thus able to leave the country with their help and return to England, but she had to leave the children behind.

7. These proceedings began on 20 June 2011 with an order made by Peter Jackson J without notice to the father. By that order, the judge made all four children wards of court and ordered that they be returned to England and Wales by the father forthwith. Every person within the jurisdiction who was in a position to do so was ordered to co-operate in assisting and securing the children's immediate return. Any person not within the jurisdiction who was in a position to do so was requested to co-operate in assisting and securing their immediate return. The judicial, administrative and law enforcement authorities of the Islamic Republic of Pakistan were requested to use their best endeavours to assist in taking any steps which might appear to them necessary and appropriate in locating, safeguarding and facilitating the return of the children in accordance with the spirit of the UK-Pakistan Judicial Protocol on Children Matters signed by the Chief Justice of Pakistan and the President of the Family Division of the High Court of England and Wales on 17 January 2003. That order was served on the father in Pakistan and confirmed by Her Honour Judge Coates on 30 September 2011.

8. On 31 October 2011, the mother obtained a without notice order from Eleanor King J freezing the father's assets in this country, with a view to

sequestration as a means of persuading the father to comply with the court's orders or at least of providing the mother with funds to litigate in Pakistan. This brought the father's brother, PA, into the proceedings, as he is co-owner of one of the properties specifically named in the order. The order was confirmed by Her Honour Judge Cahill QC on 28 November 2011 after a hearing at which the father was represented by counsel, but not present. The matter was listed for determination of the jurisdiction question in February 2012. Despite various manoeuvrings in an attempt to have it postponed, the hearing went ahead before Parker J, with the father playing no part and PA now acting in person with another brother, JA, as his McKenzie friend. PA had also filed two witness statements setting out the case for the father and his family.

9. On 20 February 2012, Parker J determined that all four children were habitually resident in England and Wales: [2012] EWHC 663 (Fam). She was satisfied that the mother never voluntarily sought for the children to live in Pakistan. She rejected the father's assertion that there was an agreement that the parents should reconcile and live in Pakistan. She accepted that the mother never acquiesced, became resigned or consented to her and the children remaining in Pakistan. The three older children therefore retained their habitual residence in England. Adopting the approach of Charles J in *B v H (Habitual Residence: Wardship)* [2002] 1 FLR 388, she determined that Haroon, too, was habitually resident here, having been born to a mother who remained habitually resident here and who was kept in Pakistan against her will. She continued both the wardship and the freezing orders and again ordered that the children be returned to this jurisdiction by their father forthwith.

10. The father and his brother applied for permission to appeal out of time to the Court of Appeal, which heard the case in July 2012. The reserved judgment was sent to the parties in October 2012, but the order was not made until 31 January 2013, when a short supplemental judgment was delivered: [2012] EWCA Civ 1396 and [2013] EWCA Civ 232. The Court unanimously dismissed the father's appeal in respect of the three older children, described by Patten LJ as "quite hopeless". But by a majority, Rimer and Patten LJJ, his appeal in relation to Haroon was allowed, on the ground that the acquisition of habitual residence in any country requires the child in question to be physically present there. Habitual residence is a question of fact and a rule that a newly born child is presumed on birth to take the habitual residence of his parents "would be a legal construct divorced from actual fact". It would also be inconsistent with the approach of the Court of Justice of the European Union. *B v H (Habitual Residence: Wardship)* should be overruled. Thorpe LJ dissented. In his view a baby born to a mother resident here while on holiday abroad would be habitually resident here from the moment of birth and not from the time when he entered this country. But he recognised that "on its facts this case narrowly falls on the right side of an important boundary".

11. The judgment also invited the parties to make further submissions on whether England and Wales was the right forum in which to determine the future of the older children, given the Court's decision about Haroon. By the time of the hearing in January this year, it was clear that leading counsel now instructed on behalf of the mother would be seeking permission to appeal to this Court and wished to raise nationality as an alternative basis of jurisdiction. The most economical course, therefore, was for him to seek to argue the point in this Court and for the Court of Appeal to defer any consideration of the father's forum non conveniens argument until the outcome in this Court was known.

The legislation

12. Jurisdiction in cases concerning children is governed by two pieces of legislation. The Family Law Act 1986 resulted from recommendations of the Law Commission and Scottish Law Commission: *Family Law: Custody of Children – Jurisdiction and Enforcement within the United Kingdom* (1984, Law Com No 138, Scot Law Com No 91). Its principal purpose was to provide a uniform scheme for jurisdiction, recognition and enforcement of custody and related orders as between the three different jurisdictions within the United Kingdom. But the jurisdictional rules also apply as between England and Wales (and the other jurisdictions in the United Kingdom) and other countries.

13. The rules as originally laid down in the 1986 Act have been modified to take account of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, otherwise known as the Brussels II revised Regulation ("the Regulation"), which is of course directly applicable in United Kingdom law. They also now take account of the 1996 Hague Convention on the Protection of Children, but that was not incorporated into United Kingdom law until after the relevant date for our purposes, which all are agreed is 20 June 2011, when the first order was made.

The scope of the Act and the Regulation

14. Part I of the 1986 Act applies only to "Part I orders", defined for England and Wales in section 1(1). For our purposes, the following are relevant:

> "(a) a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order; . . .

(d) an order made by a court in England and Wales in the exercise of the inherent jurisdiction of the High Court with respect to children –

(i) so far as it gives care of a child to any person or provides for contact with, or the education of, a child; but

(ii) excluding an order varying or revoking such an order;"

15. Article 1 of the Regulation defines its scope. By article 1.1(b) it applies to civil matters relating to "the attribution, exercise, delegation, restriction or termination of parental responsibility". Article 1.2 gives a non-exhaustive list of examples, including "(a) rights of custody and rights of access; (b) guardianship, curatorship and similar institutions; (c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; …" Article 1.3 contains a list of exclusions, none of which is relevant here.

16. Article 2 of the Regulation defines some terms, including:

"2.7 the term 'parental responsibility' shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access; . . .

2.9 the term "rights of custody" shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence."

17. The first question, therefore, is whether the order first made by Peter Jackson J and repeated by Her Honour Judge Coates and by Parker J is either a "Part I order" within the meaning of the 1986 Act or an order relating to parental responsibility within the meaning of the Regulation.

Jurisdiction under the 1986 Act

18. If it is a Part I order, section 2 of the 1986 Act provides relevantly as follows:

> "(1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless – (a) it has jurisdiction under the Council Regulation, or (b) the Council Regulation does not apply but ... (ii) the condition in section 3 of this Act is satisfied. . . .
>
> (3) A court in England and Wales shall not make a section 1(1)(d) order unless – (a) it has jurisdiction under the Council Regulation, or (b) the Council Regulation does not apply, but (i) the condition in section 3 of this Act is satisfied, or (ii) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection."

19. Section 3 relevantly provides:

> "(1) The condition referred to in section 2(1)(b)(ii) of this Act is that on the relevant date the child concerned – (a) is habitually resident in England and Wales, or (b) is present in England and Wales and is not habitually resident in any part of the United Kingdom, . . ."

The omission of a reference to section 2(3)(b)(i) from section 3(1) appears to be an oversight which does not alter the sense of the provisions.

20. Thus, if the order in question is a Part I order, the first port of call is the Regulation. But if it is not a Part I order, and is an order relating to parental responsibility within the meaning of the Regulation, the first port of call is also the Regulation, because it is directly applicable in United Kingdom law. That, however, raises the prior question of whether the jurisdictional scheme in the Regulation applies not only in cases potentially involving two or more European Union members who are parties to the Regulation (all save Denmark) but also in cases potentially involving third countries such as Pakistan.

The jurisdictional scheme in the Regulation

21. The general rule is contained in article 8:

> "1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

2. Para 1 shall be subject to the provisions of Articles 9, 10 and 12."

22. Article 9 provides for the courts of a child's former habitual residence to retain jurisdiction to modify a judgment about access rights for three months after the child has lawfully moved from one Member State to another. More significantly, Article 10 provides for cases where a child has been wrongfully removed or retained. The courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention retain jurisdiction until the child has acquired a habitual residence in another Member State and either each person with rights of custody has acquiesced in the removal or retention or (to paraphrase) the child lived there for at least a year after the person left behind should have known his whereabouts, the child is settled there and (in effect) there are no extant proceedings for his return. Article 12 gives jurisdiction in relation to parental responsibility if the child has a substantial connection with that Member State, all parties have accepted that jurisdiction, and it is in the best interests of the child: the application of this provision in a case where the child was habitually resident in Pakistan was considered by this Court in *Re I (A Child) (Contact Application: Jurisdiction)(Centre for Family Law and Practice intervening)* [2009] UKSC 10, [2010] 1 AC 319..

23. Two other articles also give jurisdiction. Article 13 gives jurisdiction to the courts of the Member State where the child is present, if the child's habitual residence cannot be established and article 12 does not determine jurisdiction. More relevantly in this case, article 14 provides for a residual jurisdiction:

> "Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State."

24. Finally, reference should be made to articles 15, 19 and 20, all of which address potential conflicts between the courts in different Member States. Article 15 provides, by way of exception, that the courts of the Member State having jurisdiction may transfer the case to another Member State with which the child has a particular connection, if it would be better placed to hear the case, and this is in the best interests of the child. Article 19.2 and 19.3 provide that, where proceedings relating to parental responsibility in respect of the same child are brought in different Member States, the court second seised must stay the proceedings until it is established whether the court first seised has jurisdiction, and if that court does have jurisdiction the second court must decline it. Article 20 allows the courts of a Member State to take provisional measures in urgent cases, even if another has jurisdiction over the substance of the matter.

Was this a Part I order?

25. Mr Henry Setright QC argues on behalf of the father and his brother that the order made by Peter Jackson J fell within section 1(1)(a) of the 1986 Act because it was a "specific issue order" made under section 8 of the Children Act 1989. This is defined as "an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child": see s 8(1). Mr James Turner QC argues on behalf of the mother that, because the order was made in proposed proceedings under the inherent jurisdiction of the High Court, it could not be a Children Act order. Neither is completely right.

26. The court has power to make any section 8 order of its own motion in any "family proceedings" in which a question arises with respect to the welfare of any child: see s 10(1)(b). Proceedings under the inherent jurisdiction of the High Court are family proceedings for this purpose: see s 8(3)(a). So, assuming for the moment that an order to return or bring a child to this jurisdiction falls within the definition of a specific issue order, the judge might have made such an order even though this was not what the mother applied for. But that is not what he did. There are many orders relating to children which may be made either under the Children Act 1989 or under the inherent jurisdiction of the High Court: an order authorising a blood transfusion for a Jehovah's Witness child is a good example. There is no mention of the Children Act 1989 in the order made by Peter Jackson J, which specifically refers to the inherent jurisdiction and moreover also makes the children wards of court, which is not an order available under the Children Act 1989.

27. So does the order fall within section 1(1)(d) of the 1986 Act? Quite clearly it does not fall within the wording of that para. It is not an order giving care of a child to any person or providing for contact with or education of a child. Moreover it is clear from the Law Commissions' Report that the Scottish Law Commission had regretfully acknowledged the view of the Law Commission that "a review of the wardship jurisdiction beyond the core areas of care and control, access and education would require further consultation and could not now be undertaken in this exercise without causing unacceptable delay": Law Com No 138, para 1.25.

28. I conclude, therefore, that the order made by Peter Jackson J and repeated by Parker J fell neither within section 1(1)(a) or section 1(1)(d) of the 1986 Act and was therefore not covered by the jurisdictional prohibitions in section 2 of that Act.

Was this an order relating to parental responsibility within the scope of the Regulation?

29. Parental responsibility is given a wide definition in article 2.7 and must include deciding where the child shall be for the time being. The order to bring the children to this jurisdiction related to the exercise of that power. Furthermore, the order made the children wards of court, which places them in the guardianship of the High Court, and is thus one of the examples expressly referred to in article 1.2(b). I conclude, therefore, that the orders made did fall within the scope of the Regulation.

Does the Regulation apply where there is a rival jurisdiction in a non-Member State?

30. The Regulation deals with jurisdiction, recognition and enforcement in matrimonial and parental responsibility matters. Chapter III, dealing with recognition and enforcement, expressly deals with the recognition in one Member State of judgments given in another Member State: see article 21.1. But there is nothing in the various attributions of jurisdiction in Chapter II to limit these to cases in which the rival jurisdiction is another Member State. Article 3 merely asserts that in matters relating to divorce, legal separation or marriage annulment "jurisdiction shall lie with the courts of the Member State" in relation to which the various bases of jurisdiction listed there apply. Article 8 similarly asserts that the courts of a Member State "shall have jurisdiction in matters of parental responsibility . . ." Furthermore, article 12.4 deals with a case where the parties have accepted the jurisdiction of a Member State but the child is habitually resident in a non-Member State, thus clearly asserting jurisdiction as against the third country in question. Hence in *Re I (A Child) (Contact Application: Jurisdiction)*, this Court held that article 12 did apply in a case where the child was habitually resident in Pakistan. There is no reason to distinguish article 12 from the other bases of jurisdiction in the Regulation.

31. In *Owusu v Jackson* (Case C-281/02) [2005] QB 801, the Court of Justice of the European Communities held that the rule in article 2 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Measures 1968, which required that "persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that state", meant that the courts of that state had to assume jurisdiction, even though there was a third country which also had jurisdiction and even though that country was, on the face of it, the more appropriate forum in which to bring the action. Thus the English court was not only empowered but obliged to assert and exercise jurisdiction rather than leave the parties to the jurisdiction of a state (Jamaica) which was not party to the Convention.

32. We have not heard detailed argument on whether the courts of a Member State which has jurisdiction in respect of parental responsibility for a child under the Brussels II revised Regulation is obliged to exercise that jurisdiction even though there is a third country which would be better placed to hear the case. The wording of articles 3 and 8 of the Regulation is not the same as that in article 2 of the Brussels Convention. Furthermore, article 19 of the Regulation deals with the position where there are pending proceedings in two Member States and article 15 allows the courts of the Member State having jurisdiction to transfer the case to another Member State in appropriate circumstances (see para 24 above). It might therefore be thought anomalous for this to be precluded in a case where the courts of a non-Member State were better placed to hear the case.

33. In the context of matrimonial proceedings, it has twice been held in the High Court that *Owusu v Jackson* does not prevent the court from invoking the statutory power (in section 5(6) and para 9 of Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973) to stay proceedings here if there are already proceedings in a non-Member State: see *JKN v JCN (Divorce: Forum)* [2010] EWHC 843 (Fam); [2011] 1 FLR 826 and *AB v CB* [2012] EWHC 3841 (Fam); [2013] 2 FLR 29. We are told that permission to appeal has been granted in the latter case. It would therefore be unwise of us to express a view on the position in children's cases, which might well require us to make a reference to the Court of Justice. The relevance of *Owusu v Jackson* is merely to reinforce the conclusion that the jurisdiction provisions of the Regulation do indeed apply regardless of whether there is an alternative jurisdiction in a non-Member State.

Is there jurisdiction under article 8 of the Regulation?

34. Jurisdiction under article 8 depends upon where the child is habitually resident. It has hitherto been thought (see, for example, Dicey, Morris and Collins on *The Conflict of Laws*, 15th Edition (2012), Rules 17(2) and 18(2); Clarke Hall and Morrison on *Children*, paras 234 and 236) that the concept of habitual residence, as developed by the courts of England and Wales for the purposes of both the 1986 Act and the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Hague Child Abduction Convention"), is different from the concept of habitual residence as interpreted by the Court of Justice of the European Union for the purposes of the Regulation. Very recently, in *DL v EL* [2013] EWCA Civ 865, at para 48, the Court of Appeal has expressed the view that "there is now no distinction to be drawn" between the test adopted in each of those three contexts. As we are dealing only with habitual residence under the Regulation, it is not strictly necessary for us to resolve that debate.

35. Nevertheless, it is highly desirable that the same test be adopted and that, if there is any difference, it is that adopted by the Court of Justice. There are several

reasons for this. First, the Law Commissions recommended the adoption of "habitual residence" in part because it had been widely used in international conventions, including the Council of Europe Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (1981) Cmnd 8155 and the Hague Child Abduction Convention, and was likely to be recognised abroad: see Law Com No 138, para 4.15. As Advocate General Kokott pointed out in *Proceedings brought by A* (Case C-523/07) [2010] Fam 42, various international conventions, in particular the Hague Convention of the Protection of Minors 1961, the Hague Convention on the Protection of Children 1996 which superseded it, and the Hague Convention on the Civil Aspects of International Child Abduction 1980, formed part of the legislative history of the Regulation. In part, the Regulation supersedes them. In part, they operate alongside one another. The "fields of application of the various instruments must be consistently demarcated from one another". This presumed a "uniform understanding of the concept of habitual residence" (para AG23). Thus it would appear that the purpose of both the 1986 Act and the Regulation was to adopt a concept which would apply across the board.

36. Secondly, as both the Law Commissions and the Advocate General pointed out, that concept was to be distinguished from "the legalistic concept of domicile" (para AG31). As Professor Perez-Vera put it in her Explanatory Report on the Hague Child Abduction Convention:

> "66. . . . We shall not dwell at this point upon the notion of habitual residence, a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile."

To the same effect are the first two of the four well-known propositions of Lord Brandon in the leading English case on habitual residence under the Child Abduction Convention, *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, 578:

> "The first point is that the expression 'habitually resident', as used in article 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case."

37. Thirdly, however, as Rhona Schuz has put it "Many courts have been unable to resist the temptation to 'legalise' the concept" ("Habitual residence of children under the Hague Child Abduction Convention – theory and practice" (2001) 13 CFLQ 1, at 4). In particular, the courts in England and Wales have supplied their own test, derived from the test of "ordinary residence" regarded by the House of Lords in *R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309 as settled law, itself derived from taxation statutes. Lord Scarman defined it thus, at 343:

> "Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."

(See, for example, *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887; *Al-Habtoor v Fotheringham* [2001] 1 FLR 951; *Re R (Abduction: Habitual Residence)* [2004] 1 FLR 216; *Re P-J (Children) (Abduction: Consent)* [2010] 1 WLR 1237; *Re H-K (Habitual Residence)* [2012] 1 FLR 436).

38. This test has at least two disadvantages. In the first place, the Law Commissions deliberately adopted "habitual" rather than "ordinary" residence, because the latter frequently occurred in tax and immigration statutes and they thought that its use in the wholly different context of family law was a potential source of confusion (Law Com No 138, para 4.15). Furthermore, the reference to adopting an abode "voluntarily and for settled purposes" is not readily applicable to a child, who usually has little choice about where he lives and no settled purpose, other than survival, in living there. If this test is adopted, the focus inevitably shifts from the actual situation of the child to the intentions of his parents.

39. Fourthly, and perhaps for that reason, the English courts have been tempted to overlay the factual concept of habitual residence with legal constructs. The most important of these is the "rule" that where two parents have parental responsibility for a child, one cannot change the child's habitual residence unilaterally: this dates back at least as far as a dictum of Lord Donaldson MR in the Court of Appeal in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, at 572, and the decision of Wall J in *In re S (Minors)(Child Abduction: Wrongful Retention)* [1994] Fam 70, approved by the Court of Appeal in *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887, 892, and taken for granted ever since. It was for this reason that Patten LJ regarded the father's appeal in relation to the three older

children as "quite hopeless". Recognising a unilateral fait accompli would be a "charter for abduction" (para 52).

40. The father has not challenged that conclusion in this Court and so the question is not before us. It is worth noting that the "rule" has not been universally adopted: see, for example, *Mozes v Mozes* 239 F 3rd 1067 (9th Circuit 2001); *SK v KP* [2005] 3 NZLR 590. Nor is there a hint of it in the European jurisprudence. It would not inevitably be a charter for abduction. Both the 1986 Act and the Regulation contain provisions designed to retain jurisdiction in the country where a child was formerly habitually resident for at least a year after his wrongful removal or retention: see 1986 Act, s 41 (albeit that it has been held that this does not apply as between the United Kingdom and other countries: *Re S (A Child: Abduction)* [2002] EWCA Civ 1941, [2003] 1 FLR 1008) and Regulation, article 10 (see para 22 above). As Lord Hughes points out, article 10 provides a good reason why the courts of England and Wales retain jurisdiction over the three older children in any event. The Hague Child Abduction Convention is concerned with wrongful removal or retention of a child from the country where he was habitually resident *immediately before* that wrongful removal or retention: see article 3. As Lord Hughes also points out, the "rule" is more relevant in retention than removal cases, but the answer may lie in treating the unilateral change of habitual residence as the act of wrongful retention, even if it takes place before the child was due to be returned. The matter may therefore require fuller consideration in another case, but it is not necessary for us to express a concluded view.

41. Fifthly, of course, once one adopts concepts of this sort, it becomes tempting to construct another "rule", that a child's habitual residence is necessarily that of his primary carer or carers. In *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, Lord Brandon continued, at 579C:

> "The fourth point is that, where a young child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers."

42. It may then seem a small step to apply this principle to a case in which the child has never even been present, let alone lived, in the country where his primary carer is habitually resident. It is not difficult to think of examples where this would accord with both the underlying reality and the "criterion of proximity" referred to in Recital 12 to the Regulation. In this case, Thorpe LJ gave the example of "an English mother habitually resident in England who gives birth to a child in France. As a result of complications mother and child are hospitalised for an extended period before they are fit to come home" (para 29). In his view, the child was habitually resident in England from birth and not just from when she set foot in this country. In *In re T (A Child)(Care Proceedings: Request to Assume*

Jurisdiction [2013] EWHC 521 (Fam), [2013] Fam 253, a pregnant 17 year old Slovakian girl ran away from a children's home in Slovakia and gave birth to the baby here. While deciding to transfer the case to Slovakia under article 15, Mostyn J "would instinctively conclude that an infant's habitual residence derives from his mother" (para 41) were it not for the Court of Appeal's decision in this case. In *B v H (Habitual Residence: Wardship)* [2002] 1 FLR 388, both parents were habitually resident in England, where the child was conceived, but she was born in Bangladesh, after the father had refused to let the mother and the other children return home from a holiday. Charles J held that all the children, including the new baby, were habitually resident here. He placed some reliance on *Re J* (above) and also took the view that to erect a positive rule that physical presence was a necessary prerequisite to establishing an habitual residence ran "counter to the proposition . . . that habitual residence is, or is primarily, an issue of fact and is not an artificial concept" (para 133). The facts of this case are, of course, very similar to those of *B v H*.

43. It follows from the requirement that residence be habitual that it is not lost by temporary absences, such as that of the mother giving birth while on holiday in France or the mother on the run from a Slovakian children's home. Thus one can be habitually resident somewhere where one is not actually present at the relevant time. No-one doubts that this mother remained habitually resident in England during her enforced absence in Pakistan. From this too, it can appear artificial to construct a rule that physical presence at some time, however fleeting, is an essential pre-requisite.

44. On the other hand, the English jurisprudence recognises that a person may have no country of habitual residence. In *Re J,* at 578-9, Lord Brandon said this:

> "The third point is 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. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B."

I share Lord Hughes' view that the third and fourth points made by Lord Brandon are best seen as helpful generalisations of fact, which will usually but not invariably be true, rather than as propositions of law. There has been a tendency to

construe this fourth statement as if it were a statute, and debate the meaning of "appreciable time". I would not accept that it is impossible to become habitually resident in a single day. It will all depend upon the circumstances. But I would accept that one may cease to be habitually resident in one country without having yet become habitually resident in another.

45. Finally, as we have seen, in the vast majority of cases jurisdiction will now be governed by the Regulation, which the courts in the United Kingdom will have to construe in accordance with the guidance given by the Court of Justice.

46. How then does the English approach square with that of the Court of Justice of the European Union? That court has considered the matter in two cases. *Proceedings brought by A* (Case C-523/07) [2010] Fam 42 concerned a family who had originally lived in Finland but then moved to live in Sweden. Some years later, they travelled to Finland in a camper van, originally for the holidays, moving from campsite to campsite and the children did not go to school. But in October the parents applied to the Finnish authorities for social housing. So were the children habitually resident in Finland?

47. Advocate General Kokott stressed that habitual residence had to be distinguished from mere presence (para AG20), and also from "the legalistic concept of domicile" (para AG31). She proposed that it should correspond to "the actual centre of interests of the child" (para AG38); the court should take account of all factors present when it was seised of the case (para AG 39); the duration and regularity of residence and the child's familial and social integration may be particularly significant (para 40).

48. The "actual centre of interests" concept dates back to Professor Steiger's Explanatory Report to the 1961 Protection of Children Convention and has been adopted by the Court of Justice in other contexts. But in *Proceedings brought by A* the Court accepted that the approach under the Regulation should be different from the approach in other areas of European Union law. Their approach was a child-centred one:

> "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." (Emphasis supplied)

The operative part of the judgment put it this way:

> "2. The concept of 'habitual residence' under article 8(1) . . . 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."

49. *Mercredi v Chaffe* (Case C-497/10 PPU) [2012] Fam 22 concerned a two month old baby born in England to unmarried parents and removed by her French mother to the French island of La Réunion. The English court made orders for her return four days later. But proceedings in France under the Hague Child Abduction Convention failed because the father did not have rights of custody. Was the child habitually resident in England and Wales when the orders were first made? The Court of Justice repeated much of the guidance in *Proceedings brought by A*, including this:

> "49 . . . in order to determine where a child is habitually resident, *in addition to the physical presence of the child* in a member state, other factors must also make it clear that that presence is not in any way temporary or intermittent." (Emphasis supplied)

50. The court went on to point out that the child's age is liable to be of particular importance. Normally it is the social and family environment of the child which is fundamental in determining habitual residence. But where the child concerned is an infant:

> "55 . . . An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where . . . the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the court's case law, such as the reasons for the move by the child's mother to another member state, the languages known to the mother or again her geographic and family origins may become relevant."

The operative part of the judgment put it this way:

> "1 The concept of 'habitual residence' . . . must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a member state – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that member state and for the mother's move to that state and second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that member state."

51. Incidentally, although not directly relevant to the point which we have to decide, concern had been expressed in the English courts at other passages in *Mercredi v Chaffe* which appeared to import a requirement of permanence for residence to be habitual. At first instance in *DL v EL*, Sir Peter Singer compared the French and English texts of the judgment, which showed that the French text had almost throughout used "stabilité" rather than permanence and in the one place where it did use "permanence" it was as an alternative to "habituelle": [2013] 2 FLR 163, paras 71 et seq. It was this comparison which helped the Court of Appeal to conclude that there was no difference between the English and European approaches.

52. Understandably, Mr Setright concentrates on the phrase "in addition to the physical presence of the child" which appears in both judgments. He can also pray in aid the view previously taken in the English courts that, in order to be habitually resident, one must first be resident, and that in order to be resident once must at least have set foot in a country (see, for example, *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887, per Sir John Balcombe at 895, heavily relied upon by Patten LJ in this case). He does, however, accept that a child can acquire the parent's habitual residence almost immediately after arriving there.

53. Mr Turner stresses that the point with which we are concerned simply did not arise in either *Proceedings brought by A* or *Mercredi v Chaffe*: the question was whether the children were habitually resident in the place where they were. The references to physical presence should be read in the context of the Advocate General's argument in *Proceedings brought by A* that "habitual residence must be distinguished from mere presence" (AG20). In *Mercredi* the court had regarded the habitual residence of an infant as depending on the social and family integration of the mother, thus implying that the child's habitual residence would be that of the mother, even if the child had never been there. This is consistent with Lord Brandon's fourth point in *Re J* (above), with the undoubted proposition that one

can be habitually resident without being physically present at the relevant time, and with the realities of a young child's situation.

54. Drawing the threads together, therefore:

i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.

ii) It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.

iii) The test adopted by the European Court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.

iv) It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.

v) In my view, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from *R v Barnet London Borough Council, ex p Shah* should be abandoned when deciding the habitual residence of a child.

vi) The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.

vii) The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.

viii) As the Advocate General pointed out in para AG45 and the court confirmed in para 43 of *Proceedings brought by A*, it is possible that a child may have no country of habitual residence at a particular point in time.

55. So which approach accords most closely with the factual situation of the child – an approach which holds that presence is a necessary pre-cursor to residence and thus to habitual residence or an approach which focusses on the relationship between the child and his primary carer? In my view, it is the former. It is one thing to say that a child's integration in the place where he is at present depends upon the degree of integration of his primary carer. It is another thing to say that he can be integrated in a place to which his primary carer has never taken him. It is one thing to say that a person can remain habitually resident in a country from which he is temporarily absent. It is another thing to say that a person can acquire a habitual residence without ever setting foot in a country. It is one thing to say that a child is integrated in the family environment of his primary carer and siblings. It is another thing to say that he is also integrated into the social environment of a country where he has never been.

56. However, I cannot be confident that this is acte claire for the purpose of European Union law, for several reasons. First, the Court of Justice has not so far had to consider a case such as the present, or indeed any of the examples given in para 42 above. Second, the facts are particularly stark. This child would probably not have been conceived, and certainly would not have been born and kept in Pakistan, had his mother not been held there against her will. Without that, the child would undoubtedly have become habitually resident in this country. Third, the European Court would have to consider the implications for the Hague Child Abduction Convention if a child such as this, or a child born on holiday, were held to have no country of habitual residence. The whole Convention, beginning with article 3, is predicated upon there being a state where the child is habitually resident immediately before the wrongful removal or retention. Can it be the case that the Convention would not apply if the child born to an English mother while on holiday abroad were abducted from the hospital?

57. Fourth, there is judicial, expert and academic opinion in favour of the child acquiring his mother's habitual residence in circumstances such as these. Principal amongst those judicial opinions is the conclusion reached by Lord Hughes in this very case. Reunite International Child Abduction Centre, the leading non-governmental organisation specialising in advice, assistance, mediation and research in relation to international child abduction and the movement of children across international borders, have intervened in this case in support of the mother. They submitted that, while there should be no rule that a new-born child takes the habitual residence of the mother, the child's place of birth should carry little weight where the only reason that the child has been born in a particular place is because the mother has been deprived of her autonomy to choose where to give

birth. The Centre for Family Law and Practice, whose co-Director has conducted some important research into child abduction, similarly submitted that a person who had used such coercion should not be enabled to deprive the child of the protection of the courts of the country where he would otherwise have been born. More broadly, it has been suggested that, given the inherent vagueness of the concept, the decision in any particular case will inevitably depend upon a balance between the applicable policy considerations: see Rhona Schuz, "Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context" (2001) 11 *J Transnational Law and Policy* 101.

58. Hence I would not feel able to dispose of this case on the basis that Haroon was not habitually resident in England and Wales on 21 June 2010 without making a reference to the Court of Justice. But we can only refer a question to the Court if it is necessary for us to determine the case before us. For the reasons which will appear below, it is not at present so necessary.

Is there another basis of jurisdiction?

59. Article 14 applies where no court of a Member State has jurisdiction under articles 8 to 13. No other Member State is involved in this case. Either the courts of England and Wales have jurisdiction under article 8 or no court of a Member State does so. In that case, the jurisdiction of England and Wales is determined by the laws of England and Wales.

60. We have already established that the prohibition in section 2 of the 1986 Act does not apply to the orders made in this case. The common law rules as to the inherent jurisdiction of the High Court continue to apply. There is no doubt that this jurisdiction can be exercised if the child is a British national. The original basis of the jurisdiction was that the child owed allegiance to the Crown and in return the Crown had a protective or parens patriae jurisdiction over the child wherever he was. As Lord Cranworth LC explained in *Hope v Hope* (1854) 4 De GM & G 328, at 344-345:

> "The jurisdiction of this Court, which is entrusted to the holder of the Great Seal as the representative of the Crown, with regard to the custody of infants rests upon this ground, that it is the interest of the State and of the Sovereign that children should be properly brought up and educated ; and according to the principle of our law, the Sovereign, as *parens patriae,* is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects. The first question then is**,** whether this principle applies to children born out of the allegiance of the Crown ; and I confess that I

> do not entertain any doubt upon the point, because the moment that it is established by statute that the children of a natural born father born out of the Queen's allegiance are to all intents and purposes to be treated as British born subjects, of course it is clear that one of the incidents of a British born subject is, that he or she is entitled to the protection of the Crown, as *parens patria.*"

61. The continued existence of this basis of jurisdiction was recognised by the Court of Appeal in *Re P (GE) (An Infant)* [1965] Ch 568, where Lord Denning MR said this:

> "The court here always retains a jurisdiction over a British subject wherever he may be, though it will only exercise it abroad where the circumstances clearly warrant it: see *Hope v Hope* (1854) 4 De GM & G 328; *In re Willoughby* (1885) 30 Ch D 324; *R* v *Sandbach Justices, ex p Smith* [1951] 1 KB 62."

The Law Commissions in their Report also recognised its continued existence, while pointing out that "there appears to be no reported decision in which jurisdiction to make a wardship order has been based on the allegiance of a child who was neither resident nor present in England and Wales" (see Law Com No 138, paras 2.9 and 4.41). In fact, *Hope* was just such a case, as the boys in question had been born in France to British parents, had never lived here (although they had been brought here for a few days by their father), and were in France when the proceedings were begun.

62. However, in *Al Habtoor v Fotheringham* [2001] 1 FLR 951, para 42 Thorpe LJ advised that the court should be "extremely circumspect" and "must refrain from exhorbitant jurisdictional claims founded on nationality" over a child who was neither habitually resident nor present here, because such claims were outdated, eccentric and liable to put at risk the development of understanding and co-operation between nations. But in *Re B; RB v FB and MA (Forced Marriage: Wardship: Jurisdiction)* [2008] 2 FLR 1624, Hogg J did exercise the jurisdiction in respect of a 15 year old girl born and brought up in Pakistan, who had never been here but did have dual Pakistani and British nationality. She had gone to the High Commission in Islamabad asking to be rescued from a forced marriage and helped to come to Scotland to live with her half-brother. The High Commission wanted to help her but felt unable to do so without the backing of a court order. Hogg J made the girl a ward of court and ordered that she be brought to this country. The half-brother was assessed as offering a suitable home and in fact she went to him. Hogg J explained that she thought the circumstances "sufficiently dire and exceptional": para 10. In *Re N (Abduction: Appeal)* [2013] 1 FLR 457, McFarlane LJ commented that "If the jurisdiction exists in the manner described by Hogg J then

it exists in cases which are at the very extreme end of the spectrum" (para 29). The facts of that case were certainly not such as to require the High Court to assume jurisdiction over the child in question.

63. In my view, there is no doubt that the jurisdiction exists, insofar as it has not been taken away by the provisions of the 1986 Act. The question is whether it is appropriate to exercise it in the particular circumstances of the case. Mr Turner accepts that Parker J did not address herself to this basis of jurisdiction and to whether, if Haroon were not habitually resident here, it would be appropriate to exercise it. He accepts that the case will have to return to her in order for her to do so.

64. Mr Setright, with the able assistance of Mr Manjit Gill QC, has raised a number of important general considerations which may militate against its exercise. It is inconsistent with and potentially disruptive of the modern trend towards habitual residence as the principal basis of jurisdiction; it may encourage conflicting orders in competing jurisdictions; using it to order the child to come here may disrupt the scheme of the 1986 Act by enabling the child's future to be decided in a country other than that where he or she is habitually resident. In a completely different context, there are also rules of *public* international law for determining which is the effective nationality where a person holds dual nationality.

65. All of these are reasons for, as Thorpe LJ put it in *Al Habtoor*, "extreme circumspection" in deciding to exercise the jurisdiction. But all must depend upon the circumstances of the particular case. Among the factors which may be relevant in this case are:

i) The father is now estopped from denying that the three older children are habitually resident here. There is no obstacle to their future being decided in this country, which is undoubtedly the country with which they had the closest connection until they were prevented from leaving Pakistan to return here in November 2009.

ii) The basis upon which the father proposed to mount a forum non conveniens argument in relation to the older children was that the High Court did not have jurisdiction in relation to Haroon. If it is determined that the High Court should exercise its jurisdiction in relation to Haroon, that argument disappears. The father should not be permitted to raise any other arguments in relation to the older children which he could have raised at first instance.

iii) Nevertheless, arguments as to the appropriate forum in which to decide Haroon's future will be relevant to whether it would be right for the High Court to exercise its inherent jurisdiction based on nationality in his case.

iv) Among those arguments will be the practicability of the mother litigating the children's future in Pakistan, in the light of the findings already made by the judge. How reasonable is it to expect her to return to that country, given what happened to her there previously? Conversely, how reasonable is it to expect the father to return here, where he was born and has lived for most of his life and has property and other family members?

v) The circumstances in which these children came to be in Pakistan, and the coercion to which their mother was subject, while not determinative, are highly relevant factors.

vi) It is troubling that these proceedings have been continuing for so long without any inquiry being made about how the children are. Children and Families across Borders (formerly International Social Service) have helpfully intervened to suggest how this might be done, and the judge may wish to consider what they say.

66. We are told that the father wishes to file evidence in relation to the issue which is to be remitted to the judge. However, he must not be permitted to reopen the factual and legal issues which have been decided against him. He must not be permitted to take any advantage from his past refusal to take part in the proceedings, to file or to give evidence, or to obey court orders.

67. The judge has already decided to exercise jurisdiction on the basis that Haroon is habitually resident here. Should she decide not to exercise jurisdiction on the basis of his nationality and allegiance, it will become necessary to decide whether he is indeed habitually resident here. As already explained, this Court cannot resolve that question without referring it to the Court of Justice. The parties should therefore have liberty to apply to this Court for a reference to be made in the event that a decision on the point becomes necessary.

Conclusion

68. The appeal is allowed. The case is remitted to Parker J to consider as a matter of urgency whether to exercise the Court's inherent jurisdiction in relation

to Haroon. The case should be listed before her for directions as soon as possible with a hearing as soon as possible thereafter.

LORD HUGHES

69. I gratefully acknowledge Lady Hale's exposition of the facts of this case, and I agree with her about the order which this court should make to dispose of this appeal. I also respectfully agree with much the greater part of her reasoning en route to that proposed order. I do not, however, feel able to leave the case without setting out some observations on the issue of the habitual residence of the youngest child, which is the question on which the appeal came to this court, and on which at present the last word in this jurisdiction is that of the majority of the Court of Appeal. The point is of some importance since although it is unusual for the habitual residence of a newborn baby to fall for consideration when he has not yet reached the shores of his family's established home, both this case and *B v H (Habitual Residence: Wardship)* [2002] 1 FLR 388 show that it is by no means hypothetical. Moreover, although in the present case there exists another possible basis for the jurisdiction of the English court, similar events to those which have taken place here could very easily occur in a family which was well established and settled here, but which did not have British nationality.

70. As to the several other issues in the case it is enough to set out in the briefest terms my agreement with each of the propositions which follow.

i) The order made by the judge for the return of the children to England, including the youngest, was an order "...relating to…the exercise…of parental responsibility" within the terms of Articles 1(1)(b) and 2(7) of the (directly effective) Council Regulation EC 2201/2003 ("Brussels II revised").

ii) It follows that the jurisdiction of the English court falls to be exercised on one or more of the bases set out in Articles 8 to 14 of Brussels II revised, and that the primary basis is, as provided for by Article 8, the habitual residence of the child at the time at which the court was seised of the application by Mother.

iii) The order made by the judge was not a "Part I order" within the terms of the Family Law Act 1986, and therefore the jurisdiction of the English court is not confined by that Act to the basis of the habitual residence of the child.

iv) The order made by the judge was made in the course of the court's very longstanding wardship jurisdiction over children, which has always been available in the case of a child who is a British national, irrespective of the child's habitual residence or current whereabouts.

v) As a matter of English law, this nationality based jurisdiction should be exercised with great caution in a case where the habitual residence of the child in England is not established, but there will be some instances where it is proper to exercise it.

vi) If it be the case that the youngest child is not habitually resident in England, he is not habitually resident in any State which is a member of the European Union. In that event, if it is proper under English law for the English court to exercise jurisdiction on the basis of his nationality, such jurisdiction is available to the court within Brussels II Revised through Article 14.

vii) The judge has not had the opportunity to consider the exercise of jurisdiction in relation to the youngest child on the basis of his nationality. The case should be remitted to her to address this possibility, and also for her to consider Father's application to stay the English proceedings on the grounds that Pakistan is on the facts a more convenient and suitable forum for the determination of the children's future.

viii) The factors set out in Lady Hale's judgment at paras 64 and 65 will be amongst those potentially relevant to the judge's remitted enquiry. I also agree that if Father is to be permitted to adduce further evidence it must be limited to evidence which addresses the remitted issues and does not attempt to re-open the factual matters on which the judge has already made findings: see para 66 of Lady Hale's judgment.

ix) There is no occasion for us to resolve the difficulty presented by *Owusu v Jackson* nor its impact (if any) on family cases governed by Brussels II revised.

Habitual residence: the youngest child

71. This is not the place to attempt a wide-ranging analysis of all aspects of habitual residence. Indeed the most commonly troublesome questions, namely those associated with moves from one country to another which one side contends to be temporary and the other to be sufficiently settled, do not arise in this case.

What follows is directed only to the decision of the Court of Appeal in the present case that there exists a rule which requires that before a person can be habitually resident in a jurisdiction, he or she must at some time have been physically present there. Some general considerations must, however, be set out if that issue is to be addressed.

72. I agree with Lady Hale who has identified the long-standing tension between the generally accepted proposition that habitual residence is a question of fact and the desire to provide some guidance on the approach which courts should adopt when deciding whether it has been demonstrated. A good example is *Mozes v Mozes* (2001) 239 F 3rd 1067. At times, the guidance offered comes close to being framed as propositions of law, although usually this has not been the intention of the authors. Such intention was disclaimed in *Mozes v Mozes* and it is absent also, I think, from the locus classicus in England and Wales of Lord Brandon of Oakbrook's speech in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562. There Lord Brandon made it clear (at 578G) that the question whether someone was or was not habitually resident in a particular country

> "…is a question of fact to be decided by reference to all the circumstances of any particular case."

He then went on to offer a number of general guides to the determination of the issue. Immediately after the proposition just cited he said this:

> "The third point is 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. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that, where a child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers."

It will be seen that that immediately following passage offers at least three generally stated propositions, many of which have since been treated in some

quarters as amounting to propositions of law. One is that an habitual residence in country A may be abandoned in a single day. A second is that habitual residence in country B cannot be established (or, as English lawyers are prone to say, "acquired") in a single day, and a third is that an infant who is in the sole lawful custody of his mother will necessarily have the same habitual residence as she has (or, as English lawyers are prone to say, will "derive" his habitual residence from hers).

73. Lord Brandon's propositions are, as it seems to me, much better regarded as helpful generalisations of fact than as propositions of law. He cannot have intended them to operate as propositions of law without destroying his starting point, namely that habitual residence is a question of fact, to be determined by consideration of all the circumstances. However, whether or not that is the correct analysis of *Re J*, it is now clear from the jurisdiction of the Court of Justice of the EU that habitual residence is a question of fact: see below.

74. Consistently with treating habitual residence as a question of fact, it seems to me that each of Lord Brandon's supplemental propositions will clearly usually be true. An émigré flying from Heathrow to a new home in Australia, who has sold every possession in England and intends to make a permanent home in Sydney will surely normally no longer be habitually resident in England from the day of his departure. But it might perhaps be different if he had neglected to obtain permission from Australia to re-locate, and decided at Dubai that he would return to England. A person arriving in a foreign country hoping to make his permanent home there will no doubt in many cases not be regarded as habitually resident there until he has established himself, with home, occupation, permission to reside and so on. But if he has pre-arranged all of this and is joining his spouse and family, it might well be that his habitual residence would be established more or less immediately on arrival.

75. The same is true of Lord Brandon's third generalisation, which is of direct relevance to the present case. One commonly relevant factor in the establishment of habitual residence is clearly the intention of the individual. But an infant of very tender years is in no position to form any independent intention. His or her habitual residence will normally be established by belonging to a family unit which has habitual residence in a particular place, and the infant will thus share it. As a generalisation it is therefore plainly true that the infant will normally share the habitual residence of the person who has lawful custody of him, and this is a valuable aid to courts. But this is not an invariable rule of law, and it is not too difficult to envisage factual situations in which this proposition will not be true. If a young unmarried woman who is habitually resident in State A but whose parents live in State B becomes pregnant and determines to give birth to her child back at the home of her parents, and thereafter by agreement with them to leave the child there to be brought up by them, she will no doubt remain habitually resident in

State A. If State A is England she will, by English law, have the 'sole lawful custody' of the child (ie sole parental rights and the right, unless and until a court intervenes, to determine where the child lives). But neither before or after she travels back to England after the birth, leaving the child in State B as planned, will the child will "derive" his habitual residence from hers as a matter of law, nor will he share it with her as a matter of fact.

76. The trans-national movement of children in the course of disputes about their upbringing, and the associated forum-shopping by parents and others, is a major international problem. Its incidence has only grown since the 1980 Hague Convention, with the increase in cross-border personal relationships and the ever-greater ease of international travel. The 1980 Convention may on occasion operate as a relatively blunt instrument, and no one would claim that its necessarily summary procedure is incapable of ever resulting in injustice, but its contribution to controlling this international problem has been immense. As between the large number of party States, it proceeds upon the basis that in the event of wrongful removal or retention of a child there should normally be a summary return to the State of his or her habitual residence and that the necessary, and often finely balanced, merits decisions which fall to be made are to be made in the courts of that country. In turn, wrongful removal or retention is to be ascertained by reference to the rights of the parties under the law of the State in which the child was habitually resident immediately before the event. This has spawned, in England at least, a proposition closer than those above to a rule of law, namely that where two parents have parental responsibility for a child, one of them cannot by unilateral action alter the habitual residence of the child: see Lord Donaldson of Lymington MR in the Court of Appeal in *Re J (A Minor) (Abduction: Custody Rights)* supra at 572 and Wall J in *In re S (Minors) (Abduction: Wrongful Retention)* [1994] Fam 70. The occasion for propounding this 'rule' was not so much the case of wrongful removal but that of wrongful retention. In most cases of wrongful removal, the habitual residence of the child immediately before removal will not be put in doubt by the unilateral actions of one parent. But in the case of wrongful retention, it may. If for example the child, hitherto living with parent A in State A, is visiting parent B in State B under an agreement for contact, and whilst there parent B unilaterally makes arrangements for the child to stay permanently, such as by obtaining immigration rights, enrolling at school and taking similar associated steps, it may be contended that such steps cause the child thereafter to be habitually resident in State B. If, additionally, the view is taken that retention does not occur until the time arrives at which the child is due to return to State A, the argument can be advanced that by then the child is habitually resident in State B, where it follows that retention cannot be wrongful. To hold that parent B's unilateral actions cannot bring about a change of habitual residence is one route to ensuring that the 1980 Convention is not made ineffective in such a case.

77. It seems to me important to note this situation, which is not rare. As Lady Hale explains at paras 39-40, Brussels II revised contains provisions designed for such a case. Article 10 preserves the jurisdiction of State A not only until habitual residence has been established in State B but also until either all relevant persons have acquiesced in the removal/retention or (broadly) a year has passed, the child is settled and there has been unjustified failure to object, or the courts of State A have reached a determination inconsistent with the continued exercise of jurisdiction. But neither under Article 10 nor the 1980 Hague Convention can this continuing jurisdiction in State A operate if by the time of retention (or even removal) habitual residence has already changed. What matters most is that State A can make an effective order for return. This may be either under the 1980 Hague Convention (as chiefly it will be) or outside it, as may well be possible if the person ordered to make the return is present in State A or has property there (as here). So what matters is where the child's habitual residence was immediately before the removal or retention.

78. I agree with Lady Hale that we are not called upon to resolve this question in the present case, which must await another day. I also agree that it is apparent from Article 10 that Brussels II revised contemplates that habitual residence may shift at some stage *after* a wrongful removal or retention. It may well be that the problem identified can be resolved consistently with the effectiveness of the 1980 Hague Convention. It may well be that the correct view is that unilateral acts designed to make permanent the child's stay in State B are properly to be regarded as acts of wrongful retention, notwithstanding that the scheduled end of the child's visit has not yet arrived. Such a conclusion is not, to my mind, in any way precluded by the decision of the House of Lords in *Re H (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476, which holds no more than that a specific act of retention must be identified, and it is consistent with the decision of Wall J in *In re S* (supra). The significance of the point here is simply twofold. First, Brussels II Revised is, notwithstanding that in the event of conflict it prevails over the 1980 Hague Convention (see Article 60), clearly meant to co-exist consistently with that Convention remaining effective – see for example Articles 10 and 11 – and it ought to be construed wherever possible with that very important objective in mind; in particular the concept of habitual residence needs to be construed similarly in each of the two instruments. Second, providing this approach is adopted, it is unlikely that even in this situation it is necessary to formulate a rule of law that a child's habitual residence cannot unilaterally be changed by one parent where two parents both have parental responsibility.

79. The general approach advanced above is, I believe, wholly consistent with the decisions of the CJEU on the approach to habitual residence in *Proceedings brought by A* (Case C-523/07) [2010] Fam 42 and *Mercredi v Chaffe* (Case C-497/10PPU) [2012] Fam 22.

80. In accordance with its usual practice when dealing with the same issue in successive cases, the court used substantially the same language in each. The following principal propositions can be extracted from the decisions.

i) The meaning of 'habitual residence' is autonomous, that is to say not governed by differing national laws on the topic: *A's case* at para 34.

ii) One of the great values of habitual residence as a base for jurisdiction is proximity: *A's case* at para 35; by this the court clearly meant the practical connection between the child and the country concerned.

iii) The question is one of fact. At para 37 in *A's case*, repeated at para 47 in *Mercredi v Chaffe* the court said:

"The "habitual residence" of a child, within the meaning of article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case."

iv) Simple physical presence is not by itself sufficient. At para 38 in *A's case* the court said:

"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."

Those words were substantially repeated in *Mercredi v Chaffe* at para 49.

v) Those other factors will mainly be, in the case of a child, those which show 'some degree of integration in a social and family environment': see paras 38 and 44 in *A's case* and identical language at para 47 in *Mercredi v Chaffe*. Thus, for example, on the facts of *A's case* where the issue was whether the stay was enduring or intermittent, they are likely to include, as the court said at paras 39 and 44:

"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."

This formulation was preferred by the court to that suggested by the Advocate General in *A's case*, namely the 'actual centre of interests' (see AG at para 38).

vi) Similarly, in the case of a child, the intention of the parent or parents will normally be a relevant factor. At para 40 in *A's case*, repeated at para 50 in *Mercredi v Chaffe*, the court said:

"the intention of the person with parental responsibility to settle permanently with the child in another member state, manifested by certain tangible steps such as the purchase or rental of accommodation in the host member state, may constitute an indicator of the transfer of the habitual residence"

On the facts of *Mercredi v Chaffe* where the child was a babe in arms and the issue was less whether the presence was intermittent than whether there was sufficient endurance to amount to habitual residence, this factor was of greater significance.

vii) The duration of the stay is a relevant factor but is not determinative. In *Mercredi v Chaffe* at para 51 the court said:

"In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host state, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case."

The use of the word 'permanence' (which did not appear in *A's case)* must, for the reasons explained by Lady Hale at para 51, be read together with the

careful analysis of Sir Peter Singer in *DL v EL* [2013] EWHC 49 (Fam), [2013] 2 FLR 163, endorsed by the Court of Appeal at [2013] EWCA Civ 865.

viii) Generally speaking, an infant will share the habitual residence of the parent(s) with whom he or she lives. In *Mercredi v Chaffe* at paras 54 – 55 the court said:

"54. As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.

55 That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment."

ix) In exceptional circumstances a person may have no habitual residence: *A's case* at para 43.

81. It follows from the above that I respectfully agree with the helpful summary given by Lady Hale at para 54.

82. To the extent that the Court of Appeal in the present case held that the youngest child did not 'derive' his habitual residence from his mother as a matter of law, I agree, for the reasons set out above. But in my view the court was wrong to attribute the argument for Mother to a contention for dependent habitual residence. This is essentially what Patten LJ did at para 61 when he considered and rejected the case for a special rule for newly born children:

"One could construct a rule by which a newly born child was presumed to take on birth the habitual residence of its parents or custodial parent. But the rule would be a legal construct divorced from actual fact which is what the court in *B v H (Habitual Residence: Wardship)…* said that it was anxious to avoid and which has been rejected in all the earlier decisions of this court. It would also run contrary to this court's acceptance in cases such as *Al*

> *Habtoor v Fotheringham*… that a child's habitual residence is not to be treated as necessarily the same as that of his parents."

83. I entirely agree that no such rule exists. But it does not follow that England was not the youngest child's habitual residence and I am unable to see that the application of the approach set out above produces the conclusion to which the majority of the Court of Appeal came, namely that he *could not* be habitually resident in England simply because he had never been physically present here.

84. Both Patten and Rimer LJJ proceeded on the basis that it is a minimum legal requirement of habitual residence that there has at some time been physical presence. The decision amounts to a rule of law at least to the extent that it propounds a general proposition that factual habitual residence *cannot be achieved* without physical presence at some time. Rimer LJ put it thus at 38:

> "As regards the youngest child, H, the position is different. He was born in Pakistan and has never set foot in England and Wales. In respectful disagreement with Thorpe LJ, I agree with Patten LJ, for the reasons he gives, that it follows that H cannot be said to have been habitually resident in England and Wales at the date of either order. The decisions of this court in *In re M (Abduction: Habitual Residence)* [1996] 1 FLR 887 and *Al Habtoor v Fotheringham* [2001] 1 FLR 951 show that the question of whether a person is habitually resident in a particular country is one of fact. They further show that an essential ingredient in the factual mix justifying an affirmative answer is that the person was at some point resident in that country; and that it is not possible to become so resident save by being physically present there. If there has been no residence there, there can be no habitual residence there."

For his part, Patten LJ, at 47, derived from the same cases a "boundary" to the effect that:

> "The acquisition of habitual residence in any country requires the adult or child in question to be physically present there."

He returned to that proposition at 60, saying:

> "As the cases recognise, residence denotes and involves a physical presence."

85. Both judgments thus relied upon passages in *In re M (Abduction: Habitual Residence)* [1996] 1 FLR 887 and *Al Habtoor v Fotheringham* [2001] FLR 951. In the former, parents of Indian origin who were living in England agreed on their separation to send their son to India for his minority, to be brought up by his grandparents. Mother subsequently changed her mind and sought to make the child, still in India, a ward of the English court. The issue was whether her decision changed the habitual residence of the boy back to England. The argument was that it did because the continuing assent of both parents was necessary as a matter of law to his continuing habitual residence being in India. That argument was rejected, as it is clear it would be today both in Europe and in England. It is perfectly correct that Sir John Balcombe said this at 895:

> "Before a person, whether a child or an adult, can be said to be habitually resident in a country, it is clear that he must be resident in that country. Of course, residence does not necessarily require physical presence at all times. Temporary absence on holiday, or for educational purposes (as in *Re A),* will not bring to an end habitual residence. But here the judge found as a fact, and on ample evidence, that K became habitually resident in India. He has never to this day come back to England. As a matter of fact, he has not been resident in England since he went to India in February 1994. Bracewell J held that the mother's change of mind both brought to an end K's habitual residence in India and gave him an habitual residence in England.
>
> I have the gravest doubts whether the first proposition is correct. Clearly, the mother's change of mind could not alter the fact that he was, and is, physically resident in India. Whether her change of mind could alone alter the 'habitual' nature of that residence I very much doubt, but in any event it is not necessary finally to decide that point on this appeal, since the one thing about which I am quite clear is that the child's residence in India could not become a residence in England and Wales without his ever having returned to this country. As I said before, the idea that a child's residence can be changed without his ever leaving the country where he is resident is to abandon the factual basis of 'habitual residence' and to clothe it with some metaphysical or abstract basis more appropriate to a legal concept such as domicil."

To like effect, Millett LJ said simply at 896:

> "While it is not necessary for a person to remain continuously present in a particular country in order for him to retain residence there, it is not

> possible for a person to acquire residence in one country while remaining throughout physically present in another."

It was sufficient for the decision that that independent habitual residence was not altered simply by the wish of one parent. It is unsurprising that the fact that the boy had remained in India was treated as an additional reason why his habitual residence was still there. He had clearly established an habitual residence independent of his parents. The court did not have before it the case of an infant who has no independence of his parents but is by contrast integrated into the family unit of one of them.

86. In the later case of *Al Habtoor v Fotheringham* the whole family unit of which the child was part had emigrated to Dubai where the boy's father lived. Some months later the mother and stepfather became disenchanted with Dubai, quarelled with father and returned to England without the boy. On the question of habitual residence, the issue was whether the boy's had reverted to England because Mother's had. That was an argument for dependent (or legally "derived") habitual residence, which the court rightly rejected. In doing so, Thorpe LJ cited the passages above quoted from *Re M*. They were clearly cited for the rejection of dependent habitual residence. Once again, the fact that the boy remained in Dubai was an additional reason why his habitual residence remained there. Once again, the court did not have to consider the case of an infant who was an integrated member of a family unit which was habitually resident in a particular place and did not change it. In the present case Thorpe LJ clearly did not regard either this decision or *Re M* as binding the Court of Appeal to hold that the youngest child could not be habitually resident in England because he had not yet physically reached these shores, for he dissented from the decision that it did. Particularly given his unrivalled experience of all aspects of cross border family issues, his views deserve considerable weight. This court is not in any event bound even if the Court of Appeal was, but for my part I agree with him.

87. Next, the majority in the Court of Appeal treated the CJEU cases as inconsistent with the youngest child having an habitual residence in England. Patten LJ (with whom Rimer LJ agreed) said at para 62 that such a proposition

> "would also clearly be inconsistent with the approach set out in *Mercredi v Chaffe* …. which contemplates a detailed examination of whether a child's presence in a particular jurisdiction involves a sufficient engagement with a settled family life in that place as to amount to habitual residence."

Of course the enquiry in both *A's case* and *Mercredi v Chaffe* would involve a detailed examination of the connection or engagement of the child with a settled family life in Finland or France respectively, but that was because the issue in those cases was whether the family unit as a whole had sufficiently settled to be habitually resident in the new country. In neither case did the court have to consider the case of an infant who is an integrated member of a family unit which was habitually resident in State A although currently detained against the will of the adult in State B. Whilst in both cases the court incorporated into its decision, at paras 38 and 49 respectively, the need for other evidence "in addition to mere presence" it is crystal clear that this was said in order to demonstrate that mere presence was not automatically *sufficient*. Neither court was concerned with the question whether presence is always *necessary*.

88. The CJEU emphasised in both cases the importance of examining the degree of integration of the child into a social and family environment. It emphasised in *Mercredi v Chaffe* at paras 54 – 55, cited above at para 80(viii), the manner in which an infant's environment is essentially a family one. In the present case, the youngest child was born into a family unit which consisted of his mother and siblings; Father had been, when in England, estranged from it and living elsewhere. This family unit had its habitual residence in England. So, in my view, did the youngest child. He similarly would have shared their habitual residence if he had been born unexpectedly whilst mother was on holiday in Spain, or at sea on a cruise or in transit. In any of these situations, if one asked anyone but a lawyer where the newly born child was habitually resident, the answer would, in my view, have been "With his mother, brother and sisters of course". The same would be true, as it seems to me, if he was born to his mother at a time when she was running away from home and temporarily abroad, like the mother in flight from Slovakia in *In re T (a Child)(Care Proceedings; Request to Assume Jurisdiction)* [2013] EWHC 521 (Fam); [2013] Fam 253.

89. The slightly different facts of *H v H (Jurisdiction to Grant Wardship)* [2011] EWCA Civ 796; [2012] 1 FLR 23, to which we were referred after the hearing, illustrate the factual nature of the enquiry. There the British father, of Afghan origin, travelled back to Afghanistan to marry. His wife, the mother, planned to come to England but had never left Afghanistan when their first child was born. Her subsequent journey (alone) to England may have resulted in her own habitual residence being established in England, but clearly could not affect that of the child, which was understandably conceded by experienced counsel to be in Afghanistan. There was in that case no family unit with an habitual residence in England, into which the child was born. Nor was there any question of Mother being detained in Afghanistan by coercion. There was rightly no suggestion in the Court of Appeal of any rule of law either that the child "derived" habitual residence from one or other parent, or that the fact that the child had never been

present in England was alone enough to resolve the question. Jurisdiction based on the nationality of the child was not advanced in that case.

90. The sole question on this part of this case is whether the factual enquiry required is overlain by a rule which prevents a person from being habitually resident in a place where he has not yet set foot. I see no occasion for any such rule. There is, I entirely agree, also no 'rule' automatically ascribing habitual residence by dependence to a place to which the child has never been. There is a factual enquiry into the integration of the family unit to which he or she belongs, and that may well yield the conclusion that the child shares the habitual residence of that unit even if he has not yet achieved physical presence there, especially if he is being prevented by coercion or other force majeure from doing so. The decision of the Court of Appeal in this case involves a rule or general proposition because it necessarily excludes habitual residence without some past physical presence. The contrary approach, which to my mind is correct, involves no rule or generality at all, save for the advice to look, in the case of an infant, at the position of the family unit of which he is part. This does not involve a rule for dependent habitual residence. It merely asserts the possibility that habitual residence may exist in a State which is the home of the family unit of which the infant is part, and is where he would be but for force majeure.

91. It is true of course that if one focuses on the position after a year or more in Pakistan it is no doubt the case that one will find links and a degree of integration perforce experienced by the youngest child in that country. He has extended family there. He is physically cared for there. But that is, in this case, only because he, as well as his siblings, have been wrongfully detained there by coercion.

92. It is also of course true that in the great majority of cases, habitual residence is characterised by actual residence, that is to say physical presence. But it is well established that although rules of law are generally inappropriate the concept of habitual residence is necessarily to some extent a legal one; as Patten LJ said at para 59, it is a jurisdictional concept. And it is well established that habitual residence can and often does co-exist with actual current absence. If current physical presence is not essential, then so also can habitual residence exist without any physical presence yet having occurred, at least if it has only been prevented by some kind of unexpected force majeure.

93. There can be no doubt about the jurisdiction of the English court in relation to the elder siblings. This is not because of any rule of law which prevents one of two parents from unilaterally altering the habitual residence of a child. It is because as the 1980 Hague Convention requires, in the case of abduction, whether removal or, as here, retention, the acid test is habitual residence immediately

before the event. They were resident in England. They went to Pakistan only for a three week holiday. There they have been wrongfully retained. For the same reason, Article 10 of Brussels II revised maintains the jurisdiction of the English court. The only difference between the elder children and the youngest is the accidental fact that he has not yet reached the shores of his homeland. The reason why he has not done so is because he has been wrongly detained elsewhere by coercion. In my view he is, like them, a member of a family unit which is firmly based in England and when born into it he was like the rest of its members habitually resident there. His wrongful retention commenced immediately afterwards. Indeed, if the Court of Appeal is right, he could now be removed to another country without the removal being wrongful; such successive transportation of children to avoid enforced return is by no means unknown. There would, in my respectful view, be a serious failure of the protection afforded by the 1980 Hague Convention and Article 10 if a newly born child in this situation is held to have no habitual residence and thus to be incapable of wrongful removal or retention. I am unable to see any sufficient reason for such a conclusion.

94. I accept of course that, this view being a minority one, it cannot be said to be acte claire, so that if this case or some other were to turn on the point, reference to the CJEU would be indicated. At present, this case does not turn on it.