Neutral Citation Number: [2020] EWCA Civ 1187

Case No: B4/2020/0698

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE FAMILY DIVISION
Mrs Justice Judd

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 September 2020

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE BAKER
and
LORD JUSTICE PHILLIPS

- -

B (A Child) (Abduction: Habitual Residence)

- -

Mr Richard Harrison QC and Ms Katy Chokowry (instructed by **The International Family Law Group LLP**) for the **Appellant Father**
Ms Jacqueline Renton and Ms Charlotte Baker (instructed by **Access Law**) for the **Respondent Mother**
Mr Christopher Hames QC and Mr Harry Langford (instructed by **Freemans Solicitors**) for **The International Centre for Family Law, Policy and Practice**

Hearing date: 16 July 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Thursday 10th September 2020

Lord Justice Moylan:

1. The father appeals from the dismissal on 8 April 2020 by Judd J of his application under the 1980 Hague Child Abduction Convention ("the 1980 Convention") for an order that the parties' child (B) be returned to France. The application was dismissed because the judge decided that B was habitually resident in Australia, and not in France, at the date of the mother's retention of B in England and Wales and that, as a result, the 1980 Convention did not apply. The judge did not, therefore, determine whether the mother had established either acquiescence or the existence of a grave risk under Article 13(b), both of which she relied upon.

2. The brief background is that in December 2019 the family moved from Australia, where they had been living for a number of years including since B's birth, to live in France. They arrived in France on 2 December. On 20 December the family came to England and Wales to stay with the mother's family over the Christmas holidays. The father returned to France on 27 December to commence his new job. On 3 January 2020 the mother told the father that she and B would not be returning to France.

3. At the hearing below it was accepted, although the basis of this is not entirely clear, that the father's application depended on B being found to be habitually resident in France on 3 January 2020.

4. The substantive issues raised by this appeal are:

   (1)(a) Did the judge's finding that B was habitually resident in Australia mean that the 1980 Convention does not apply;

   (1)(b) If the 1980 Convention does apply, did the judge have power to make an order that B should be returned to France or is there no such power, as argued by the mother; if there is such a power, should an order have been made, as sought by the father;

   (2) Was the judge wrong to find that B was habitually resident in Australia and should she have decided that B was habitually resident in France.

   As referred to above, the basis on which it was accepted that the father's application depended on B being habitually resident in France is not clear. However, as this is an issue which goes to the court's jurisdiction, it is one which we need to determine.

5. If the appeal is allowed in respect of any of the above, the application will have to be remitted for a rehearing because the judge did not determine the other grounds on which the mother opposed a return order.

6. For the reasons set out below, namely our determination that B was habitually resident in France at the relevant date, the issue of whether a child can be returned to a third state does not arise. However, because it has been fully argued and because we have been told that it is an issue in other pending cases, I propose to deal with the issue of principle in this judgment.

7. The father is represented by Mr Harrison QC and Ms Chokowry, neither of whom appeared below. The mother is represented by Ms Renton, who did not appear below, and Ms Baker.

8. The International Centre for Family Law, Policy and Practice (ICFLPP) was given permission to intervene in this appeal because of issue (iii), which is an issue of general importance and significance in the application of the 1980 Convention. I am grateful to them and their counsel, Mr Hames QC and Mr Langford for their submissions.

Background

9. A very brief summary of the background is as follows.

10. B is now aged 2. She was born in Australia, where her parents were then living, and remained living in Australia until 1 December 2019. The mother was born in England and Wales and moved to live in Australia in 2007. She acquired Australian citizenship in 2013. The father was born in France and moved to live in Australia in 2014. The parties met there in 2015 and married in 2017.

11. The family lived in rented accommodation in Australia. Both the mother and the father worked until B's birth after which the mother was "on long service and maternity leave". The mother set out details of their life in her statement which "included lots of activities including mother and toddler groups, classes and social get togethers". B attended nursery and this had just increased to two days per week.

12. In 2019 the family decided to move to live in France, specifically the area in France from which the father came and where his family, or at least some of them, still lived. As described by the judge, the mother "felt pressured by the father to go and live in France" but ultimately she agreed to do so. The family "gave up their rented property … packed up their possessions and left on 1 December". The mother had "left her job open in Australia until January 2021 and the father's contract in France allowed for a six month probationary period".

13. Again quoting from the judgment:

> "In France, the family moved straight into a rented property that they had viewed and secured online, which was furnished, and the family dog arrived a day or two after they did. The father's job was due to start on 27 December. Meanwhile, the family had decided to spend Christmas with the maternal family in the UK from 20 December until 5 January in the case of the mother and from 20 to 26 or 27 December in the case of the father".

The family duly came to England and Wales on 20 December 2019 with the father returning on 27 December because of his work commitments. On 3 January 2020, the mother informed the father that "she believed the relationship between them was at an end and that she did not intend to return to France with [B]".

14. At the hearing below, the skeleton argument on behalf of the father set out a number of factors relied on in support of his case that B was habitually resident in France.

These included: the parents had planned to move permanently to France; the family "had given up their home, their possessions and everything they had in Australia"; their remaining possessions were shipped to France; the family dog came with them to France from Australia; both the father and B were French nationals; the family's medical insurance and medical care were transferred to France; B was registered for day care; B was registered with the library in France; the mother had not worked in Australia for more than 2 years prior to the move to France; the father had full-time employment in France; B's extended paternal family lived in France; and neither parent has any extended family in Australia.

15. The mother's case was that the "door to a return [to Australia] was very much open and both parents ensured they had a 'safety net' so that they could return to Australia in the event that their move to France did not work out or in the event that the father's 6-month probationary [work] period was not successful". A number of other specific matters were relied on including: the father continued with his application for a permanent Australian visa (based on the mother's citizenship); the mother's employment remained open for her to return in 2021; the family remained registered with their GP, paediatrician, dentist and health visitor in Australia (although they had suspended their medical insurance); B did not have a bed in "their temporary French home"; the mother described "in some detail, the isolation she felt in" France; neither B nor the mother "speak anything beyond conversational French"; and that there were difficulties in the marriage.

The Judgment

16. By her answer to the father's application, the mother contended that B was not habitually resident in France at the date of the alleged wrongful retention. She also contended that the father had acquiesced in B's retention and relied on Article 13(b).

17. The application was heard on 7/8 April 2020. The judge did not hear any oral evidence and gave an ex tempore judgment on the second day.

18. The judge recorded that, as referred to above, it was "accepted that the father's application depends upon a finding by me that [B] was habitually resident in France at the relevant date". It was, understandably, not suggested that B should be returned to Australia nor was it suggested that the judge "should exercise a welfare jurisdiction". As a result, the judge only dealt with the issue of habitual residence and did not deal with the other matters relied on by the mother in opposition to the father's application for a return order.

19. The judge set out the background to the family moving to France as follows:

> "[4] The father had spoken of the family going back to live in France after [B] was born but in August 2019, he applied for and secured a job there. The mother and father considered this offer carefully comparing the cost of living in each country and they decided to go. The mother says in her statement that she felt pressurised by the father to go and live in France, although at times he was indecisive. In any event, they gave up their rented property in Australia, packed up their possessions and left on 1 December. This was a decision by them both. The mother

> had left her job open in Australia until January 2021 and the father's contract in France allowed for a six months probationary period."

20. The judge set out a brief summary of the law relating to habitual residence referring to the six decisions in the Supreme Court from *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2014] AC 1 to *In re C and another (Children) (International Centre for Family Law, Policy and Practice intervening)* [2019] AC 1; Hayden J's decision of *Re B (A Child: Custody Rights, Habitual Residence)* [2016] 4 WLR 156; and the CJEU's decision of *Proceedings brought by HR (with the participation of KO and another)* [2018] Fam 385.

21. The judge then set out the submissions made on behalf of the father as to the circumstances surrounding the family's move to France. They had given up their accommodation in Australia and packed up "all their possessions". They rented a property in France "with no particular end date", into which they moved immediately and "they unpacked all their things". They brought their dog. The father had employment. "There was some dispute between the parties as to whether the mother was much involved in the process of setting up a bank account, registering with a doctor, or even registering [B] at a nursery, but it is clear that these things were underway during the period before leaving Australia, upon arrival in France, and also whilst the family was in the UK over the Christmas period". The judge also referred to the sort of activities B had been doing while in France between 2 and 20 December.

22. The judge also summarised the legal submissions made on behalf of the father. These included that the focus is on the child; that the test is that "there should be some degree of integration into a social and family environment not that she should be fully or even substantially integrated"; that it is possible for habitual residence "to be lost or indeed to be gained in one day"; and that "it is highly unusual or exceptional for a child to have no habitual residence".

23. On behalf of the mother, emphasis was placed on the fact that B's "integration into her social and family environment in Australia was a deep one as was that certainly of the mother". The "situation in France was not a mere copy of the situation in Australia in that the mother, as an integral part of the family unit, was not at all happy or settled". The mother "felt isolated and the state of the relationship and the language barrier made her feel excluded from significant decisions and indeed from life there altogether". She "did not make any particular social contacts and there were few, if any, of the regular social contacts that a parent or parents and toddler begin to develop as they establish a new abode"; for example, B did not attend a nursery or any social groups and had been take to the library once.

24. The judge conclusions were as follows:

"[16] I entirely accept that it is possible for a child, or indeed any person, to lose a previous habitual residence and to gain a new one in a very short space of time. Indeed, as little as a day, a week, or in a case such as this, in less than three weeks. Having considered all the evidence carefully, however, I accept Ms Baker's submissions that [B] was not habitually resident in France as at the relevant date, 3 January. In particular, I accept that the situation of the family unit in France was not simply a replica of the situation in Australia. In so doing, I make it clear that I am not saying that there needs to be any sort of equivalence between the two. The fact she was more integrated in her Australian life would not mean that she could not achieve some degree of integration in France, a lesser degree of integration but still sufficient. However, it is my finding in this case that she simply had not achieved a degree of integration in a social and family life as required by the authorities in France as at 3 January.

[17] I bear in mind that [B] is very much dependent at her very young age on the position of her parents. One of those parents, her mother, did not become at all integrated into France during the time that she spent there. She had her doubts right from the very beginning, she felt excluded because of the language barrier, she was not able to drive, she did not have use of her mobile phone, or easy use of a bank account. Regardless of whose, indeed if it was anyone's fault at all, the mother was unsettled and unhappy both in the relationship and otherwise during the period when she was in France. That must be clear from what happened afterwards.

[18] The father's family was there but the mother had not really begun to develop any friendships or support networks either for herself or [B] in the time that they spent in France. The mother had joined a group of English-speaking people on Facebook but none of them lived nearby and she did not see any of them. Although I accept that the father was in a different situation from the mother, in that he spoke the language and was returning to the country of his birth and upbringing, with the mother feeling as she did, the family unit was simply not at all the same as it had been in Australia. Apart from possibly one or two visits to the library, [B] had not really begun the process of getting into the sort of life a toddler of her age does, for example, by going to any toddler groups, or parent and toddler groups, or attending any social get togethers at all, although I accept of course she spent time with paternal relatives. She had not visited the nurseries that she was to attend and the process of integration into that was only due to start in early January.

> [19] In my judgment, the process of integration into a social and family life in France had barely started at the time the family left to go to the UK for Christmas and I do not think anything material happened over the course of the Christmas period to move it on. As I say, it follows from that as at 3 January, I find that [B] was not integrated and had not begun to be integrated into a social and family environment in France and therefore that she cannot have been habitually resident at that time.
>
> [20] It is not necessary for me to make any more findings beyond that as to [B's] habitual residence. I have been conscious at all times while considering the evidence and law in this case that it is highly unusual for a court to find that a child has no habitual residence. No doubt it is very unusual as well as undesirable for an individual, a child or an adult, to have no habitual residence at a particular point in time but it does occasionally happen and particularly at a junction like this when a family has just moved from across the world to a new place and then they organise a holiday very soon afterwards. Having said that, the roots in Australia were strong ones for the mother and B at least and I have concluded they had not loosened to the extent they had lost habitual residence there. Even if I am wrong about that I am clear that neither of them had gained habitual residence in France."

25. As a result of this determination, the judge dismissed the application.

Submissions

26. On behalf of the father, Mr Harrison and Ms Chokowry submitted, in summary, in respect of the issues referred to above: (1)(a) that the judge was wrong not to find that there had been a wrongful retention within the scope of the 1980 Convention on the basis of her determination that B was habitually resident in Australia; 1(b) that the judge should have ordered B's return to France; and (2) that the judge should have decided that B was habitually resident in France. Logically, the second point comes first because, if B was habitually resident in France, the 1980 Convention would clearly apply. However, I propose to deal with the submissions in the same order as the issues.

27. (1)(a) Mr Harrison submitted that all that is required for the 1980 Convention to be engaged is that, at the date of the wrongful removal or retention, the child is habitually resident in *a* Convention state. This, he submitted, is clear from the structure of the 1980 Convention.

28. (1)(b) If the 1980 Convention does apply, Mr Harrison submitted that the court has power to order the child's return to a state other than that of his or her habitual residence at the date of the wrongful removal or retention. In this case, this issue has been described as a return to a third state.

29. Mr Harrison submitted that the power to order a child's return to a third state is "strongly" supported by the wording of the 1980 Convention and by the *Explanatory*

Report on the 1980 Convention by Professor Pérez-Vera ("the *Explanatory Report*"), in particular by what is said at [110] (as set out below) about the Convention having been deliberately framed to leave open this option. He also relied on *In re C and another (Children) (International Centre for Family Law, Policy and Practice Intervening)* [2019] AC 1, at [35].

30. As to the preamble, which states that the 1980 Convention is designed "to ensure the prompt return [of children] to the State of their habitual residence", Mr Harrison submitted that these words should not be given undue weight. They are a "useful aid" but should not be taken to mean that the court can *only* order a return to the child's state of habitual residence at the date of the wrongful removal or retention.

31. Mr Harrison also submitted that the 1980 Convention should be construed widely in order to ensure the "maximum protection" for children who have been abducted. This would be consistent with the 1980 Convention's wider objective of deterring abductions as well as preventing the creation of a lacuna which would not be in the interests of children who have been removed to or retained in another state by one parent acting unilaterally. This would also be consistent with interpreting and applying the 1980 Convention in a way which would best fulfils its objectives, as suggested by Professor Rhona Schuz in *The Hague Child Abduction Convention: A Critical Analysis*, 2013 at pp. 182-185 ("*A Critical Analysis*"). This supports Article 12 being interpreted as mandating a return order subject only to a wrongful removal or retention having been established.

32. Mr Harrison accepted that a return order must not act as a "disguised" relocation. Accordingly, he submitted that an order should only be made when the 1980 Convention's purpose of effecting a "return" was being achieved. Accordingly, in addition to a return to the state of the child's habitual residence, article 12 should be interpreted as potentially including (i) a return to the state from which the child has been removed or retained; and/or (ii) a return to the child's primary carer in another state.

33. In response to the welfare jurisdiction issues raised on behalf of the mother, as referred to below, Mr Harrison submitted that the purported problems, if a child was returned to a third state, were not as significant as was being suggested. He pointed, by way of example, to the present case in which neither France nor England would have substantive jurisdiction under the 1996 Hague Child Protection Convention ("the 1996 Convention") because, on the judge's finding, only Australia would have substantive jurisdiction under article 5.

34. (2) Mr Harrison submitted that the judge's decision that B remained habitually resident in Australia was clearly wrong when the whole family had decided to move to live in France; had made comprehensive arrangements to move to live in France; and had then moved to live in France while at the same time effectively severing their connections with Australia. It was, he submitted, "artificial" to suggest that B could still be habitually resident in Australia when there had been a "wholesale move" by the family to France.

35. In his submission, it is not in the interests of children to have, what he described as, a "limping" habitual residence which no longer reflects the "criterion of proximity" referred to in recital 12 of BIIa (Council Regulation (EC) No 2201/2003). This

recital had been identified by Lord Wilson in *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 606, at [42], as being of "significant" effect.

36. Mr Harrison accepted that there is "no single prescribed way" in which a judge must determine this issue. Specifically, he submitted that it is not necessary for a judge to go through Lord Wilson's "expectations" from *In re B*. What *is* required, when the issue is whether a new habitual residence has been acquired, is that the judge undertakes a balanced analysis of the child's connections with both relevant states. Accordingly, he submitted that when, as will typically be the case following a relocation, a child has some degree of integration in both the old and the new state, the court will need to undertake a "parallel analysis" of the factors which connect the child with each of these states and which point, in *In re B* terms, on the one hand, to integration in the new state and, on the other hand, to disengagement from the old state.

37. What, Mr Harrison submitted, the judge needed to address in this case was both the degree of integration in France and the degree of disengagement from Australia. The judge had failed to carry out this parallel analysis and had focused solely, or disproportionately, on the degree of integration in France. In support of this submission, he relied on *Re J (A Child) (Finland) (Habitual Residence)* [2017] 2 FCR 542 in which Black LJ (as she then was) had acknowledged the force in the submission made in that case, at [57], that the judge had concentrated "entirely on the situation as it was in Finland" (to which the child had moved from England) and, at [61], had "failed to put [the 'English factors'] into the melting pot". In this context, Mr Harrison "took issue" with [17](viii) of Hayden J's summary in *Re B* because, he submitted, it does not properly reflect the nature of the parallel exercise required; by "focusing only on the degree of connection with the old state and not on other matters [it] distorts the exercise".

38. In addition, the judge's assessment of B's integration in France was flawed. Her conclusion that B "had not achieved a degree of integration" was wrong. This followed from the judge wrongly considering the extent to which B's life in Australia was replicated in France and focusing unduly on the mother's "doubts" and that she did not "feel" integrated. Mr Harrison also challenged the importance attached by the judge to the fact that B "had not really begun the process of getting into the sort of life that a toddler of her age does". This, he submitted, did not mean that B did not have some degree of integration in France.

39. In summary, Mr Harrison submitted that the judge had failed to put all relevant matters into the melting pot and had not considered the extent of B's disengagement from, or the extent of her continuing connections with, Australia. At most, at [16]-[20], she had compared B's life in France with her life in Australia and this was insufficient. He submitted, bluntly, that to "conclude that the child remained habitually resident in a country where there was no home and to which neither parent wished to return flew in the face of common sense".

40. Ms Renton and Ms Baker on behalf of the mother accepted, in respect of issue (1)(a), that the 1980 Convention applies if the child is habitually resident at the relevant date in a Contracting State other than the requested state.

41. (1)(b) Ms Renton's primary submission was that there is *no* power under the 1980 Convention other than to order that a child be returned to the state of their habitual residence. In simple terms, she submitted that the word "return" means return and not relocation to a third state.

42. As an alternative, Ms Renton proposed that, in the event that the court found there was such a power, one possibility may be that the jurisdiction to order a child's return to a third state was limited to a return to a primary carer, although she pointed to issues that might arise over the determination of who was the primary carer and other jurisdictional issues as referred to below.

43. In support of her primary submission, Ms Renton relied on the use of the word "return" throughout the 1980 Convention and on the specific wording of the preamble. This, she submitted, is of greater relevance than the *Explanatory Report* which is now 40 years old and was written at a time when the expectation had been that most abductors would be the non-primary carer, when the experience since then has been the opposite. Further, she submitted that, under article 32 of the 1969 Vienna Convention, any such report is only a supplementary tool of interpretation. In contrast, article 31 specifically provides that, for the purpose of interpretation, a treaty comprises, "in addition to the text, … its preamble and annexes". In support of her submission as to the approach which should be taken to the interpretation of the 1980 Convention, Ms Renton relied on *Hanbury-Brown v Hanbury-Brown* [1996] Fam CA 23, a decision of the Full Court of the Family Court of Australia, at [5.23]-[5.30] and [5.43] and on Lady Hale's observation, in a case concerning the 1996 Convention, *In re J (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 1291 ("*In re J (Morocco)*"), at [38], that "it would be unfortunate if words in the Explanatory report were treated as if they were words in the Convention itself".

44. Although the preamble has not been expressly incorporated into our domestic law, Ms Renton also relied on a number of authorities which showed that it is relevant to, and she submitted important in, the interpretation of the 1980 Convention: these included *In re H (Abduction: Custody Rights); In re S (Abduction: Custody Rights)* [1991] 2 AC 475, at p.498G; *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144, at [14]; and *In re C*, at [23].

45. She also submitted that the question of whether such a power exists needs to be looked at in the context of the broader jurisdictional framework such as that provided by BIIa and the 1996 Convention. This framework created a number of problems with a return to a third state. Under these provisions, the courts with substantive jurisdiction are those in the state in which the child is habitually resident. Sending a child to another state could mean that that state had no substantive jurisdiction to make welfare decisions which, Ms Renton submitted, strongly militates against there being such a power under the 1980 Convention. Both BIIa and the 1996 Convention also respectively provide, by articles 10 and 7, that the state of habitual residence retains jurisdiction after an abduction until certain conditions have been satisfied.

46. • While another state might have some form of residual jurisdiction, its scope would be limited, for example in the 1996 Convention (and in respect of France in the present case), to urgent measures under article 11. This would be based on the child's presence in that state unless jurisdiction was transferred under articles 8 or 9.

There could also be significant issues about the efficacy and enforceability of any protective measures. Ms Renton pointed to the importance attached to, and the court's obligation to scrutinise, the adequacy of protective measures as has been made clear in a number of authorities, including, in respect of a third state, in *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] 2 FLR 194. She also referred to the *Guide to Good Practice on Article 13(1)(b)* published by the Permanent Bureau of the Hague Conference in March 2020.

47. Ms Renton submitted that to order a return to a third state would be, effectively, using the inherent jurisdiction through "the back door". To "return" a child to a third state would be making a welfare decision without any welfare assessment and circumventing the necessary welfare enquiry as set out in *In re NY (A Child) (Reunite International and others intervening)* [2019] 3 WLR 962, at [55]. Accordingly, Ms Renton submitted that, if such an order was being proposed, it would be better suited to determination by the exercise of the court's inherent jurisdiction. In her submission the factors listed in the submissions on behalf of the Intervenor, as referred to below, also pointed to the exercise of any such power being welfare based rather than pursuant to the 1980 Convention.

48. (2) In respect of habitual residence, Ms Renton submitted that the judge reached a decision which was open to her and there was no basis on which this court could interfere. She relied on Lord Reed's observation in *In re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 76, at [18], as to "the limited function of an appellate court".

49. Ms Renton acknowledged that there had been an "agreed move" in this case but pointed to the fact that, as referred to in the judgment, the mother "had left open her job in Australia" and that the father's employment "allowed for a six months probationary period". The door had not been firmly shut on Australia.

50. The judge had applied the right test which required "a factual, child focused assessment, and residence must correspond to '*the place which reflects some degree of integration by the child in a family and social environment*'". Ms Renton submitted that the judge had been right to determine that B "had not achieved a degree of integration … as required by the authorities". As a "very small child" whose primary carer was the mother, there was a "nexus" between the mother's degree of integration and B's integration. The judge had, therefore, been right to place weight on the mother's "lack of integration".

51. Ms Renton also submitted that, in paragraph 20, a "crucial" paragraph, the judge had assessed the degree of B's "dislodgement or disengagement" from Australia and had carried out the appropriate "balancing exercise". The judge had determined that the "roots in Australia were strong ones for the mother and [B] at least and … [that] they had not loosened to the extent that they had lost habitual residence there". When, during the hearing, Ms Renton was asked by Phillips LJ what continuing connections B had with Australia, she submitted that the issue was whether the deep roots had been pulled up. In her submission, the strength of the roots was such that they had not. The mother was an Australian citizen and maintained contact with friends there; and the family retained connections with Australia such as being registered with a GP and having bank accounts. B had had a "full life" in Australia which had to be balanced against her "slender life" in France.

52. Mr Hames and Mr Langford, on behalf of the ICFLPP, submitted that article 12 of the 1980 Convention should be interpreted as permitting a return order to a third state. Article 12 does not repeat the wording in the preamble. The reasons for this, and that this issue was expressly considered, are set out in the *Explanatory Report*, at [110]. Accordingly, this interpretation would be in keeping with the intention of the drafters of the 1980 Convention.

53. In addition, Mr Hames submitted that this approach would be consistent with a purposive construction of the 1980 Convention because it would promote the protection of children from the harmful effects of international child abduction. The research carried out by the ICFLPP has shown the damaging effect of abduction. This approach would ensure that the remedy of summary return would be available to a greater number of children. It would also promote the operation of the 1980 Convention as a deterrent to parental abduction.

54. Mr Hames set out a list of factors which, he submitted, may assist court when deciding whether to make a return order to a third state. These were: whether such a return would be in keeping with the objectives of the 1980 Hague Convention which are designed to serve the best interests of children who have been wrongfully removed or retained; any parental agreement or parental intention about the upbringing of their children, particularly as to the arrangements as to where they should live; meaningful social and family ties and connections of the children with the state of the habitual residence and the third state; the practicality of a return, including the ability of the parents to litigate; any jurisdictional issues arising from such a return, including any surviving jurisdiction of the state of a child's habitual residence; whether a third state return order is consistent, or not inconsistent with a welfare decision of a court with primary jurisdiction; any other factors relevant to forum conveniens; and the availability and efficacy of protective measures available on or prior to a return to a third State, particularly measures relating to jurisdiction.

55. In his submission, the question in each case would be whether a return to a third state would be consistent with and achieve the objectives of the Convention. It must not, in effect, be a welfare-based relocation decision but must depend on whether it would "truly be a 'return' within article 12".

Law

56. The first issue of law which arises in this case is whether, as stated in the judgment, the father's application depended on B being habitually resident in France or whether the 1980 Convention applies based on the judge's decision that B was habitually resident in Australia. This involves two discrete questions: first, whether the alleged wrongful retention is within the scope of the 1980 Convention and, secondly, whether the Convention provides a practical remedy in this case when the father seeks B's return to France and not to Australia.

57. The relevant Articles for the first of these questions are Articles 3 and 4.

58. Article 3 provides that a removal or retention will be "wrongful" when it is in breach of a parent's "rights of custody … under the law of the State in which the child was habitually resident immediately before the removal or retention".

59. Article 4 provides that the 1980 Convention applies "to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights".

60. It does not matter where the alleged wrongful retention took place: see *Re H (Abduction: Retention in Non-Contracting State)* [2019] 2 FLR 653. In the course of my judgment in that case, I described the basic requirements for the application of the 1980 Convention as follows:

> "[52] In my view, the only basic requirements for the application of the Convention are:
>
> (a) the child must have been habitually resident in a Contracting State at the date of the alleged removal or retention;
>
> (b) the removal or retention must be wrongful;
>
> (c) the application must be determined in the Contracting State where the child is; and
>
> (d) the Convention must be in force between both States."

The 1980 Convention applies whenever the child is habitually resident at the relevant date in a Contracting State, subject only to it being other than the requested state. It does not apply if the child is habitually resident in the requested state at the date of the retention or removal because, as explained by Lord Hughes in *In re C*, at [34]:

> "The Convention cannot be invoked if by the time of the alleged wrongful act, whether removal or retention, the child is habitually resident in the state where the request for return is lodged. In such a case, that state has primary jurisdiction to make a decision on the merits, based on the habitual residence of the child and there is no room for a mandatory summary return elsewhere without such a decision."

61. The next question is, if the 1980 Convention applies in this case, does it potentially provide the father with the remedy which he seeks, namely that B be returned to France rather than to Australia, or is his only remedy a return to Australia. As referred to above, this issue has been described as a return to a third state, namely a state other than that of the child's habitual residence at the relevant date.

62. The preamble to the 1980 Convention sets out its objective:

> "Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,"

As explained by Lady Hale in *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144:

> "[14] … This objective is, of course, also for the benefit of children generally: the aim of the Convention is as much to deter people from wrongfully abducting children as it is to serve the best interests of the children who have been abducted. But it also aims to serve the best interests of the individual child. It does so by making certain rebuttable assumptions about what will best achieve this: see the Explanatory Report of Professor Pérez-Vera, at para 25."

63. One of the purposes of a prompt return is to remedy what might otherwise be the consequences for the child of one parent's unilateral wrongful act, namely their separation from their other parent and from their existing family life with the progressive establishment of a new life in the new state the longer it takes to procure their return. This appears, for example, from the *Explanatory Reports*, at [40], when it states that the "Convention is designed as a means for bringing about speedy solutions so as to prevent the consolidation in law of initially unlawful factual situations, brought about by the removal or retention of a child".

64. As noted by Lady Hale in *In re E*, at [9]:

> "[8] … The first object of the Hague Convention is to deter either parent (or indeed anyone else) from taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any dispute can be determined there. The left-behind parent should not be put to the trouble and expense of coming to the Requested State in order for factual disputes to be resolved there. The abducting parent should not gain an unfair advantage by having that dispute determined in the place to which she has come."

This is in part because the courts in the family's "home country" will be better placed to make any welfare decisions and determine any factual disputes. In addition, as Lady Hale said, at [15]: "Restoring a child to her familiar surroundings is seen as likely to be a good thing in its own right".

65. Apart from the preamble, there is no other reference in the 1980 Convention to a child's return being to the state where they were habitually resident. All the Articles simply refer to "the return of the child". For example, Article 12 contains the general principle that:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."

66. The *Explanatory Report* considers Article 12 at [106] to [111]. It first addresses, at [107] and [108], the "problem of determining the period during which the authorities concerned must order the return of the child forthwith". This was resolved with the imposition of a one year time limit for the automatic application of the 1980 Convention but, because of concerns that this was inflexible, this was coupled with scope for a later application provided that child was not "settled". This is explained as follows:

> "109 The second paragraph answered to the need, felt strongly throughout the preliminary proceedings, to lessen the consequences which would flow from the adoption of an inflexible time-limit beyond which the provisions of the Convention could not be invoked. The solution finally adopted plainly extends the Convention's scope by maintaining indefinitely a real obligation to return the child. In any event, it cannot be denied that such an obligation disappears whenever it can be shown that 'the child is now settled in its new environment'. The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor or upon the person who opposes the return of the child, whilst at the same time preserving the contingent discretionary power of internal authorities in this regard. In any case, the proof or verification of a child's establishment in a new environment opens up the possibility of longer proceedings than those envisaged in the first paragraph. Finally, and as much for these reasons as for the fact that the return will, in the very nature of things, always occur much later than one year after the abduction, the Convention does not speak in this context of return 'forthwith' but merely of return.
>
> 110. The problem common to both of these situations was determining the place to which the child had to be returned. The Convention did not accept a proposal to the effect that the return of the child should always be to the State of its habitual residence before its removal. Admittedly, one of the underlying reasons for requiring the return of the child was the desire to prevent the 'natural' jurisdiction of the courts of the State of the child's residence being evaded with impunity, by force. However, including such a provision in the Convention would have made its application so inflexible as to be useless. In fact, we must not

> forget that it is the right of children not to be removed from a particular environment which sometimes is a basically family one, which the fight against international child abductions seeks to protect. Now, when the applicant no longer lives in what was the State of the child's habitual residence prior to its removal, the return of the child to that State might cause practical problems which would be difficult to resolve. The Convention's silence on this matter must therefore be understood as allowing the authorities of the State of refuge to return the child directly to the applicant, regardless of the latter's present place of residence."

67. The only domestic authority in which an order has been made under the 1980 Convention for a child to return to a third state is *O v O (Child Abduction: Return to Third Country)* [2104] Fam 87. In that case a family living in Australia, but originally from the USA, decided to relocate to the USA. It was agreed that the mother would travel there directly with one child while the father would travel there with the older child after a holiday in Thailand. The father did not abide by the agreement and, instead, came to England and told the mother that he intended to stay here with the older child. Keehan J found that the father had wrongfully removed the child from Australia because the father had already decided that he would not abide by the agreement before he left Australia. The father contended that any order under the 1980 Convention could only require the child's return to Australia. The mother sought an order that the child be returned to her in the USA.

68. Keehan J made the order sought by the mother. In his view, at [64], the 1980 Convention "should be given a purposive interpretation and not a narrow or restrictive interpretation" and "it would be strange indeed if the Convention required steps to be taken which were positively contrary to the interests of the subject children". He went on to conclude, at [65], that it would be "wholly contrary to the interests of" the child for her to be "returned to Australia, where there are no family members, where there is no family home" and where the father had no employment. It would also be a "wholly artificial exercise to invite the courts of Australia to make welfare interest decisions in respect of" the older child alone when "both of these parents had made a clear and reasoned decision to leave Australia and to base their new home back again in the USA".

69. The issue was addressed by Lord Hughes in an obiter passage in *In re C* in which he referred both to the *Explanatory Report* and, with implicit approval, to the decision of *O v O*:

> "35 The submissions made to this court addressed also the separate question of whether a return under the Abduction Convention, if made, must always and only be made to the state of habitual residence immediately before the wrongful act. It is to be noted that article 12 does not contain any such restriction, and that Professor Pérez-Vera's Report at para 110 makes clear that the decision not to do so was deliberate. The reason given is that whilst ordinarily that state will be the obvious state to which return should be made, there may be circumstances in which it would be against the interests of the child for that to be the destination of return. The example given is of the applicant

> custodial parent who has, in the meantime, moved to a different state. The propriety, in such circumstances, of an order returning the child to the new home state of the custodial parent is not in issue in this case. For the reasons given above, the silence of article 12 on the destination of a return order is of no help on the issue which does arise, namely whether an order for return can be made if at the time of the wrongful act the child was habitually resident in the requested state. It is however to be observed in passing that the unusual circumstances envisaged in para 110 of the Pérez-Vera Report were held at first instance to have arisen in *O v O (Child Abduction: Return to Third Country)* [2014] Fam 87 and there did result in an order for return to the new home state."

70. The other relevant domestic authority is *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] 2 FLR 194 in which a return order to a third state was set aside. The parents and the child were all Hungarian nationals and they had lived there until 2017 when they moved to Germany. In 2018, after a holiday in Hungary, the mother travelled to England with the child and stayed here. In his application under the 1980 Convention, the father sought the child's return to Hungary because he had left Germany and returned to live in Hungary. The return order was set aside because, as set out in my judgment at [57], it was "in effect a relocation order". It was ordering neither a return to the state in which the child had been habitually resident at the relevant date nor a return to the state "to which the custodial parent had moved". Rather, it "was an order which required the mother to move to a State with which she and A clearly had connections but in which they had not been living and to which there was no existing agreement or arrangement that they would move".

71. Mr Hames has provided us with, what he described as, a limited survey of the approach taken in other jurisdictions to this issue. It was limited because of the time constraints but also because of the limitations in conducting such an exercise through internet searches, although INCADAT, the International Child Abduction Database maintained by the Permanent Bureau of the Hague Conference, is a very valuable resource in this respect.

72. • I do not propose to set out all the authorities to which we were referred, in part because only one of them appears directly to have addressed the issue raised in the present case. For example, there was some consideration of the meaning of "remove" and "return" in *Hanbury-Brown v Hanbury-Brown* but in a very different context, namely as to the meaning of removed/removal in Articles 1 and 3. The mother in that case contended, at [5.1], that the 1980 Convention "applies not to a removal of a child from a country but from a custodian, and mandates a return of the child not to a country but to the custodian whose custodial rights were breached by the removal". In its judgment, the court analysed the meaning of "remove" and "return" for the purpose of addressing the mother's case, which was rejected. This was because, at [5.31], "the evil at which the Convention is aimed is the harm presumptively done to children by their removal, contrary to the wishes of a custodian, across state boundaries."

73. The only case to which we were referred in which a return to a third state was ordered is a decision by the Supreme Court of Israel. We do not have the judgment but have a summary of the case which appears in *A Critical Analysis* at pp. 182/183. The case is *RB v VG* RFamA (SC) 5579/07, 7 August 2007. The circumstances of that case were unusual and the reasons for the decision are summarised at p.183:

> "In RB v VG for two years prior to the removal to Israel, the child had been living with the mother in France after the Belgian Court had awarded custody to the mother and given permission for relocation. The father appealed against this decision and eventually the Belgian Appellate Court allowed his appeal and ordered that the child be transferred to the custody of the father in Belgium. Before the date set for the transfer the mother removed the child to Israel. The mother's argument that the Court could not order return of the child to Belgium because his habitual residence was in France was rejected. Justice Arbel stated that in most cases returning the child to a third country would not give effect to the objectives of the Convention of returning the child to a familiar everyday life. However, in cases where it is not practicable to return the child to the place of habitual residence, then it may be preferable to return the child to a third country than to leave him in the State of refuge, especially where the third country was a place with which he was familiar, for example, where he had lived there previously or had visited the left-behind parent there. Furthermore, in this particular case, if the child had not been abducted, he would have in any event moved to live in Belgium in accordance with the Belgian Court's decision, which was enforceable in France. Thus, returning the child to France, from where he would be sent to Belgium in any event, would only lead to unnecessary prolongation of the process of returning the child to his father, in contravention of the purpose of the Convention"

74. It is also relevant to note that, both in England and Wales and in other jurisdictions, the 1980 Convention is interpreted as giving the requested court a discretion as to the manner in which the return is effected including as to the place to which the child is returned in the state of his or her habitual residence.

75. So, for example, in *Re (A Minor) (Abduction)* [1988] 1 FLR 365, Nourse LJ observed briefly, at p. 373, that the return "contemplated" by the 1980 Convention was a "return to the country of the child's habitual residence" and not, as had been suggested, a "return to the custody of the father". Similarly, in *Re H (Abduction: Grave Risk)* [2003] 2 FLR 141, Dame Elizabeth Butler-Sloss P said:

> "[33] The return of children under the Hague Convention is to the jurisdiction of their habitual residence and it is not generally necessary or likely that the return would be to the same situation nor should it be in the present case."

76. In *Murray v Murray* [1993] FamCA 103, the Full Court, at [171], made clear that the return order did not require the children to be returned to any particular place in

New Zealand, in particular Dunedin, where the family had been living. It was "open to [the mother] to return to another part of New Zealand where the danger to her may be less". In *Matzke v Matzke* (2009) BCSC 1532, the order provided for the children to be returned to Nebraska, to which the father had moved after they had been abducted, and not Texas which was where the family had been living before the abduction.

77. Having set out the legal framework, I deal below with the question of whether there is power under the 1980 Convention to return a child to a third state.

78. I now turn to consider the law relating to habitual residence.

79. As an issue of fact, the normal approach to appeals from findings of fact applies. This was emphasised by Lord Reed in *In re R:*

> "[18] Finally, it is relevant to note the limited function of an appellate court in relation to a lower court's finding as to habitual residence. Where the lower court has applied the correct legal principles to the relevant facts, its evaluation is not generally open to challenge unless the conclusion which it reached was not one which was reasonably open to it."

80. Since the appeal was heard in the present case, judgment has been handed down in another case which addressed habitual residence in the context of the 1980 Convention: *M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105. I do not propose to repeat what I said in my judgment in that case, in particular about *In re B*.

81. However, it is still necessary to address some aspects of the law relating to habitual residence for the purposes of considering the judge's decision that B had not become habitually resident in France and remained habitually resident in Australia. I propose, therefore, to review what has been said in some of the authorities about the manner in which habitual residence in a new country is acquired.

82. The essential aspects of the court's approach to the determination of habitual residence are summarised in Lord Reed's judgment *In re R* [2016] AC 76 in which he, in turn, at [17], summarised what Lady Hale had said in *A v A*, at [54]:

> "[17] As Baroness Hale DPSC observed at para 54 of *A v A*, habitual residence is therefore a question of fact. It requires an evaluation of all relevant circumstances. It focuses on the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It is necessary to assess the degree of integration of the child into a social and family environment in the country in question. The social and family environment of an infant or young child is shared with those (whether parents or others) on whom she is dependent. Hence it is necessary, in such a case, to assess the integration of that person or persons in the social and family environment of the country concerned. 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."

83. It has been emphasised in a number of cases that only "some" degree of integration is required. For example, in *In re B*, at [39], Lord Wilson made clear that there does not have to be "full integration in the environment of the new state … only a degree of it". In *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038, Lady Hale, at [60], referred to the "essential question" as being "whether the child has achieved a sufficient degree of integration into a social and family environment in the country in question for his or her residence there to be termed 'habitual'".

84. What degree of integration will be "sufficient" will obviously vary from case to case depending, for example, on the extent to which a child has connections with, say, two states and could, potentially, be habitually resident in either of them. This is why the court has to undertake a "global analysis" which, as Ms Renton submitted, is a factual, child focused assessment, as made clear by the CJEU's decision of *Proceedings Brought by HR (With the Participation of KO and Another)* [2018] Fam 385 (*HR v KO*"). This will involve the court assessing the factors which connect the child with the state or states in which he or she is alleged to be habitually resident.

85. I quoted at some length from *HR v KO* in *Re G-E (Children) (Hague Convention 1980: Repudiatory Retention and Habitual Residence)* [2019] 2 FLR 17, at [59], and I propose to do so again:

> "[41] According to case law, the child's place of habitual residence must be established on the basis of all the circumstances specific to each individual case. In addition to the physical presence of the child in the territory of 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 it reflects some degree of integration of the child into a social and family environment: see *A*'s case [2010] Fam 42, paras 37 and 38; *Mercredi v Chaffe* [2012] Fam 22, paras 44 and 47-49 and *OL v PQ* (Case C-111/17PPU), paras 42 and 43.
>
> [42] It is apparent from that case law that the child's place of habitual residence for the purpose of Regulation No 2201/2003 is the place which, in practice, is the centre of that child's life. Pursuant to article 8(1) of that Regulation, it is for the court seised to determine where that centre was located at the time the application concerning parental responsibility over the child was submitted.
>
> [43] In that context, it is necessary, in general, to take into consideration factors such as the duration, regularity, conditions and reasons for the child's stay in the territory of the different member states concerned, the place and conditions of the child's attendance at school, and the family and social relationships of the child in those member states: see *A*'s case [2010] Fam 42, para 39.

> [44] Furthermore, where the child is not of school age, a fortiori where the child is an infant, the circumstances of the reference person(s) with whom that child lives, by whom the child is in fact looked after and taken care of on a daily basis - as a general rule, its parents - are particularly important for determining the place which is the centre of that child's life. The court has observed that the environment of such a child is essentially a family environment, determined by that person or those persons, and that that child necessarily shares the social and family environment of the circle of people on whom he or she is dependent: see *Mercredi v Chaffe* [2012] Fam 22, paras 53-55.
>
> [45] Accordingly, in a situation where such an infant lives with its parents on a daily basis, it is necessary, in particular, to determine the place where the parents are permanently present and are integrated into a social and family environment. In that regard, it is necessary to take into consideration factors such as the duration, regularity, conditions and reasons for their stay in the territory of the different member states concerned, and the family and social relationships maintained by them and by the child in those member states: see *Mercredi v Chaffe*, paras 55 and 56.
>
> [46] Lastly, the intention of the parents to settle with the child in a given member state, where that intention is manifested by tangible steps, may also be taken into account in order to determine the child's place of habitual residence: see *A*'s case [2010] Fam 42, para 40; *C v M* [2015] Fam 116, para 52 and *OL v PQ*, para 46."

86. In *Re G-E*, at [59], I also pointed to "the comparative nature of the exercise", which can be seen, for example, from [43] in *HR v KO* (when the CJEU referred to factors relevant to a child's connection with the *different* member states) and from the comparative exercise carried out by Lord Wilson in *In re B*, at [49] and [50] (when he considered the child's connections in terms of "disengagement" from one state and "integration" in another). I would also refer to what Lord Hughes said in *A v A*, at [80(ii)], when, after referring to the CJEU decisions of *Proceedings brought by A* and *Mercredi v Chaffe*, he identified a number of propositions from these cases, one of which was the following:

> "(ii) One of the great values of habitual residence as a base for jurisdiction is proximity: Proceedings brought by A, para 35; by this the court clearly meant the practical connection between the child and the country concerned."

This reference to the word "proximity" as meaning "practical connection" was quoted by Lord Wilson in *In re B*, at [42], providing further context for his subsequent comparative evaluation in that case.

87. The need to have regard to a child's connections with each of the states in which they are said to be habitually resident was also emphasised by Black LJ (as she then

was) in *Re J (Finland)*: see, for example, [57], when she referred to "the relevance of the circumstances of a child's life in the country he has left as well as the circumstances of his life in his new country", while making clear, at [61], that the "weight … to be attributed" to these factors when they were "put into the melting-pot" was a matter for the judge.

88. Further, having regard to submissions which are sometimes made about the need for the court to follow a structured path with a series of questions, I would also endorse what Black LJ went on to say:

> "[62] In endorsing certain of Mr Turner's criticisms of Judge Cushing's judgment, I do not wish to be taken as suggesting that there is only one way in which to approach the making of a finding of fact about habitual residence. Habitual residence is a question of fact and the scope of the enquiry depends entirely on the particular facts of the case. *What is important is that the judge demonstrates sufficiently that he or she has had in mind the factors in the old and new lives of the child, and the family, which might have a bearing on this particular child's habitual residence.* The court's review of all of the relevant evidence about habitual residence cannot be allowed to become an unworkable obstacle course, through which the judge must pick his or her way by a prescribed route or risk being said to have made an unsustainable finding. In some cases it will be necessary to carry out quite a detailed analysis of the situation that the child has left; in other cases, less detail of that will be required and the judge will be able to explain shortly why that is and focus more on the circumstances in the new country.
>
> [63] It has now been said countless times that there is no room for glosses and sub-rules in the field of habitual residence. A recent reiteration of this can be found at [46] of *Re B* … Lord Wilson was careful to call the three propositions, which he there set out about the point at which habitual residence might be lost and gained, "suggestions", stressing that they were "not sub-rules but expectations" and underlining the lack of rigidity in what he was saying by observing that they were expectations "which the fact-finder may well find to be unfulfilled in the case before him". When he turned to the particular facts concerning B, in a section headed "Application" commencing at [48], he was even further from stating principles than he had been at [46], having turned his attention to what, as a matter of fact, should be the finding as to habitual residence in that case. He would not expect, I imagine, to find a judge's finding as to habitual residence being impugned because the judge had failed to work, step by step, through each of the elements he examined in [49] and [50] of his judgment as if through a welfare checklist. Mr Turner's submissions did not go quite so far as to suggest that, but they did have a flavour of it." (my emphasis)

89. Picking up what Black LJ said in *Re J (Finland)*, I also propose to repeat my conclusions from *M (Children)*, in particular in respect of Lord Wilson's see-saw analogy:

> "[61] In conclusion on this issue, while Lord Wilson's see-saw analogy can assist the court when deciding the question of habitual residence, it does not replace the core guidance given in *A v A* and other cases to the approach which should be taken to the determination of the habitual residence. This requires an analysis of the child's situation in and connections with the state or states in which he or she is said to be habitually resident for the purpose of determining in which state he or she has the requisite degree of integration to mean that their residence there is habitual.
>
> [62] Further, the analogy needs to be used with caution because if it is applied as though it is the test for habitual residence it can, as in my view is demonstrated by the present case, result in the court's focus being disproportionately on the extent of a child's continuing roots or connections with and/or on an historical analysis of their previous roots or connections rather than focusing, as is required, on the child's *current* situation (at the relevant date). This is not to say continuing or historical connections are not relevant but they are part of, not the primary focus of, the court's analysis when deciding the critical question which is *where* is the child habitually resident and not, simply, *when* was a previous habitual residence lost."

90. Finally, on the issue of habitual residence, given the circumstances of this case, it is relevant to note that habitual residence can change from one state to another extremely quickly.

91. In *A v A*, at [44], in a passage approved by Lord Wilson in *In re B* at [39], Lady Hale made clear that she did not "accept that it is impossible to become habitually resident in a single day. It will all depend on the circumstances". As an issue of fact it will, clearly, "all depend on the circumstances" but, to use Lord Wilson's see-saw analogy, there is nothing which prevents "deeper roots" coming up very quickly and being replaced by another habitual residence which will frequently have shallower roots. Those latter roots can still provide a sufficient, "some", degree of integration to establish habitual residence.

92. It sometimes appears, as referred to further below, that Lord Wilson's observations in *In re B* have been interpreted as meaning that deep roots will invariably take time to come up. This is not the case in part because, if it was, it could result in a child continuing to be habitually resident in a country with which they had no substantive continuing practical connection.

93. Indeed, in my view, it was in part his concern to make clear that the loss of a previous and the acquisition of a new habitual residence could *both* happen equally quickly that led Lord Wilson to conclude, at [47], that Lord Brandon's third preliminary point "should no longer be regarded as correct" because, at [39], it was "too

absolute". The point which had been proposed by Lord Brandon, as set out in *In re B*, at [34], was 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".

94. It is also relevant to note the terms of two of Lord Wilson's three "expectations", at [46], which were as follows:

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

It sometimes appears that these two elements have been overshadowed by the third, namely "(a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state".

95. I would emphasise that Lord Wilson's graphic analogy of the see-saw does *not* mean that habitual residence cannot change very quickly. This, as I have endeavoured to explain, is, in my view, clear from what he said in *In re B* itself. However, it can also be seen from what Lady Hale said in *In re LC*:

> "[63] The quality of a child's stay in a new environment, in which he has only recently arrived, cannot be assessed without reference to the past. Some habitual residences may be harder to lose than others and others may be harder to gain. If a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly. If a person leaves his home country for a temporary purpose or in ambiguous circumstances, he may not lose his habitual residence there for some time, if at all, and correspondingly he will not acquire a new habitual residence until then or even later. Of course, there are many permutations in between, where a person may lose one habitual residence without gaining another."

96. I need also, briefly, to deal with the jurisdictional issues raised by Ms Renton. I make clear that this is only a very limited review. Under both BIIa and the 1996 Convention, the habitual residence of the child is the primary basis on which the courts of a state will have substantive jurisdiction to determine welfare issues. Accordingly, when a child is habitually resident in an EU Member State or a 1996 Convention Contracting state, that state will have substantive jurisdiction.

97. In addition, both BIIa and the 1996 Convention provide that the state of the child's habitual residence at the date of the wrongful removal or retention will continue to have substantive jurisdiction. This continues until, in simplified terms, either the

child has become habitually resident in the new state and the other parent has acquiesced in the removal or retention or the child has been resident in the new state for one year, the other parent has not initiated return proceedings and the child is settled: respectively Articles 10 and 7.

98. Another EU Member State and another Contracting State will not have substantive welfare jurisdiction but will only have a limited jurisdiction to take protective measures in cases or urgency: respectively Articles 20 and 11. In *In re J (Morocco)*, the Supreme Court decided that a summary return order could be made under Article 11 of the 1996 Convention and that, by that route, a child could be returned to a state that was not a party to the 1980 Convention.

99. There is also scope for the transfer of jurisdiction under, respectively, Articles 15 and Articles 8/9.

Determination

100. (1)(a) I start with the question of whether the 1980 Convention would *only* apply in this case if B was found to be habitually resident in France at the date of the mother's retention on 3 January 2020 and does not apply because the judge found that she was habitually resident in Australia.

101. In my view, as referred to above, the 1980 Convention applies whenever the child is habitually resident in a Contracting State, other than the requested state, at the date of the alleged wrongful removal or retention. This is clear, for example, from Article 4 which expressly provides that the Convention applies "to *any* child habitually resident in a Contracting State" at that date (my emphasis).

102. Accordingly, applied to the facts of this case, the 1980 Convention would apply to the mother's retention in January 2020 because, on the judge's finding, B was habitually resident in Australia at that date. It would also seem inevitably to follow that the retention, as a unilateral act, would be in breach of the father's rights of custody and, therefore, wrongful.

103. (1)(b) The next question is whether, as an issue of principle, an order under Article 12, assuming no exceptions were to be established, can only require a child to be returned to the state of their habitual residence at the date of the wrongful removal or retention or whether the 1980 Convention permits a court to order that a child be "returned" to a third state.

104. In my view, for the reasons set out below, there is power under the 1980 Convention to order that a child be returned to a third state.

105. In answering this question, the 1980 Convention is properly to be interpreted purposively. In *In Re F (A Minor) (Abduction: Custody Rights Abroad)* [1995] Fam 224, Butler-Sloss LJ said, at p. 229F/G:

> "It is the duty of the court to construe the Convention in a purposive way and to make the Convention work."

Likewise, in *In re K (A Child) (Reunite International Child Abduction Centre intervening)* [2014] AC 1401, Lady Hale posed the following question when

considering whether "rights of custody" should be interpreted as including, what have been called, "inchoate rights":

> "[3] The issue … is between two different approaches to the interpretation of the concept. Is it to be interpreted strictly and literally as a reference to rights which are already legally recognised and enforceable? Or is it to be interpreted purposively as a reference to a wider category of what have been termed "inchoate rights", the existence of which would have been legally recognised had the question arisen before the removal or retention in question? The issue is well illustrated by the facts of the present case."

She decided that the term should be interpreted purposively. The purposes of the 1980 Convention which she considered relevant in that case were, at [60], to "protect the child from the harmful effects of international child abduction" and to "enable the courts of the child's habitual residence to determine where his long-term future should lie".

106. The purposes relevant to the interpretation of Article 12 are: protecting the child from the harmful effects of abduction; providing a prompt remedy to address the taking parent's wrongful act; and enhancing the effect of the 1980 Convention in discouraging abduction generally.

107. The wording of the preamble would support the conclusion that the 1980 Convention is confined to making an order for a child's return to the state of their habitual residence. However, in my view, the preamble is setting out the *general* objective of the Convention in the interests of children generally rather than seeking to define the scope of orders which can be made in respect of specific children pursuant to its provisions, none of which contain any such limitation.

108. Further, of considerable significance to this issue, the *Explanatory Report* could not be clearer that this question was expressly considered at the time of the drafting of the 1980 Convention and a "proposal to the effect that the return of the child should always be to the State of its habitual residence" was not accepted. Professor Pérez-Vera sets out the clear example of when the left-behind parent had moved to a different jurisdiction after the abduction but before the proceedings were determined. This might happen, for example, because it had taken a long time to find the child or because of a deterioration in the stability of the home state.

109. · In addition, whilst an obiter comment, I consider that what Lord Hughes said in *In re C* also provides powerful support for this interpretation. Submissions had been made to the Supreme Court on this question. Although briefly addressed, Lord Hughes would not have referred to the *Explanatory Report* and *O v O* in the way that he did, if he did not agree with their effect. He did not indicate that he disagreed with what was said in the *Report* or the decision made in the case; nor did he say that it was an open question.

110. In my view, it is also clear that to confine the terms of Article 12 to permitting a return only to the state of habitual residence at the relevant date would not promote the objectives of the 1980 Convention. The power will inevitably only arise if the

requirements under the Convention for the making of a return order have otherwise arisen. Why, it might be asked, should the taking parent at that stage be able to avoid the effect of the Convention and why should the child be deprived of the remedy provided by the Convention? I do not consider it sufficient to answer that question simply by responding with the answer that such an order is not expressly included within the terms of the Convention. A principled answer must be identified as to why it is or is not within the scope of the 1980 Convention. In my view, the principled answer is that it is within the scope of the Convention.

111. First, I do not consider that, as a matter of interpretation, the 1980 Convention has this limitation. The *Explanatory Report* makes clear that an express decision was made to leave scope for a return to a third state. This was, in part, because the Convention continues to apply even after the initial one year limit has expired, provided the child is not settled.

112. Secondly, I consider that to confine Article 12 as suggested would be contrary to the primary objective of the Convention which is to protect children from the harmful effects of their abduction. To exclude the remedy of a return to a third state would not protect children in that situation from the harmful effects of abduction. I do not consider that it is any answer to this to say that an alternative jurisdiction would be available in England and Wales. As an international convention, the 1980 Convention operates autonomously and its interpretation cannot depend on the vagaries of domestic laws. Whilst the 1996 Convention might provide an alternative remedy, many states which are parties to the 1980 Convention are not parties to the 1996 Convention.

113. Thirdly, if Article 12 is not interpreted so as to include this power, absent any of the exceptions being established, the court would be mandated to order, "shall order", the child's return to the state of habitual residence *at the date of* the wrongful removal or retention. There is no residual discretion under the 1980 Convention. *O v O* provides an example of when, as Keehan J said, it would have been "absurd", and contrary to the child's welfare, to have ordered that the child be returned to Australia. As Keehan J said, at [64]: "It would be strange indeed if the Convention required steps to be taken which were positively contrary to the interests of the subject children".

114. In my view, Ms Renton's arguments do not address the difficulty which would be created if this was the *only* order which the court could make when it was required under Article 12 to make an order for "the return of the child forthwith". This would be the effect of those arguments unless, by implication, a new discretion was created outside the express terms of the 1980 Convention which enabled the court to decline to make a return order.

115. Accordingly, either the 1980 Convention needs to be interpreted so as to permit the court to order a child's "return" to a third state or to be interpreted so as to permit the court to decline to order the child's return to the relevant state of habitual residence. In my view, the former sits much better within the scheme of the 1980 Convention and would better promote its objectives. The latter, in contrast, would represent a significant breach of the core principle of the 1980 Convention that a discretion as to whether to make a return order arises *only* if one of the exceptions is established.

116. During the course of the hearing, I asked Mr Hames more than once how the court would decide whether such an order was appropriate because I was concerned that it might be introducing a step which required a more general welfare assessment. His answer was that such an order should only be made when it was consistent with the objectives of the 1980 Convention. This answer troubled me at the time but, on reflection, it does provide a principled basis for interpreting the Convention as including such a power. As I have said, to interpret the Convention otherwise would be inconsistent with the objective of protecting children from the harmful effects of international child abduction and would lead to the consequential issue to which I have just referred.

117. Clearly, any such power must be used with considerable care so that it does not procure an effective relocation without any concomitant welfare enquiry. It is to be used *only* when it is, in effect, procuring the child's *return*. The most obvious example when it might be used is when the child is being returned to his or her primary carer. Another example might be when, as in this case on the judge's determination of habitual residence, the family has moved to new state but has not yet become habitually resident there.

118. As to the relevant factors, I would endorse those factors referred to by Mr Hames in his submissions (at paragraph 54 above), which I do not propose to repeat.

119. Turning to the facts of this case, if any return order can only be made to the state of the child's habitual residence at the relevant date, the consequence of the judge's finding as to habitual residence would be that the court could order B's return to Australia. Indeed, absent the mother establishing any of the exceptions under the 1980 Convention then, as referred to above, the court would be required to make such an order. It is not difficult to see that such an order would be nonsensical and why the father has, sensibly, not sought such an order. The family has no continuing substantive connections with Australia. Nor, looking at another objective of the Convention, could it sensibly be suggested that it would be appropriate to require the parents to litigate in Australia either by relocating there or by seeking to do so remotely from their current locations.

120. It is also relevant to note that the jurisdictional limitations referred to by Ms Renton would, as submitted by Mr Harrison, arise both in respect of England and Wales and in respect of France. Under the 1996 Convention only Australia would have substantive jurisdiction because of the provisions of Article 7. The parties could, of course, seek to address this through Articles 8 or 9 but this would apply equally to England and Wales and France.

121. I do not deal with the issue of whether such an order should have been made in this case because it does not arise, as a result of my conclusions on the issue of habitual residence.

122. (2) I now turn to deal with the question of habitual residence.

123. For the reasons set out below, I have concluded that B was habitually resident in France at the date of the mother's retention of her in England and Wales. In my view, this is the inevitable conclusion on any proper application of the appropriate test.

124. The judge's decision in respect of France was based on her conclusion that B "had not achieved a degree of integration in" or "begun to be integrated into a social and family environment in France". This appears to have been significantly because "the mother did not become at all integrated into France" and "the family unit was simply not the same as it had been in Australia". In respect of Australia, the judge's decision was based on her conclusion that "the roots in Australia … had not loosened to the extent that [the mother and B] had lost habitual residence there".

125. As to the position in respect of France, in my view it is clear that B had "some" degree of integration. The whole family had moved there with the intention of living there. They had a home, even if it was only rented. They brought all their remaining possessions with them. They brought their dog. The father had employment. It was where the father was from so, at least for him, he was returning to an environment with which he was very familiar.

126. With all due respect to the judge's decision, the fact that the mother did not "become at all integrated" and/or that the family unit was not the same as in Australia and/or that B did not have the same activities as those she had had in Australia, do not mean that there was not some degree of integration. These latter factors do not negate the effect of the former.

127. *All* the relevant circumstances need to be considered. In addition, in this respect, the judge's focus only on the mother's situation was too narrow. It was necessary to look at the family's situation including that of the father. This was made clear, for example, in *HR v KO*, at [44], when the CJEU identified as being "particularly important for determining" the habitual residence of a young child, "the circumstances of the reference person(s) with whom that child lives, by whom the child is in fact looked after and taken care of on a daily basis - as a general rule, its parents". The same point was made in *Mercredi v Chaffe*, at [55]: "An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent". The circumstances of both parents and not just one parent, even the primary carer, are relevant.

128. As to the position in respect of Australia, despite Ms Renton's submissions, I do not consider that the judge's analysis can stand. In my view, Ms Renton sought to place far more weight on the judge's analysis, at [20], than it can bear. This paragraph, with the judge's bare conclusion that the roots in Australia were strong and had not loosened, does not sufficiently reflect the nature and extent of the family's continuing connections with Australia. The family's continuing connections with Australia could only be described as tenuous. The matters relied on by the mother, in support of her argument that the door had been left open to a return to Australia, are plainly insufficient to counterbalance the extent of the family's "disengagement" from Australia.

129. What degree of integration and what degree of disengagement will be sufficient to mean that a child is habitually resident in the state to which the family has moved will obviously vary from case to case. However, adopting what Black LJ said in *Re J (Finland)*, in my view the judge has not demonstrated sufficiently that she had in mind the relevant factors in B's old and new lives. She did not carry out a sufficient comparative or balancing exercise of the factors connecting B with France and with Australia.

130. If the judge had performed this exercise she would inevitably have concluded that B was habitually resident in France. The family had left Australia "with the intention of emigrating and having made all the necessary plans to do so"; per Lady Hale in *In re LC*. There had been a considerable "amount of adult pre-planning" and "all the central members of the child's life in the old state" had moved to the new state; per Lord Wilson in *In re B*. In the circumstances of this case B had achieved the requisite degree of integration, in part because the family had severed their substantive connections with Australia, such that B was habitually resident in France as at 3 January 2020.

Conclusion

131. For the reasons set out above, I have concluded that this appeal must be allowed. Absent agreement between the parents, the matter will have to be listed for a further hearing in the Family Division to determine the exceptions relied on by the mother.

Lord Justice Baker:

132. I agree that the appeal must be allowed for the reasons set out in paragraphs 124 to 130 of Moylan LJ's judgment. Looking at the totality of the family's circumstances at the relevant date, I conclude that the child had achieved some degree of integration into a social and family environment in France. This was an example of the type of case, identified by Lady Hale, at [63], in *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038*C*, of a family leaving their home country with the intention of emigrating, having made all necessary plans, and thereby losing one habitual residence immediately and acquiring a new one very quickly.

133. Like my Lord, I consider that the judge erred in focusing on the position of the mother rather than the family unit as a whole. Furthermore, although the judge warned herself that there should not be "any sort of equivalence" between the family's situation in France and Australia, it is clear reading her judgment as a whole that, when assessing the degree of current integration in France, she used the degree of historic integration Australia as a comparator. To my mind, this is a further illustration of the need for caution, identified by Moylan LJ in his judgment in the recent decision in *M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105, when applying the "see-saw" analogy suggested by Lord Wilson in *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 606. There is a danger that the analogy may lead judges to think that, when a family moves from one country to another, there needs to be an equivalent degree of integration in the second country to that enjoyed in the first before habitual residence in the second country can be acquired.

134. At the hearing before the judge, it was accepted on behalf of the father that his application under the 1980 Convention depended on B being habitually resident in France. Although the third state issue was referred to in a skeleton argument filed on behalf of the mother, it was apparently not raised by counsel then appearing on behalf of the father. In the light of the view reached by this court that the child had acquired habitual residence in France, the question whether the court has the power under the 1980 Convention to order the return of the child to a country other than

the state of her habitual residence does not arise on this appeal. In my view, this question is complex and finely balanced. The point was not taken before the judge and, although it was fully argued before us, our decision on habitual residence means that any comment I may make on this question would be entirely obiter. For my part, I would prefer to refrain from expressing any view until the issue falls for substantive determination.

Lord Justice Phillips:

135. I agree that, for the reasons given by Moylan LJ and Baker LJ, when the family relocated from Australia to France, B ceased to be habitually resident in the former country and quickly became habitually resident in the latter. I would only add that I see no difficulty in applying Lord Wilson's graphic analogy to this type of situation: if all the weight on one side of a see-saw is removed and even some of it placed on the other side, the see-saw will immediately tip all the way over. I would also allow the appeal.

136. The question of whether there is power under the 1980 Convention to order the return of the child to a third state therefore does not arise for consideration. In common with Baker LJ, I would prefer not to express an obiter view on that difficult question.