Neutral Citation Number: [2023] EWCA Civ 897

Case No: CA-2023-000036

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (FAMILY DIVISION)
Christopher Hames KC (sitting as a Deputy High Court Judge)
LS21P01690/LS22P00468

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 July 2023

Before :

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LORD JUSTICE PETER JACKSON

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S (Children: Parentage and Jurisdiction)

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- -

Will Tyler KC, Jennifer Lee and **Samara Brackley** (instructed by **Expatriate Law Limited**)
for the **Appellant**
Jacqueline Renton and **Nadia Campbell-Brunton** (instructed by **Kingsley Napley LLP**)
for the **Respondent**
Michael Gration KC and **Katy Chokowry** (instructed by **Mills & Reeve Solicitors**)
for the **Intervener (Reunite)**

Hearing date : 17 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

Introduction

1. This appeal raises two issues:

   (1) Is the appellant CP the legal parent of children who are the subject of applications that she has made to the court, the children's mother being her former civil partner M?

   (2) Does the Family Court have jurisdiction to entertain CP's applications?

   The first question turns on the interpretation and application of s. 42 of the Human Fertilisation and Embryology Act 2008 ('HFEA 2008'), while the second depends on ss. 2(1)(b)(i) and 2A(1) of the Family Law Act 1986 ('FLA 1986').

2. It is a misfortune for any family to find itself involved in litigation that raises a genuine point of law. This appeal gives rise to two entirely separate legal issues. The parties are therefore lucky to have lawyers that have been willing to give their services pro bono. The court is grateful to the advocates and those that have supported them, and to Reunite for its intervention and to its counsel for their submissions, also given pro bono. The way in which the appeal has been prepared and presented reflects credit on the family law community.

3. In this judgment I shall set out the factual background and state my conclusions about the first issue – parentage. In his judgment, Moylan LJ states his conclusions, with which I agree, about the second issue – jurisdiction. The reason why the issues are unrelated is that there is an unappealed finding that the children are 'children of the family' of CP and M. That finding is sufficient to found jurisdiction if it otherwise exists, as s. 42(4) FLA 1986 equates the position of children of the family who are not the children of the parties to a civil partnership with that of children who are. Accordingly, the issue of legal parentage makes no difference to the issue of jurisdiction, but it is nonetheless of immense significance to the whole family, and above all to the children.

The factual background

4. The children, who are all British citizens born in the UK, were conceived by fertility treatment and are now habitually resident in a Gulf State. I will describe the family history in a way that minimises the risk of them being identified.

5. CP and M met in 2005 and became civil partners in 2006, living together in this country. In 2007, M underwent treatment at a fertility clinic in the United States. A, born in 2008, was conceived by intrauterine insemination. CP was present at the birth. In 2009, M and CP entered into a parental responsibility agreement for A.

6. Section 42 HFEA 2008 created for the first time the possibility of legal parentage for non-biological same-sex female civil partners. The Act has effect for children born on or after 6 April 2009. Accordingly, it could not confer parenthood on CP in relation to A, but it is applicable to the younger children.

7. At the end of 2009, M discovered that CP had been having an affair. It was M's case that their relationship broke down irretrievably from this point, albeit that CP still sometimes lived in her home and that they resumed their intimacy from time to time; CP disputed this and said that their relationship continued for another five years with her living together with M and the children as a member of the family.

8. In 2010, M underwent a further round of treatment at the clinic in the United States, on this occasion by in vitro fertilisation. CP remained in this country, looking after A. A number of embryos were created and some were transferred, leading to the birth of children in 2011, at which CP was again present. The remaining embryos were transferred in 2013 and further children were born. CP was not present at the birth as her father was dying, but she visited hospital every day. In 2012, M met another woman, who she later married.

9. CP is not named on any of the children's birth certificates. A's surname is a combination of the surnames of M and CP. The younger children's surname is M's surname and they have CP's surname as their last middle name. When the children were baptised in 2014, CP fully participated in the ceremony. M is recorded on the baptism certificates as their mother and CP as their guardian.

10. At the end of 2014, M moved to a Gulf State with the elder children, while the younger children remained for five months in England with CP and a nanny. CP brought the younger children to M in 2015, returning to England shortly afterwards. M and CP made an amicable arrangement for the children to stay with CP in England for six or seven weeks each summer, and in the Gulf for one or two weeks over every Christmas and New Year period when M was abroad. This arrangement continued until 2019.

11. In 2016, the parties' civil partnership was dissolved by proceedings in England. In 2017, a final financial remedy consent order was made by the Family Court. The order recorded that the parties wanted to give effect to an agreement on child support pursuant to the Child Support Act 1991, directing CP to pay child periodical payments to M for 'the children of the family'.

12. In 2018, M married her partner, and in 2019 they entered into and registered parental responsibility agreements for all the children. In 2021, CP married her own partner.

13. From 2019 onwards, CP's time with the children reduced. She last saw A in December 2020 and she last saw the younger children briefly in the Gulf in December 2021. Since 2021, A has been at boarding school in England, spending some holiday time with M in the Gulf and some with M's family in England. The younger children live with M and her wife in the Gulf, where they go to school.

The proceedings

14. In February 2022, CP applied for a child arrangements order under s. 8 of the Children Act 1989, seeking time with the children during the school holidays: two weeks over Christmas and the New Year, one week at Easter and three weeks at summer, with additional ad hoc time with A to be agreed between her and him. Her application said that her status as a same-sex parent prevented her from applying to the Court in the Gulf State and that the English courts had jurisdiction under the FLA 1986. In March 2022, she issued a further application seeking permission to invoke the court's

inherent jurisdiction and stating that she would therefore have no other means of having her parental rights determined and of exercising them.

15. The legal position in the Gulf State was agreed between the parties. Same sex relationships are criminalised. A non-biological, same-sex parent of a child is not recognised as a parent and has no standing to apply to court in relation to contact or other aspects of parental responsibility.

16. As to the legal position in the US state where the clinic is situated, civil partnerships are not recognised, though same-sex marriage was recognised in 2014. In 2019, a law was enacted which provided that the spouse of a child's gestational mother is the child's other parent: previously the law had provided for the husband of the gestational mother of a child to be the child's other parent. It was accepted before us that, so far as the clinic was concerned, it was (in contrast to the position in this country) entirely a matter for M and CP as to whether they presented as a couple.

17. At a case management hearing, it was determined that the preliminary issues for the court were:

> "(i) Is the applicant a parent to the children, or any of them?
>
> (ii) Does this court have jurisdiction to make child arrangements orders and/or other orders regarding the children's welfare?
>
> (iii) Should any such jurisdiction be exercised?"

18. The matter came before Christopher Hames KC, sitting as a deputy High Court Judge, between 14 and 18 November 2022. He read and heard evidence from CP and five witnesses called by her, and from M and two witnesses called by her. On 2 December 2022, he handed down a reserved judgment. His decision was that CP was not the legal parent of the younger children but that all the children were children of the family of M and CP. He concluded that no jurisdiction existed in respect of the younger children and he dismissed the proceedings regarding them. He found, applying ss. 2(1)(b)(ii) and 3(1)(b) FLA 1986, that the court had jurisdiction in respect of A, due to his presence in England and Wales at the time CP's application was made. He stayed the proceedings regarding A, with liberty to restore, so that CP could consider whether to proceed in respect of A alone: if not restored by 28 February 2023, they were to be dismissed.

19. There has been no appeal from the judge's finding that the children are children of the family. CP applied for permission to appeal from the ruling in relation to parentage of the younger children and the orders in respect of jurisdiction. On 17 February 2023, permission to appeal was granted by Moylan LJ on three grounds:

> "1. The judge erred in deciding that the applicant is not a parent of the younger children, and, in particular, the judge wrongly interpreted and wrongly applied the provisions of s 42 of the HFEA 2008 to the facts of the case;
>
> 2. The judge erred in deciding that the "question of making the order" (as sought by the applicant in her application for Child Arrangements Orders) is not properly considered to have "arise[n] in connection with [...] civil partnership proceedings"

> and so misinterpreted ss 2(1)(b)(i) and 2A(1) of the FLA 1986 and wrongly applied those provisions to the facts of the case; and
>
> 3. The judge further erred in his interpretation of ss 2(1)(b)(i) and 2A(1) of the FLA 1986 in that he wrongly declined to accept or to recognise that the children's prior relationship with the applicant, their and her right to respect for family life and to the enjoyment of that right without discrimination, and the absence of any other forum to determine the children's welfare issues required him to read down or otherwise interpret the provisions of ss 2(1)(b)(i) and 2A(1) of the FLA 1986 in such a way that the courts of England and Wales were able to entertain jurisdiction in relation to the dispute as to the children's welfare."

The judgment

20. In the early stages of his careful judgment, the judge described the factual and procedural background and summarised each party's case. He set out the legal framework with reference to parentage, citing s. 42 HFEA 2008 and *Re G (Human Fertilisation and Embryology Act 2008)* [2016] EWHC 729 (Fam), [2016] 4 WLR 65.

21. The judge then surveyed the law on jurisdiction, citing ss. 1, 2, 2A, 3 and 42 of the FLA 1986 and the decisions in *Lachaux v Lachaux* [2019] EWCA Civ 738, [2019] 4 WLR 86; *Re A (Jurisdiction: Family Law Act 1986) (Application for Amplification)* [2021] EWFC 105; *Re A (Children)* [2013] UKSC 60, [2014] AC 1; *Re B (A Child)* [2016] UKSC 4, [2016] AC 606; and *Re M (A Child)* [2020] EWCA Civ 922, [2020] 3 WLR 1175.

22. Coming to his assessments of the parties, the judge wrote:

> "72. The first witness I heard was the applicant. She appeared to me to have a relaxed and laid back personality, but is clearly articulate and intelligent. She spoke well and her answers were clear and generally supportive of her case. However, she was keen to impress on me that she considered herself the children's mother and that they were her sons. Understandably she wanted to accentuate her involvement with the children's conception and birth but she had to candidly admit that a lot of the available documentation did not assist her case. In places her answers were significantly lacking in detail. It became clear to me that she was not the organiser and even the decision-maker in the children's lives. She was not able to provide a lot of detail about either the fertility treatment the respondent undertook or the management of the children's lives. This ranged from day to day organisation to major decisions about where they would live or be educated. I appreciate that often she was being asked questions about events some 8 years or even 14 years ago, but I was left with the impression that she was not as heavily involved as she would have me believe. I suspect that was because she is now desperate to resume a relationship with the children and understandably wanted me to know how important her role in their conception and lives had been. I accept in part the criticism made of her by Ms Renton that when she explained matters which didn't quite

> fit with her narrative, she tended to fall back on reliance on latent homophobia… which did not really ring true. That said, I do not think that in cross examination she knowingly told me anything that she knew was false.
>
> 73. She told me that she and the respondent had made a joint decision as a couple to have children. She very much wanted children and was herself part of a large sibling group. She denied that she had played no role in the conception process or in the selection of a suitable sperm donor. She was able to give vivid evidence about her presence of the birth of the elder children and how happy she had felt. I accept she would have wanted to be at the birth of some of the younger children had her father's terminal illness not intervened. I have no doubt that she loves the children and provided them with good quality care.
>
> 74. The respondent gave evidence next. She too was clearly intelligent and articulate but appeared to be more driven than the applicant. I think that she was the more powerful personality of the couple and was the one likely to make the major decisions both about their relationship and the children's upbringing. Her evidence to me was generally more precise and factually detailed than that of the applicant's. However, mirroring the applicant, she was keen to downplay and understate the involvement of the applicant in the children's lives in a way which did not always ring true. I suspect she is very keen to ensure that the applicant is not able now to interfere with her own care of the children and the management of their lives. To adopt the phrase used by Mr Tyler, I think she did at times indulge in 'case-building' in the way she pushed her own narrative to enlist the support of others, including Witness 6 who gave evidence to me and the lawyer presently attached to the fertility clinic. However, I do not accept Mr Tyler's submission that such 'case-building' damaged, still less destroyed, her own credibility."

23. The judge's assessment was therefore that the parties were intelligent and essentially honest witnesses whose evidence was somewhat influenced by their anxieties about the outcome. At no stage did he make a finding that either was being untruthful.

24. The judge addressed the issues about parentage of the younger children at paragraphs 100-134 and about whether they were children of the family at paragraphs 135-136. The balance of the judgment is concerned with the question of jurisdiction.

25. These are the judge's observations on the parties' dealings with the clinic:

> "100. As her written evidence makes clear, the applicant initially thought she had signed documents for the fertility clinic giving her consent to the respondent's fertility treatment. I am satisfied that she did not. I consider it far-fetched to find that the fertility centre would have purposely destroyed or suppressed such documents. I am also satisfied that the respondent is the sole owner of the biological material generated by the fertility treatment and, so far as the clinic was concerned, all decision making was carried out by her.

101. The fall-back position of the applicant is, as I understand it, that the law of the state in the US where Clinic F is based did not require a formal consent from her for the treatment to proceed. The same can also be said of section 42 of the HFEA.

102. All that the documents contain is what are, in my judgment, passing references to the applicant as the partner of the patient which seems to be as part of the respondent's social circumstances and do not show that consent was required from her or given.

103. I did not find the applicant's evidence about her role in the process, at the time of each treatment, particularly convincing. She said she was fully involved. However, she showed, in my judgment, a remarkable lack of basic knowledge of the fertility process undertaken by the respondent for any of the children's conceptions. In her statement she confused IUI (intrauterine insemination) with IUD (intrauterine device – a type of contraception). In her oral evidence she was not able convincingly to explain her error. In addition, she was unaware which of the children had been conceived by IUI and which by IVF (invitro fertilisation). This has a significant impact on how the sperm and eggs are harvested, used and stored and how embryos were created and stored. The respondent explained in great detail, and which I accept, how that after her miscarriage she was compelled to re-consider the type of conception she would attempt for the younger children because of the potential shortage of sperm. She specifically wanted children who were all genetically full siblings and who therefore had the same sperm donor. A's sperm donor was no longer donating by the time of the miscarriage which I accept worried the respondent, as IUI uses far more vials of sperm than IVF and generally is accepted to have a lower success rate than IVF. While the applicant was aware of the miscarriage, she appears to have no knowledge of its impact on the respondent's fertility planning, which I found surprising.

104. The applicant described how she assisted the respondent in the selection of the sperm donor by looking at lots of photographs which each potential sperm donor had provided of themselves as a baby. The applicant's only vivid evidence of the process was her description of the beautiful eyes the selected donor had as a baby. The respondent told me the selected donor had astigmatism and was short sighted. I doubt whether either would have been apparent from the baby photographs. The respondent told me, and I accept, that for her the far more important factors was the educational profile and whether or not the donor had genetic conditions which would affect the children. The applicant knew, rather vaguely, that the sperm donor was of mixed heritage with some Italian ancestry, while the respondent was able to tell me each ingredient of his racial make-up together with the facts that he was the Head of Pharmacology at his employer's firm and was allergic to penicillin. Generally, the respondent's evidence contained all the detail I would expect from somebody heavily involved and invested in the fertility process to have known.

105. Neither party's evidence suggests any evidence of any discussion as to which of them would be genetic or gestational mother. While the applicant asserted she wanted children, there was never any suggestion by either party that any consideration was given to the applicant becoming a genetic or gestational mother."

26. Having considered the subsequent history in some detail, the judge then came to his conclusions:

"Conclusion on consent issue

131. I have found the issue of consent to be finely balanced. This is partly because of the way section 42 of the HFEA is drafted. Given that the pre-condition of the fact of the parties' civil partnership at the relevant time is fulfilled, there is a statutory presumption which can only be displaced by the proof of a negative: that there was no consent to the conception. Although in this case the burden of displacing the presumption rests on the respondent, in other cases it could be on 'W' to displace the burden if, for example, she did not want to be a parent. It is also apparent that the mere fact of the parties being in a civil partnership at the relevant date is not by itself, a sufficient reason for her to become a parent.

132. It seems to me that there are, at least 3 possibilities contemplated by section 42:

i) There is clear evidence that 'W' (the applicant in this case), has expressly consented to the fertility treatment, perhaps by signing documents, and so the presumption of consent does not operate;

ii) There is clear evidence that 'W' has positively objected to the treatment, perhaps because the parties had separated but remained in a civil partnership;

iii) Either W or the mother (as the case may be) has produced some material which displaces the presumption and successfully proves the absence of W's consent.

133. In my judgment there is no evidence that the applicant has either positively objected to the treatment of the younger children (born on or after 6 April 2009) or that she has clearly consented to the treatment. To use the language of Sir James Munby P, there is evidence that the applicant did not consent: the respondent says at no time did the applicant consent which I find credible. I am not entitled to use the presumption as a 'makeweight'. Although I am not directly concerned with the issue of consent to the treatment in respect of A, it is relevant to what happened for the conception of the younger children.

134. Having carefully considered and weighed all of the evidence, I conclude that there was no 'deliberate exercise of choice' by the applicant but only an awareness or acquiescence of the decision taken by the respondent. My primary reasons are as follows:

i) I accept the respondent's evidence that the applicant did not fully participate in the whole process.

ii) I do not accept the applicant's account of her involvement. I found it vague and lacking in detail.

iii) There is no record or mention of her in the fertility records of her having consented although I do not accept that the consent can only be proved by some formalised document, pro-forma or otherwise: there is therefore no question of the absence of a written document conclusively proving that the applicant did not consent.

iv) I am satisfied that the respondent was quite determined to proceed with the treatment regardless and without reference to the views of the applicant.

v) The presence of the applicant at the birth of the eldest children and the presence of her name was a consequence of their relationship and nothing more.

vi) Had the applicant consented, she would have been registered as a parent on the children's birth certificates.

vii) It is common ground that by the time of the treatment for the younger children, the applicant had had an affair with another woman of which the respondent was aware and, for separate reasons the applicant had spent time away.

viii) Prior to the children's removal… there was never any question that the applicant needed to consent, or would be entitled to object, to the children moving…, or to stay there once she returned to England.

Conclusion on 'child of the family' issue

135. …

136. In my judgment all the children are to be treated as a "child of the family" within the matrimonial jurisdiction in the FLA 1986. My primary reasons are:

i) The parties entered a parental responsibility agreement for A. I do not accept this was merely to make arrangements for his care if the respondent died prematurely.

ii) While she may not have been a mother or parent, I accept the applicant's evidence that shows that the applicant, the respondent and the children were a family. The applicant effectively played the role of a step-parent. Her role was different to that of a best friend.

iii) The children were given the applicant's surname and other names significant to her.

> iv) I accept the respondent's evidence that the applicant provided emotional support to the respondent and gave care to the children; but I reject her attempt her to portray this as merely transactional in return of board and keep.
>
> v) The video of the children's baptism in 2014 shows a family event involving the applicant and respondent and all the children as a family.
>
> vi) The respondent would not have agreed the extensive arrangements for the children to spend time with the applicant had she not been a significant person in their lives.
>
> vii) The respondent would not have written the letter to the applicant's employer in October 2015 if the applicant had not been part of the children's family."

Parenthood and parentage

27. Legal parenthood provides a lifelong parent-child connection affecting matters such as birth registration, nationality, financial responsibility and inheritance. Parentage usually brings for the child an enduring legal relationship with parents and wider family members. These are fundamentally important matters, and the HFEA seeks to provide clarity about them. It is also apparent that, where the adults are in a marriage or civil partnership, the Act seeks to provide a child who is born from assisted reproduction with two parents, unless the spouse or civil partner did not consent to the means of conception.

28. Section 55A FLA 1986 provides a route by which disputes about parentage can be resolved. Any person may apply to the High Court or the Family Court for a declaration as to whether or not a person named in the application is or was the parent of another person so named. There are provisions concerning the court's ability to hear or refuse to hear such an application, but where a declaration is made the court must notify the Registrar General. In the present case, neither party made an application for a declaration, but instead argued the issue of parentage within the proceedings under the Children Act 1989. The importance of the issue of parentage is such that the more proper procedure would have been for an application under s. 55A to have also been before the court; however, its absence does not affect the substance of the matter.

29. Section 42 HFEA 2008 is situated in Part 2 of the HFEA 2008, which concerns parenthood in cases involving assisted reproduction. It provides:

> "42 Woman in civil partnership or marriage to a woman at time of treatment
>
> (1) If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership with another woman or a marriage with another woman, then subject to section 45(2) to (4), the other party to the civil partnership or marriage is to be treated as a parent of the child unless it is shown that she did not consent to the placing in W of the embryo or

> the sperm and eggs or to her artificial insemination (as the case may be).
>
> (2) This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1)."

30. Subsection 1, which tracks the provision in s. 35 for a man who is married or in a civil partnership, contains a rebuttable presumption of parentage. The female civil partner of a gestational mother will be treated as a parent of the child unless it is shown that she did not consent to the placing of the biological material in the mother. The provision applies equally to those spouses or civil partners who (like CP) wish to be treated as a parent as to those who do not.

31. One such willing civil partner played a part in *Re G (Human Fertilisation and Embryology Act 2008)* [2016] EWHC 729 (Fam), [2016] 4 WLR 65, a very different case to the present one. X was the biological mother of twins of whom her former partner Y was the gestational mother. Y was at the time of the pregnancy in a civil partnership with another woman, from whom she had separated. X and Y signed consent forms at the clinic, which everyone believed conferred legal parentage on X by virtue of ss. 43-44 HFEA 2008, which may take effect when s. 42 does not apply. However, due to an error at the clinic, the wrong forms were signed. Sir James Munby P rectified the forms by substitution of the correct text. The remaining issue concerned the civil partner, from whom the court had an uncontested statement in these terms:

> "I was not involved in any discussions that Y and X had about their plans … I did not give my consent to be treated as a legal parent to any child born as a result of treatment. I was aware that it was Y and X's intention to be the parents, equally, of any child born … and I had no intention of being a legal parent to their child … I fully support X's application to be treated as a legal parent to the twins, she is their biological mother."

32. In these circumstances, s. 42 HFEA 2008 obviously did not represent an obstacle to the relief sought by X. Nevertheless, Sir James Munby P made these observations:

> "25 In relation to the meaning and effect of section 42, I was referred to a number of authorities: *S v McC (orse S) and M (DS intervening)* [1972] AC 24 (Lord Reid, p 41); *Leeds Teaching Hospitals NHS Trust v A* [2003] EWHC 259 (QB), [2003] 1 FLR 1091 (Dame Elizabeth Butler-Sloss P); *In re R (A Child) (IVF: Paternity of Child)* [2005] UKHL 33, [2005] 2 AC 621 (Lord Walker of Gestingthorpe, para 42); *In re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam), [2008] 1 FLR 1047 (McFarlane J); *M v F (Legal Paternity)* [2013] EWHC 1901 (Fam), [2014] 1 FLR 352 (Peter Jackson J); and AB v CT *(Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12, [2016] 1 FLR 41 (Theis J).
>
> 26. For present purposes I am content to adopt, with some small adjustments, the submission of [counsel for the clinic] as to what these cases demonstrate:

> i) The intention of the 2008 Act and its predecessor the 1990 Act is to provide certainty, which is why there is a presumption.
>
> ii) Section 42 of the 2008 Act creates a rebuttable presumption that consent exists in cases of marriage or civil partnership. The presumption can be rebutted by evidence which shows that consent has not been given.
>
> iii) Once evidence to counter the presumption has been led, the presumption cannot be used as a 'makeweight'. So even weak evidence against consent having been given must prevail if there is no other evidence to counterbalance it.
>
> iv) A general 'awareness' that treatment is taking place, or acquiescence in that fact, is not sufficient. What is needed is "consent", and this involves a deliberate exercise of choice.
>
> I add, as [other counsel] correctly submitted, that whether a person "did not consent" is ultimately a question of fact."

33. As Sir James Munby P stated, this account of s. 42 was given "for present purposes". The present appeal offers the opportunity to look more closely at the legislation and to consider the cases that he cited.

34. *S v McC (orse S) and M (DS intervening)* [1972] AC 24 concerned the question of whether blood tests should be ordered in two cases where paternity was in issue. The House of Lords held that it was in the interests of the child and also of justice that the court should have before it all the best evidence available, including modern scientific evidence as provided by blood tests. Lord Reid's speech included this passage:

> "The law as to the onus of proof is now set out in section 26 of the Family Law Reform Act 1969 as follows: "Any presumption of law as to the legitimacy or illegitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that that person is illegitimate or legitimate, as the case may be, and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption." That means that the presumption of legitimacy now merely determines the onus of proof. Once evidence has been led it must be weighed without using the presumption as a make-weight in the scale for legitimacy. So even weak evidence against legitimacy must prevail if there is not other evidence to counterbalance it. The presumption will only come in at that stage in the very rare case of the evidence being so evenly balanced that the court is unable to reach a decision on it. I cannot recollect ever having seen or heard of a case of any kind where the court could not reach a decision on the evidence before it."

35. Section 26 of the Family Law Reform Act 1969, cited by Lord Reid, immediately follows Part III of the Act, which is entitled 'Provisions for use of Blood Tests in determining Paternity'. Section 26 itself is entitled 'Rebuttal of presumption as to legitimacy and illegitimacy' and it provides that the common law presumption of legitimacy "may in any civil proceedings be rebutted by evidence which shows that it

is more probable than not that that person is illegitimate or legitimate." It was in this context that Lord Reid made his observation (echoed by Sir James Munby P) about the presumption of legitimacy merely determining the burden of proof, and about the fact that "once evidence has been led… even weak evidence against legitimacy must prevail if there is not other evidence to counterbalance it."

36. The situation under the HFEA 2008 is different. The wording of s. 42 is that "the other party to the civil partnership or marriage is to be treated as a parent of the child unless it is shown that she did not consent to the placing in W (etc.)". This provision creates a status of parenthood, with a presumption that is similar in nature to the common law presumption of legitimacy, but it does not create a presumption of consent. The rebuttal does not take the form of showing that the spouse or civil partner is not the biological parent, as is the case under s. 26, but of showing that she has not consented to the procedure undertaken. The presumption and the means of rebutting it are therefore not symmetrical, as they are in the case of common law legitimacy, and it would therefore be wrong to construe s. 42 as if the presumption of parentage falls away as soon as any evidence of absence of consent, however weak, is led. Further, the section does not refer, as s. 26 does, to the possibility of the presumption being rebutted by "evidence which shows that it is more probable than not (etc.)", a description that is particularly apt for scientific test results. The true position therefore is that the presumption of parentage under s. 42 will prevail unless and until it is proved the spouse or civil partner did not consent to the procedure undertaken. In practice, as Lord Reid said, the court is likely to be able to determine the issue (here, consent) on the evidence, but it will only be where absence of consent is proved on the balance of probabilities that the statutory presumption of parentage will lose its important effect.

37. *Leeds Teaching Hospitals NHS Trust v A* [2003] EWHC 259 (QB), [2003] 1 FLR 1091 illustrates the objective nature of the factual inquiry into consent. Mrs A underwent IVF treatment at a clinic with the intention that the sperm of her husband, Mr A, would be used. Instead, the sperm of another client was used by mistake. Section 28(2) of the Human Fertilisation and Embryology Act 1990 ('HFEA 1990'), the successor to s. 27 of the Family Law Reform Act 1987 and predecessor to s. 35 HFEA 2008, provided that Mr A was to be treated as the father "unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be)." It was submitted on behalf of Mr and Mrs A that Mr A had given a broad consent to the placing of an embryo in Mrs A. He wished to take advantage of the presumption and become the legal father. However, it was held that he had not consented to what had happened. As Dame Elizabeth Butler-Sloss P stated:

> "28. … It is not, however, a matter of endorsement by the husband of his consent. The question whether the husband consented is a matter of fact which may be ascertained independently of the views of those involved in the process. On the clear evidence provided in the consent forms Mr A plainly did not consent to the sperm of a named or anonymous donor being mixed with his wife's eggs. This was clearly an embryo created without the consent of Mr and Mrs A."

38. *In re R (A Child) (IVF: Paternity of Child)* [2005] UKHL 33, [2005] 2 AC 621, which concerned the timing of consent, was another case of irregularity at a clinic. It turned

on s. 28(3) HFEA 1990, which provided for a non-biological father 'treated together' with a mother at a clinic to be regarded as the child's parent. B and the mother, D, who were not married, sought IVF treatment using sperm from an anonymous sperm donor. B had given signed consent, acknowledging that he would become the legal father of any resulting child. B and D separated but D continued with the treatment without B's knowledge and gave birth to a child. B applied for a declaration of paternity, which was granted by Hedley J, but D's appeal to this court was allowed and B's appeal to the House of Lords failed. It was held that, although treatment services had originally been provided for D and B together, they had not been so provided at the relevant time, namely when the implantation had taken place. B was therefore not the legal father of R. Lord Walker of Gestingthorpe's speech includes this passage:

> "42. First, the appellant stressed the need for certainty and clarity, a point which had carried the day before Hedley J. But important though legal certainty is, it is even more important that the very significant legal relationship of parenthood should not be based on a fiction (especially if the fiction involves a measure of deception by the mother). Infertility treatment may be very protracted and a general rule of "once together, always together" (absent express withdrawal of his acknowledgment by the male partner, or review by the clinic) could produce some very undesirable and unjust consequences."

39. There are then three decisions at first instance. The first is *In re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam), [2008] 1 FLR 1047. This concerned a surrogacy arrangement in which a parental order could not be made in respect of a child born to Mrs J for commissioning parents Mr and Mr G, using Mr G's sperm. McFarlane J considered the status of Mrs J's estranged husband in the light of s. 28(2) HFEA 1990:

> "34. Applying s 28 to the present case, Mr PJ, the estranged husband, will be treated as M's father 'unless it is shown that he did not consent to the placing in [his wife] of the embryo or the sperm and eggs or to her insemination (as the case may be)'. It has therefore been necessary for this court to investigate the issue of whether or not Mr PJ consented to these arrangements.
>
> 35. Mr PJ is now based in Spain and has failed to engage in the process of providing information to the court and the process of investigating the question of consent has therefore been protracted.
>
> 36. Mrs J's account was that Mr PJ was aware of her general intention to act as a surrogate mother and had no objection to her doing so. He was not aware of the actual surrogacy procedure that led to M's conception at the time and therefore was not in a position either to consent or not consent to the particular arrangement.
>
> 37. In the absence of any communication from Mr PJ, despite a number of requests for him to respond, and on the basis of Mrs J's evidence, at an earlier hearing I made a declaration to the effect that Mr PJ did not consent to his wife's insemination. Pursuant to s 28, the effect of that

> declaration was that the common law position applied and Mr G is to be treated for all purposes as M's father."

40. McFarlane J then addressed a submission made by the organisation COTS to the effect that, for there to be valid consent, Mr PJ would have had to be present at an information meeting and would have had to have given written consent to the treatment with full knowledge of the status that he would thereby have as the legal father of the child under HFEA 1990:

> "39. The court has not heard argument on the point and has not been expressly referred to the relevant HFEA guidelines. The submissions made by COTS on this issue, which were made at a hearing following my earlier declaration that Mr PJ did not consent, do not require determination in this case. It is however right to record that this court does not necessarily agree with the analysis suggested by COTS. Whilst the processes used at the COTS Information Meeting and at the IVF clinic may produce a situation where there is clear evidence of consent being given (where that is the case), the absence of such clear evidence does not, in my view, mean that 'it is shown that he did not consent' [HFEA 1990, s 28(2)]. The term 'consent' in s 28 is not defined in the 1990 Act and is therefore not confined to the narrow meaning argued for by COTS (express written consent given in accordance with clinic procedures and HFEA guidelines). Furthermore, in the present case the actual conception was not achieved at the IVF clinic, but as a result of a process in Mrs J's home. The wording of s 28(2) requires the court to be satisfied ('it is shown') that the husband 'did not consent'. It is therefore, in my view, necessary for the court to look more widely than simply ascertaining whether or not the husband signed a form at the clinic."

41. The second decision, *M v F (Legal Paternity)* [2013] EWHC 1901 (Fam), [2014] 1 FLR 352, also arose from conception outside a clinic. A child was conceived after the mother, Ms M, who was married to Mr H, contacted Mr F, who advertised his services as an unpaid sperm donor. Ms M applied for a declaration that Mr F was the father because the child had been conceived by normal sexual intercourse ('NI'). Had conception been the result of artificial insemination ('AI'), as contended by Mr F, s. 35 HFEA 2008 would have been engaged. Ms M and Mr F had met on a number of occasions, and Mr H had been present briefly on the first occasion. As trial judge, I determined that there had been a single occasion of AI on the first occasion, but that the conception was the result of one of several later occasions of NI. Mr F was therefore the legal and biological father. I nevertheless went on to say this about the position if s. 35 had applied:

> "25. I find that Mr H acquiesced in the AI that took place at the first meeting but that it has been shown that he did not consent. His failure to vocalize his objection or to have taken active steps to prevent the AI could only amount to consent if they were the outward signs of an inward consent. They cannot convert something short of consent into consent within the meaning of s.35 HFEA. Nor does the reverse burden of proof dilute the meaning of consent itself. Insofar as this is in any way hard on Mr F, who could for a short while at the beginning have

> been forgiven for believing that he was going to be meeting a united couple, it should be borne in mind that he made no effort whatever to find out what Mr H actually thought when they very briefly met. Moreover, by the time of the second meeting in April 2010, Mr F was well aware that Mr H was against AI and he was certainly against NI in any circumstances.
>
> 26. I do not accept the argument on behalf of Mr F that it must be proved not only that there was an absence of consent but also that the absence of consent had been communicated to all those affected. This is not what the statute says and it would not be possible for absence of consent to be communicated to 'all those affected' in many situations, including most obviously a situation in which the husband did not even know that the wife had embarked on AI.
>
> 27. Nor do I accept the argument on behalf of Mr F that the HFEA is an exclusive code governing parentage in all cases, so that if Mr H is ruled out as a parent because he did not consent to AI, the child will have no father. The statute only governs situations that fall within its footprint: the situation described would fall outwith the footprint, and the common law would continue to apply. As a result Mr F would be the legal parent."

42. Finally, *AB v CT (Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12, [2016] 1 FLR 41 was another case in which the position of an absent husband of a surrogate mother arose under s. 35 HFEA 2008. Finding that the husband had not consented , Theis J said:

> "47. Having considered the evidence in this case I have reached the conclusion the court can infer from the information that is available that CT's husband did not consent to the surrogacy arrangement. This conclusion is supported by CT being referred to as 'd/o' (daughter of) in the various documents she signs with the clinic; the fact that the agreement and supporting arrangements (such as CT's counselling arranged by SCI) make no reference to the involvement of CT's husband; SCI appear to have acted in good faith and co-operated with the authorities in India, Australia and here; all the arrangements regarding the surrogacy took place in Delhi, whereas the information the court has about CT's marriage relates to an address in West Bengal.
>
> 48. Therefore, even though CT was probably still married at the relevant time her husband is not the father of the children. As a consequence his consent is not required under s 54 (6)."

43. It can be seen that in all these cases (except *S v McC*, where the issue did not arise) the conclusion was that consent had not been given and that the spouse or civil partner was not the child's parent. None of the cases bear any resemblance to the present one, where several children were born into the home of cohabiting civil partners.

44. Having reviewed the legislation and the authorities with the benefit of the submissions we have received, I reach these conclusions about the interpretation of s. 42 HFEA

2008 and its counterpart s. 35. Where no issue is brought before a court, the spouse or civil partner of the gestational mother will be the parent of a child born after assisted reproduction in consequence of the statutory presumption of parenthood. Where an issue is raised, the court must give effect to the statutory wording by asking itself the question: *"Has it been shown on the balance of probabilities that the spouse or civil partner did not consent to the assisted reproduction that was undertaken?"*

45. This question is the only one that must be answered in order to determine whether an individual is to be treated as the child's legal parent. A closer examination of the legislation and the case law enables the following further observations to be made, but they are not a substitute for the statutory question:

(1) Whether a person did not consent is a matter of fact, taking account of all the circumstances. Assisted reproduction takes place in a wide variety of circumstances and the evaluation of whether consent has not been given must be made in the context of the actual circumstances of the individual case.

(2) The relevant time is the time when the procedure is undertaken. There will be a natural focus on evidence about that moment in time, but evidence about earlier or later periods may contribute to the assessment of whether consent was given or not.

(3) The Act does not prescribe the form in which consent can be given. It may be in writing or oral or unarticulated. It may be express or implied from all the circumstances. Formal written consent is not a requirement of the parenthood provisions of the Act, though licensed clinics in England and Wales will not offer treatment without it. In other circumstances the absence of written or express consent may not be a strong indicator that a person did not consent. The assessment will by definition be taking place in the presence of a marriage or civil partnership and will inevitably take account of the nature of the adults' relationship.

(4) The Act does not require that consent or lack of consent is communicated but a lack of communication may be a relevant factor in determining whether consent exists.

(5) The Act does not equate a lack of consent with an objection or a stated withholding of consent.

(6) The Act does not require that the consent is limited to a specific form of assisted reproduction or to a specific time or place. If the nature of the consent is broad enough, it may encompass a variety of procedures in a range of circumstances.

(7) Awareness that a procedure is being undertaken is not the same thing as consent, though it is clearly a precondition to the possibility of consent having been given.

(8) Acquiescence in a procedure being undertaken is not the same thing as consent, but the court will be careful to distinguish acquiescence from consent that has not been expressly stated.

(9) The assessment of a lack of consent is an objective exercise, but as it concerns the state of mind of the spouse or civil partner, that person's own account of their state of mind is of great importance and the court will need to have clear reasons for rejecting it. Such reasons may be found in the evidence of the gestational mother or elsewhere in the evidence.

(10) Finally, the Act does not limit the ways in which a state of mind can be formed. Whether a spouse or civil partner has or has not consented may be the result of a deliberate exercise of choice, but the law does not require consent to be given or not given in a decisive manner or on a single occasion: in some cases its presence or absence may be inferred from the circumstances.

The parties' submissions

46. The above analysis was not especially controversial as between the parties, but they strongly contest its application to CP's appeal about the parentage of the younger children.

47. For CP, Mr Tyler KC, Ms Lee and Ms Brackley argue that the judge misinterpreted s. 42 and misapplied it to the facts of the case. He was led by the decision in *Re G* to overlook the possibility of consent being inferred from the factual circumstances of the relationship between CP and M. Parties to a marriage or civil partnership will have a way of operating that suits them. The judge's analysis at paragraph 132 is missing a fourth possibility, namely that evidence is produced that does not prove the absence of consent. His specific reasons for concluding that CP did not consent were flawed. He was wrong to factor in or give such weight to: her lack of participation in "the whole process", her name not being on forms or birth certificates, M's determination, CP's affair, and her consent not being sought when M and the children moved. The findings about the significance of CP's presence at two of the births and about the children's names are inconsistent with the findings that underpin his decision that the children are 'children of the family'. Those findings strongly support the conclusion that CP at all times supported the artificial conception of each of the children, and certainly that she was more than merely aware or acquiescent. The judge's assessment was wrong, and this court should find that CP did consent.

48. For M, Ms Renton and Ms Campbell-Brunton submit that *Re G* is fit for purpose but, to the extent that it requires revisiting, it can make no difference to the outcome. In oral submissions Ms Renton accepted that there may be other ways of describing consent than as 'a deliberate exercise of choice'. However, the judge's assessment of the facts was unassailable as a finding that was open to him to make, having had all the advantages of a trial judge. His reasons were sustained by the overall picture of the parties' relationship and their approach to the fertility treatment. He rejected CP's case that she had signed documents and he noted that the clinic viewed M as a single recipient of treatment. He was entitled to treat CP's remarkable lack of basic knowledge about such a hugely significant decision as being telling. The judge was entitled to find that the parties' roles were not equivalent and that CP's role was that of a step-parent, while M was the organiser and decision-maker. He correctly distinguished between the issues of parentage and 'child of the family'. M was, said Ms Renton, "on a fertility journey alone".

Conclusion

49. The judge found the issue of consent in this case to be finely balanced. Borrowing from the authority of *Re G*, he concluded that there was no 'deliberate exercise of choice' by CP, but only an awareness or acquiescence in the decision taken by M. He gave eight primary reasons for reaching that conclusion and seven primary reasons for his finding about 'children of the family'.

50. This court will only interfere with an evaluative decision of this nature if there has been a material error of law or where the decision cannot reasonably be justified. Applying that discipline, I have concluded that the judge's conclusion about the legal parentage of the younger children is not sustainable, for the following three reasons.

51. First, it is understandable that the judge directed himself with reference to the persuasive authority of *Re G*, but it led him to frame the ultimate test as being whether there had been a deliberate exercise of choice by CP. For the reason given in paragraph 45(10) above, that narrowing of the statutory test was an error of law. As a result, he was distracted from considering whether consent on CP's part could be inferred from all the circumstances and whether what he described as acquiescence was not in truth consent that had not been expressly stated: see paragraphs 45(3) and (8).

52. Second, and in consequence, the judge failed to give any real weight to a number of compelling aspects of the evidence. The big picture here was that these were parties to a civil partnership who wanted children and created a family: see paragraphs 73, 105 and 136 of the judgment. CP told the judge in terms that she wanted children and he made no finding to the contrary. The only way either woman could become a biological parent was through assisted reproduction. That was carried out three times with participation on the part of CP, who was involved in choosing the donor, attended births and thereafter played a full part in supporting M and integrating herself into the children's lives and identities over a period of years. This indisputable history creates an irresistible inference that she consented to M's fertility treatment. The judge's conclusion that CP merely acquiesced sits uneasily in the context of a relationship between cohabiting civil partners. In such circumstances, it would be highly unusual for one partner to be passive while the other partner is conceiving and bringing children into the home and there is no sign that that was the case here. It is only natural that a person in CP's position would either support or oppose such an important decision, and here the weight of the evidence was strongly in favour of her having agreed to M receiving treatment so that children could be born. The judge had CP's own evidence, which he did not reject, that she had consented to the treatment, but he did not take that important aspect of the matter into account: see paragraph 45(9) above. Finally, the finding that CP's presence at the births and the children bearing her name was "a consequence of the relationship and nothing more" is sufficiently unexpected as to require more justification than it received.

53. Third, the judge placed undue reliance on several matters that were of no or limited relevance to the issue of consent. He found that M was the more driven partner, and that she knew a great deal more about the procedures and would have gone ahead anyway. At a number of points he compared this with CP's lesser level of involvement in the assisted reproduction and the running of the children's lives. But many relationships between parents have an imbalance of this kind, with one partner being more executive than the other, and the court's task was not to search for equivalence. The fact that CP did not choose to be a gestational mother or that she

"did not fully participate in the whole process" was not of any great relevance to the question of whether she did not consent to the process of assisted reproduction being undertaken by her civil partner. Finally, the fact that CP is not named on the children's birth certificates is a significant feature, but it could not sustain the judge's conclusion without substantial support from elsewhere in the evidence.

54. For these reasons, I do not accept that the issue of consent was finely balanced. I acknowledge that the judge heard the evidence but my analysis does not rest on anything that he derived from that process. Indeed, the detail of the evidence may have distracted him from what I have described as the big picture. The only proper conclusion is that it has not been shown that CP did not consent to the assisted reproduction procedures undertaken by M, and I would substitute a finding that she consented. I would therefore allow the appeal on Ground 1 and declare that CP is to be treated as a legal parent of the younger children, and that the Registrar General is to be so notified.

Lord Justice Moylan:

55. I am grateful to Peter Jackson LJ for setting out the background to these proceedings and for dealing with the first issue in his judgment, with which I agree.

56. The second substantive issue, as referred to above, is whether the Family Court has jurisdiction to entertain CP's applications. This depends on ss. 2(1)(b)(i) and 2A(1) of the FLA 1986 and the meaning, in particular, of the words "in connection with" in s. 2(1)(b)(i). There is also a slight additional issue as to the meaning of the words "the Hague Convention does not apply".

57. The judge first rejected Ms Renton's submission that s. 2A of the FLA 1986 did not apply because recourse to that provision was excluded by the 1996 Convention. This submission was based on the 1996 Hague Child Protection Convention ('the 1996 Convention') being the "first port of call", adopting the expression used by Lady Hale when referring to BIIa, at [20], in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2014] AC 1 ('*A v A*'), and to the Convention having no equivalent provision to article 14 in BIIa. Article 14 provided that:

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

The judge decided, at [138], that:

> "where the Hague Convention does not provide jurisdiction, the courts of England and Wales are free to apply the jurisdictional alternatives provided by the FLA 1986: that is the plain wording of Part 1, particularly sections 2 and 2A."

58. In determining the meaning of the words "in connection with", the judge applied what Poole J had said in *Re A (Jurisdiction: Family Law Act 1986)* [2021] EWFC 105 ('*Re A*'), at [20], namely:

> "ii) There needs to be some connection between the issues raised in the application and the divorce proceedings that goes beyond the mere fact that the divorce proceeded in this jurisdiction. The connection may exist due to one or more factors such as proximity in time, an overlap in the relevant facts or subject-matter, a causal link, or some other matter. However, there is no necessary condition and the sufficiency of any factors to establish a connection will be a question of fact and degree."

Applying that approach, the judge set out his reasons for deciding that CP's applications were not made in connection with the 2016 civil partnership proceedings:

> "144. … Applying this approach, I do not find any 'matter' which connects the applications before me and the civil partnership proceedings other than the fact that they both involve the same parties, the same children of the family and are before the courts of the same jurisdiction. There was no application or even a dispute over the children in or at the time of those proceedings. There is no temporal connection. These proceedings are brought because after 3 years of agreed child arrangements, the parties have, for whatever reason, fallen out and can no longer agree as to what arrangements for contact should now be made. I have not speculated as to those reasons but they were not present at the time of the dissolution. In other words, I am satisfied the applications now before the court have not been made because the civil partnership has been dissolved."

59. Since the judge's decision, this issue has been further considered by the Court of Appeal in *T (Jurisdiction: Matrimonial Proceedings)* [2023] EWCA Civ 285 ("*Re T*"). In my judgment (with which Stuart-Smith and Elisabeth Laing LJJ agreed), I disapproved of Poole J's formulation of the approach which the court should take. I set out the reasons for my decision as to the right approach at some length. However, because only one party was represented in that case and I had already given permission to appeal in the present case, I adopted the unusual course of saying, at [96], that "out of an abundance of caution", it was "subject to any further arguments advanced" in the present appeal.

60. I do not propose to repeat what is set out in *Re T* save as is necessary to address the submissions made in the present appeal which challenge that decision. The conclusion in *Re T* was based on an analysis of: (i) the development of the legislation culminating in the current provisions of the FLA 1986, in particular at [79]-[80]; (ii) what was said by the Law Commissions (for England and Wales and for Scotland) in their joint report, *Family Law, Custody of Children – Jurisdiction and Enforcement within the United Kingdom* (Law Com. No. 138) (Scot. Law Com. No. 91) ("the 1985 Report"), at [76]-[78]; and (iii) the need for an approach which was consistent with the scheme of the FLA 1986 (including s. 11) and which was clear, at [89]-[95]. I concluded, at [96]:

> "96. In summary, … it seems to me that the simple approach to be applied to sections 2 and 2A of the FLA 1986 is that they give the court jurisdiction when the parties in the matrimonial

> proceedings are or were "the parents of the child concerned"; that the matrimonial proceedings are taking place or did place in England and Wales (and concluded other than by dismissal); and that one or other or both of the parents seek a section 1(1)(a) order."

The parties' submissions

61. For M, Ms Renton engaged directly with *Re T* and submitted that it created what amounted to a "boundless discretion" which did not give any proper meaning to the words "in connection with". These words, and in particular the word "*connection*", must have been included for some reason or purpose. In her submission, they imported a question of fact which would be a "relatively easy task" for the court to determine. It required a broad factual enquiry that was not limited to, but might involve, a temporal connection or some sort of "substance overlap" between the divorce/civil partnership proceedings and the children proceedings.

62. When asked during the hearing to elaborate on the test or approach she proposed should be adopted, Ms Renton submitted that "connection" required a factual overlap or temporal link between the circumstances which led to the divorce/civil partnership proceedings and the circumstances leading to the child application. The court would need to determine why there had been matrimonial/civil partnership proceedings and decide whether those factors overlapped with the factors engaged in the child application.

63. Secondly, Ms Renton submitted that *Re T* placed too much weight on the 1985 Report. The focus of that Report had been on intra-UK jurisdictional conflicts and not international cases involving a non-UK jurisdiction. In her oral submissions, I think Ms Renton went as far as suggesting that the 1985 Report did not, and the FLA 1986 was not intended to, deal with international cases at all. She also submitted, at its highest, that a Law Commission Report could not be used for the purposes of interpreting the specific words of a statute or that, alternatively, it was a secondary source of assistance.

64. Ms Renton, nevertheless, took us to parts of the 1985 Report in support of her submission that the FLA 1986 was not intended to deal with international cases but was addressing intra-UK disputes. She relied on paragraphs 1.1, 1.12, 1.13, 1.16, 4.6, 4.34 and the Explanatory Note to s. 4(5).

65. Ms Renton also submitted that there is a tension and potentially a conflict between ss. 2 and 2A and the provisions of article 10 of the 1996 Convention because of the temporal limitation in that article. Article 10 gives jurisdiction in matters of parental responsibility, subject to certain conditions, when a court is exercising divorce jurisdiction. This submission was based on article 10(2) which provides:

> "(2) The jurisdiction provided for by paragraph 1 to take measures for the protection of the child ceases as soon as the decision allowing or refusing the application for divorce, legal separation or annulment of the marriage has become final, or the proceedings have come to an end for another reason."

She submitted that the interpretation for which she contends, in particular by reference to "temporal proximity", would fit better within the overall scheme and could create less scope for conflict between the FLA 1986 and the 1996 Convention.

66. For CP, Mr Tyler submitted that, at least in respect of the younger children, the 1996 Convention does not apply in this case because none of its jurisdictional provisions applied to give jurisdiction to any Contracting State, including England and Wales. There was, he submitted, no conflict with article 10 of the 1996 Convention. Accordingly, ss. 2(1)(b)(i) and 2A apply and determine whether this court has jurisdiction.

67. As to the meaning of the phrase, "in or in connection with matrimonial proceedings", Mr Tyler relied on *Re T*. His written submissions, prepared before that decision, relied on what was said in the 1985 Report, in particular paragraphs 4.8 and 4.9, and challenged Poole J's decision in *Re A*. In his oral submissions, he argued that the interpretation proposed by Ms Renton was neither practical nor appropriate. Any attempt to find some factual nexus between the subject matter of Children Act proceedings and that of divorce/civil partnership proceedings made no sense particularly "in the world of no-fault divorce". It would involve unnecessary and opaque satellite litigation in respect of an issue, jurisdiction, which required clarity and simplicity.

68. Mr Tyler also submitted that the court is entitled to consider Law Commission reports as being relevant to understand the intention behind legislation and as a guide to interpretation.

69. On behalf of Reunite, Mr Gration pointed to the benefits of an approach which did not require investigation of historic events and which was simple and clear. It would obviate the need for lengthy and factually complicated hearings which would lead to detrimental delays and would also avoid outcomes which, as referred to in the 1985 Report (at 4.9), might not be in the interests of children. He submitted that, on a proper analysis of ss. 2 and 2A, they provide clear and simple requirements. Mr Gration supported the reasoning and conclusions set out in *Re T* including by reference to the following matters.

70. In submissions which raised points not directly considered in *Re T*, Mr Gration further analysed the manner in which the relevant statutory provisions have developed, focusing on the introduction of the words "in connection with". He submitted that this analysis supported the conclusion reached in *Re T* that those words required only: that there must have been the relevant proceedings in England and Wales; that the same people must be involved in the child proceedings; and that the child must be their child or a child of the family. Each of these is a connection and, together, they comprise the relevant connecting factors for the purposes of establishing that "the question of making the order arises … in connection with" the preceding proceedings.

71. Mr Gration suggested that the contrary submission seemed to be based on an argument as to the sufficiency of these connecting factors and that there has to be "something more". He questioned the basis of this argument and also submitted that it was very difficult to identify what that extra connection might be. In contrast, applying the connecting factors as set out in the FLA 1986 provided a clear and easy test to apply

which weighed heavily in its favour. There was, he submitted, no need for there to be any additional connection.

72. As for the legislative history, Mr Gration started with s.42(1) of the MCA 1973 which, by s. 42(1)(a), gave the court jurisdiction to make an order in respect of children both "in any proceedings for divorce" etc and "at any time" after the grant of a decree. This was, he submitted, a provision which did not require any separate connection beyond the factors set out in s. 42(1)(a) itself. This was not changed by the FLA 1986 as originally enacted, as made clear by s. 4(5) which expressly referred to s. 42(1). I set out both of these provisions below.

73. The words "in or in connection with" were first used in the draft bill annexed to the 1985 Report in what became s. 4(5)(a) of the FLA 1986. Mr Gration submitted that they were used merely to describe the scope of jurisdiction conferred by s.42(1) of the MCA 1973. They were not used to add any requirement for any further connecting factor. Section 4 of the FLA 1986 and s. 42 of the MCA 1973 were repealed and replaced by ss. 2 and 2A but, Mr Gration submitted, nothing supported the conclusion that Parliament was, thereby, intending to restrict or change the scope of the jurisdiction which derived from s. 42(1)(a) of the MCA 1973 or to add additional requirements. They were differently structured provisions but were to the same effect and the words "in or in connection with" continued to be descriptive.

74. Mr Gration also relied on a number of passages in the 1985 Report which, he submitted, first, made clear that it did not have the narrow focus suggested by Ms Renton but proposed a jurisdictional framework which was not confined to intra-UK cases and, secondly, supported the interpretation of s. 2(1)(b)(i) as referred to above. These included paragraphs 1.12-1.13, 3.10 and 4.57, which I set out below.

75. Mr Gration also dealt with the relationship between the FLA 1986 and the 1996 Convention. He submitted that there was no conflict because the Convention "does not apply" when the case does not fall within its jurisdictional scope. Accordingly, it does not apply when a child is not habitually resident or present in any Contracting State.

Legal Framework

76. The issues which arise for consideration are the scope of ss. 2 and 2A of the FLA 1986 and what is meant by the words "the Hague Convention does not apply". The second issue is the meaning of the words "in connection with". Do they have the meaning advanced by Ms Renton and contrary to the decision in *Re T*?

77. I propose first to set out the legislative history, then refer to the 1985 Report before dealing with some of the relevant authorities.

78. As set out in *Re T*, at [78], s. 42(1) of the MCA 1973 provided, as at the date of the FLA 1986, that the court had jurisdiction to make orders in respect of a child in the following circumstances:

> "42 Orders for custody and education of children in cases of divorce, etc., and for custody in cases of neglect

> (1) The court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of eighteen—
>
> > (a) *in any proceedings* for divorce, nullity of marriage or judicial separation, before or on granting a decree *or at any time thereafter* (whether, in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute);
> >
> > (b) where any such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal;
>
> and in any case in which the court has power by virtue of this subsection to make an order in respect of a child it may instead, if it thinks fit, direct that proper proceedings be taken for making the child a ward of court." (emphasis added)

79. Again as referred to in *Re T*, at [78]-[79], the FLA 1986, as originally enacted, did not affect the court's jurisdiction under s. 42(1)(a) but did amend s. 42(1)(b) by deleting the words "within a reasonable period" and replacing them with the words "if an application for the order is made on or before the dismissal". In addition, it was provided by s. 4(5) of the FLA 1986:

> "(5) Where a court—
>
> > (a) has jurisdiction to make a custody order under section 42(1) of the Matrimonial Act 1973 *in or in connection with* proceedings for divorce, nullity of marriage or judicial separation, but
> >
> > (b) considers that it would be more appropriate for matters relating to the custody of the child to be determined outside England and Wales,
>
> the court may by order direct that, while the order under this subsection is in force, no custody order under section 42(1) with respect to the child shall be made by any court in or in connection with those proceedings." (emphasis added)

I would first note that, as submitted by Mr Gration, the words "in or in connection with" are being used to describe the scope of the jurisdiction provided *under* s. 42(1). Either the order was being made *in* matrimonial proceedings or was being made *in connection with* those proceedings, namely "at any time thereafter". They were not being used to introduce an additional test nor any connecting factor beyond what was contained in section 42(1).

80. Additionally, when s. 4(5)(b) refers to "outside England and Wales", there is nothing to suggest that it is confined to another part of the UK and does not include another State. If I understood it correctly, Ms Renton's submission to the contrary is not

sustainable, including because the Explanatory Notes, which formed part of the draft Bill, expressly said in respect of clause 4(5) (which was enacted unchanged):

> "It should be noted that the power of an English court to waive custody jurisdiction is not limited to the case where the court considers that it would be more appropriate for the custody issue to be determined in Scotland or Norther Ireland, but also extends to determination in another country."

81. Section 2 of the FLA 1986, as originally enacted, provided:

> "Jurisdiction in cases other than divorce, etc.
>
> (1) A court in England and Wales shall not have jurisdiction to make a custody order within section 1(1)(a) of this Act, other than one under section 42(1) of the Matrimonial Causes Act 1973, unless the condition in section 3 of this Act is satisfied."

It can be seen that this preserved the jurisdiction provided under s.42(1).

82. The relevant provisions of the MCA 1973 and the FLA 1986 were amended by the Children Act 1989. Section 42 of the MCA 1973 was repealed. One of the "Consequential Amendments" set out in Schedule 13 to the Children Act 1989 was that the jurisdiction provisions in s. 42(1) were incorporated into the FLA 1986 with ss. 2 and 4 of the FLA 1986 being replaced by ss. 2 and 2A. This version of s. 2 provided that the court would "not have jurisdiction to make a section 1(1)(a) order with respect to a child in or in connection with matrimonial proceedings in England and Wales *unless* the condition in section 2A of this Act is satisfied" (emphasis added). The current version of s. 2A is not materially different from the original version.

83. Section 2 has changed to incorporate reference to the Brussels Regulations and to the 1996 Convention and then to delete the former but the phrase "in or in connection with matrimonial proceedings" has always been included. The phrase clearly derived, and was incorporated, from the wording in s. 4(5) of the FLA 1986 with the restructuring being consequential on the revocation of s. 42. As submitted by Mr Gration, there is nothing to suggest that any of these changes were intended by Parliament to change the meaning of the words "in or in connection with" by restricting the scope of the jurisdiction which derived from s. 42(1)(a) of the MCA 1973 or by adding any additional requirements. As he said, they were differently structured provisions but were to the same effect as those which they replaced.

84. I would also note that the word "unless", which appeared in the original three versions of s. 2, was replaced in 2005 by the word "and" so that s.2(1)(b) provided:

> "(b) the Council Regulation does not apply but–
>
> (i) the question of making the order arises in or in connection with matrimonial proceedings and the condition in section 2A of this Act is satisfied .."

This was the first time the wording "does not apply" appears but there is again nothing to suggest that these changes, including replacing "unless" with "and" were intended to change the previous effect of these provisions in respect of the words "in or in connection with".

85. Section 2 of the FLA 1986 now provides:

> "2 Jurisdiction: general.
>
> (1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless—
>
> (a) it has jurisdiction under the Hague Convention, or
>
> (b) the Hague Convention does not apply but—
>
> (i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2A of this Act is satisfied, or
>
> (ii) the condition in section 3 of this Act is satisfied".

Section 2A provides:

> "2A Jurisdiction in or in connection with matrimonial proceedings or civil partnership proceedings.
>
> (1) The condition referred to in section 2(1) of this Act is that the proceedings are proceedings in respect of the marriage or civil partnership of the parents of the child concerned and—
>
> (a) the proceedings—
>
> (i) are proceedings for divorce or nullity of marriage, or dissolution or annulment of a civil partnership, and
>
> (ii) are continuing;
>
> (b) the proceedings—
>
> (i) are proceedings for judicial separation or legal separation of civil partners,
>
> (ii) are continuing,
>
> and the jurisdiction of the court is not excluded by subsection (2) below."

Subsection 2A(2) is not relevant in this case.

86. Section 7(b) defines "matrimonial proceedings" as "proceedings for divorce, nullity of marriage or judicial separation" and s.7(c) defines the "relevant date", when an application has been made for an order, as "the date of the application".

87. By s.42, proceedings (s.42(2) matrimonial and s.42(2A) civil partnership) "shall, unless they have been dismissed, be treated as continuing until the child concerned attains the age of 18". In addition, s. 42(4) defines a child:

> "(4) Any reference in this Part to proceedings in respect of the marriage or civil partnership of the parents of a child shall, in relation to a child who, although not a child of both parties to the marriage or civil partnership, is a child of the family of those parties, be construed as a reference to proceedings in respect of that marriage or civil partnership; and for this purpose "child of the family"—
>
> (a) if the proceedings are in England and Wales, means any child who has been treated by both parties as a child of their family, except a child who is placed with those parties as foster parents by a local authority or a voluntary organisation …"

88. As to the relevance of Law Commission reports, there are many cases in which the court has considered them to assist with interpreting statutory provisions. Indeed, of particular relevance to the present case, Lady Hale did precisely that with the 1985 Report in *A v A* when interpreting the provisions of the FLA 1986. For example, she said:

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

Later, at [27], when deciding whether an order fell within the scope of s. 1(1)(d) of the FLA 1986, Lady Hale expressly referred to a passage in the 1985 Report as an aid to construction.

89. More recently, in *Regina (O) v Secretary of State for the Home Department, Regina (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2023] AC 255, Lord Hodge, at [30], set out the assistance which may be obtained from Law Commission reports and other documents when interpreting a particular statutory provision. This included that such reports "may

disclose the background to a statute and assist the court to identify not only the mischief which it addressed but also the purpose of the legislation, thereby assisting in a purposive interpretation of a particular statutory provision". This "context … is relevant to assist the court to ascertain the meaning of the statute" but not so as to "displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity".

90. As referred to above, we were taken to a number of paragraphs in the 1985 Report. I propose, first, to set out certain paragraphs which address whether the proposed legislation was intended only to apply to intra-UK cases. I do this although, as referred to above, Lady Hale, (who was an author if not indeed the lead author of the 1985 Report), made clear in *A v A*, at [12], that "the jurisdictional rules also apply as between England and Wales (and the other jurisdictions in the United Kingdom) *and other countries*" (emphasis added).

91. Among the comments relied on by Ms Renton was one in paragraph 1.16 where it was said that "this report is not concerned with the resolution of conflicts of jurisdiction affecting countries outside the United Kingdom". However, her submission that the 1985 Report did not deal with international cases has to be contrasted with the following observations.

92. First, as set out in paragraph 1.12, it had originally been proposed that the legislative scheme would only apply to, what were called, "United Kingdom cases", namely cases in which the child "was habitually resident in some part of the United Kingdom".

> "1.12 Although these provisional proposals received a broad measure of support, we received some critical comments, in particular from members of the judiciary in England and Northern Ireland, which caused us to reconsider our approach on the common grounds of jurisdiction. For example, it was argued that the limitation of the proposed scheme to "United Kingdom cases", which were defined in the consultation paper as cases where the child in question was habitually resident in some part of the United Kingdom, would not necessarily exclude the possibility of conflict between the English and Scottish courts in cases with a wider, international element. This argument may be illustrated by the following example. A married couple, both of whom are domiciled in Scotland, move to one of the Gulf States where their child is born. The parents subsequently quarrel and the mother brings the child to the home of a grandmother, in England. The mother immediately makes an application to the High Court for custody. Such a case would not be a "United Kingdom case" as defined in the consultation paper, because at no time would the child have been habitually resident in the United Kingdom. As a result, the case would fall outside the scheme provisionally proposed and the English court would be entitled to assume jurisdiction founded on the physical presence or nationality of the child, while the Court of Session in Scotland would be entitled to assume jurisdiction based upon the child's Scottish domicile acquired at birth. The risk of potential conflicts

> of custody jurisdiction within the United Kingdom would remain.
>
> 1.13 In the light of the criticism of the jurisdictional proposals in the consultation paper, detailed discussions took place between the two Commissions, which in 1980 resulted in broad agreement about a scheme of uniform jurisdictional rules for the making of custody orders whose application would not be confined to "United Kingdom cases"."

It can be seen that, at the end of paragraph 1.12, the risk identified was of conflicts *within* the UK. However, paragraph 1.13 goes on to say that the proposed jurisdictional rules are *not* confined to UK cases.

93. This was not an isolated comment. In paragraph 3.10, it was said:

> "3.10 In framing jurisdictional rules for the purposes of our scheme we have set ourselves the following main objectives-
>
> (i) The rules should be uniform throughout the United Kingdom, and should be of general application and not confined to "United Kingdom cases"."

Later, at paragraphs 4.56 and 4.57, the Report addressed the issue of jurisdiction "in cases of emergency" which, it proposed, should be confined to "a basis of jurisdiction under our scheme". It was not thought that this would "have any adverse effect" because a court would rarely seek to intervene if the child was not physically present in the UK and, if there were any such cases:

> "the great majority would be sufficiently covered by the making of orders on the divorce basis or the habitual residence basis that we have proposed. In other words, we do not think that an emergency jurisdiction is required for the case where the child is neither present nor habitually resident in a part of the United Kingdom, nor the child of a marriage the subject of divorce, etc. proceedings in any part of the United Kingdom. The kind of case excluded by our proposal would be where a British child was in one of the Gulf States and not habitually resident in any part of the United Kingdom and his parents were not parties to divorce, etc. proceedings in any part of the United Kingdom. In that kind of case we do not think that the intervention of a court in any part of the United Kingdom would ever be likely to be appropriate, whether in cases of emergency or not."

94. I also quote what I said in *Re T* about the reasoning given by the Law Commissions for the jurisdiction based on divorce proceedings continuing until the child attained the age of 18:

> "77. As to the reasoning behind the jurisdiction continuing, the *1985 Report* explained why a court's jurisdiction to make Part I orders should continue throughout a child's minority after there had been matrimonial proceedings. It first noted, at [4.7],

its recommendation, which had been "generally approved", that a UK court with divorce jurisdiction should also have child jurisdiction. The *1985 Report* then continued:

> "4.8 The practical application of this general principle raises a problem as to when, for the purpose of custody jurisdiction, proceedings for divorce, nullity or judicial separation should be regarded as coming to an end. The effect of existing law in all three United Kingdom countries is that once the court is duly seised of the matrimonial dispute, it *retains* jurisdiction to deal with questions relating to custody of and access to the children. This jurisdiction is retained however long ago the divorce was granted, however distant the connection of the child with the country in which the divorce took place, and however close and long-standing the child's connection with some other part of the United Kingdom. The question we have to answer is whether, for the purposes of our scheme, the jurisdiction of the divorce court to make custody orders should continue so long as the child is within the appropriate age limit, i.e. 18 in England and Wales and Northern Ireland and 16 in Scotland.
>
> 4.9 We have reached the conclusion that a court dealing with divorce, nullity or judicial separation proceedings should remain entitled to exercise custody jurisdiction until the child attains the appropriate age, even where the child or his parents are or have become habitually resident elsewhere in the United Kingdom. *Our main reason for reaching this conclusion is the impossibility of devising any general rule to the contrary effect which would not sometimes operate against the interests of the child's welfare or against those of the parents.*
>
> 4.10 Nevertheless, we recognise that in some cases it will be advantageous for issues as to custody and access to be determined by a court in a United Kingdom country other than that in which the proceedings for dissolution of the marriage are brought, and we make recommendations for this purpose later in this Part of the report."
>
> 78. The reference, in [4.8], to the court retaining jurisdiction under the then existing legislation was, in relation to England and Wales, a reference to section 42(1) of the MCA 1973." (emphasis added)

The emphasised sentence is particularly relevant.

95. I now turn to the authorities.

96. In *A v A*, Lady Hale, at [20], decided in respect of BIIa (when it was included in s. 2(1)(b) of the FLA 1986) that the "first port of call" in respect of the issue of

jurisdiction was the Regulation. She also decided, at [30], that BIIa applied when there is a rival jurisdiction in a non-member state.

97. There is no equivalent in the 1996 Convention to the residual jurisdiction provision (article 14) in BIIa but I do not see how the absence of such a provision can be used to prevent a court from applying its domestic provisions when the Convention does not apply. The opposite would, in my view, be illogical. Such a conclusion would also be contrary to what is set out in the Explanatory Report on the 1996 Convention by Professor Paul Lagarde, in particular at [39].

98. I referred to this in a judgment handed down since the hearing of this appeal: *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659 ('*Re A (2023)*'). In my judgment (with which Bean and Snowden LJJ agreed) I addressed this issue at [49]-[51] and [58]-[59]. I first propose to quote again from the Lagarde Report, at [39]:

> "[39] Article 5 is based on the supposition that the child has his or her habitual residence in a Contracting State. In the contrary case, Article 5 is not applicable and the authorities of the Contracting States have jurisdiction under the Convention only on the basis of provisions other than this one (Art. 11 and 12). But nothing prevents these authorities from finding themselves to have jurisdiction, outside of the Convention, on the basis of the rules of private international law of the State to which they belong."

Although this refers only to article 5, it clearly applies more generally to the jurisdictional provisions of the 1996 Convention. Again, as referred to above, Lady Hale came to the same conclusion in respect of BIIa when she said in *A v A*, at [30]:

> "… there is nothing in the various attributions of jurisdiction in Chapter II to limit these to cases in which the rival jurisdiction is another member state. Article 3 merely asserts that in matters relating to divorce, legal separation or marriage annulment "jurisdiction shall lie with the courts of the member state" in relation to which the various bases of jurisdiction listed there apply. Article 8 similarly asserts that the courts of a member state "shall have jurisdiction in matters of parental responsibility …" Furthermore, article 12(4) deals with a case where the parties have accepted the jurisdiction of a member state but the child is habitually resident in a non-member state, thus clearly asserting jurisdiction as against the third country in question. Hence in *In re I (A Child) (Contact Application: Jurisdiction)* [2010] 1 AC 319 this court held that article 12 did apply in a case where the child was habitually resident in Pakistan. There is no reason to distinguish article 12 from the other bases of jurisdiction in the Regulation."

It is also relevant to quote what Lady Hale said in *In re I (A Child) (Contact Application: Jurisdiction)* [2010] 1 AC 319, at [15]:

> "It will be noted that, if Brussels II Revised applies, it governs the situation. If some other EU country (excluding Denmark for this purpose) has jurisdiction under the Regulation, then this country does not. But if Brussels II Revised applies and gives this country jurisdiction, it will give jurisdiction even though the residual jurisdictional rules contained in the 1986 Act would not. Only if Brussels II Revised does not apply at all will the residual rules in the 1986 Act come into play."

99. Additionally, the conclusion that, if the 1996 Convention does not apply to give jurisdiction to any Contracting State, domestic rules apply, is also supported by what is set out, at [4.11], in the Practical Handbook on the Operation of the 1996 Hague Child Protection Convention published in 2014 by the Hague Conference on Private International Law. I quoted this in *Re A (2023)*, at [51], and do not propose to repeat it.

100. My conclusions in *Re A (2023)* were as follows:

> "[49] … As I think is agreed by both parties, but is in any event clear, article 5 does not apply if a child is not habitually resident in any Contracting State at the relevant date. Conversely, if a child is habitually resident in a Contracting State at the relevant date, the 1996 Convention does apply … "
>
> and
>
> "[58] Lady Hale set out, at [20], that, for the purposes of determining jurisdiction, "the first port of call is the Regulation". That was a reference to the European Regulation, BIIa, which was then applicable in England and Wales. She explained her conclusion as follows:
>
> > "[20] Thus, if the order in question is a Part I order, the first port of call is the Regulation. But if it is not a Part I order, and is an order relating to parental responsibility within the meaning of the Regulation, the first port of call is also the Regulation, because it is directly applicable in United Kingdom law. That, however, raises the prior question of whether the jurisdictional scheme in the Regulation applies not only in cases potentially involving two or more European Union members who are parties to the Regulation (all save Denmark) but also in cases potentially involving third countries such as Pakistan."
>
> As to the "prior question", Lady Hale concluded, at [30], that "there is nothing in the various attributions of jurisdiction in Chapter II [of BIIa] to limit these to cases in which the rival jurisdiction is another member state". Lady Hale added, at [33], that the CJEU decision of *Owusu v Jackson* [2005] QB 801 "reinforce[d] the conclusion that the jurisdiction provisions of the Regulation do indeed apply regardless of whether there is an alternative jurisdiction in a non-member state".

> [59] Following the UK's leaving the EU, BIIa no longer applies. However, having regard to the terms of sub- sections 2(1)(a) and 2(3)(a) , it is clear, at least for the purposes of the present appeal, that her observation applies equally to the 1996 Convention."

101. I now turn to my conclusions in respect of the issues referred to above, in paragraph 76.

102. First, is the FLA 1986 confined to intra-UK cases as submitted by Ms Renton? It is clear to me that it is not. First and foremost, this is because there is nothing in the wording of the Act which would support such a conclusion. Secondly, it is contrary to what was said in the 1985 Report. Thirdly, it is contrary to what Lady Hale said in *A v A*, at [12], namely, I repeat, that "the jurisdictional rules also apply as between England and Wales (and the other jurisdictions in the United Kingdom) *and other countries*" (emphasis added).

103. Secondly, what do the words "the Hague Convention does not apply" mean? I do not consider that there is any reason not to apply to the 1996 Convention what Lady Hale determined in respect of BIIa in *A v A*, namely that the "first port of call" on the issue of jurisdiction in matters concerning parental responsibility is the 1996 Convention. I remain of the view, as expressed in *Re A (2023)*, at [59], that her observation as to the effect of s.2 of the FLA 1986 applies equally to this Convention. After all, the relevant wording in s. 2(1)(b) was the same for both: "neither the Council Regulation nor the Hague Convention applies".

104. Thirdly, it also appears clear to me that, applying what Lady Hale decided in respect of BIIa in *Re I* at [15] and in *A v A* at [30] and what I said in *Re A (2023)* at [49], the words "the Hague Convention does not apply" mean when the 1996 Convention does not apply to give jurisdiction to England and Wales or to any other Contracting State. In those circumstances, our domestic provisions, in this case ss. 2(1)(b)(i) and (ii) of the FLA 1986, apply to determine jurisdiction in respect of a s. 1(1)(a) order.

105. The next issue is the meaning of the words "in or in connection with matrimonial proceedings".

106. I have set out above the conclusion reached in *Re T*. In my view, the submissions made in the present case have fortified the conclusion reached in that case. With all due respect to her submissions, Ms Renton was unable to formulate an approach or test which was sufficiently clear or precise to be practically applicable. I would, therefore, only accept her submission if driven to do so by the wording of the FLA 1986. In fact, as made clear by Mr Gration's submissions, the history of the legislation supports the interpretation set out in *Re T*. As he submitted, there is nothing which suggests that the incorporation and amalgamation of the provisions of s. 42 of the MCA 1973 and s. 4 of the FLA 1986 into the provisions of ss. 2 and 2A were intended to make any substantive change to the effect of the former in respect of the court's jurisdiction.

107. This conclusion is also supported by what was said in the 1985 Report. In this respect, I would repeat what I said in *Re T*, at [78]:

> "It is clear that the Law Commissions did not intend to change this broad ground of jurisdiction nor to limit it, principally for

> the reason given in [4.9], namely "the impossibility of devising any general rule to the contrary effect which would not sometimes operate against the interests of the child's welfare or against those of the parents". Accordingly, section 2 of the FLA 1986, as originally enacted, provided that the court would continue to have jurisdiction to make a section 1(1)(a) order under section 42(1) of the MCA 1973."

108. Accordingly, the elements required to bring a case within s. 2(1)(b)(i) are those, and only those, set out in the FLA 1986 itself, namely: that the parties in the matrimonial or civil partnership proceedings are or were "the parents of the child concerned" (including a child of the family); that the matrimonial or civil partnership proceedings are taking place or did place in England and Wales (and concluded other than by dismissal); and that one or other or both of the parents seek a section 1(1)(a) order.

Conclusion

109. I would allow the appeal in relation to jurisdiction. The provisions of ss. 2(1)(b)(i) and 2A of the FLA 1986 are satisfied in this case with the result that the courts of England and Wales have jurisdiction to entertain CP's applications and to make s. 1(1)(a) orders in respect of the children, including those who are not present in England and Wales.

Lady Justice King

110. I also agree with each of the judgments of Peter Jackson LJ and Moylan LJ and therefore agree that there should be a declaration that CP is to be treated as the legal parent of the younger children and that the courts of England and Wales have jurisdiction to entertain CP's applications and to make s. 1(1)(a) orders in respect of the children if they are justified on welfare grounds.
