Neutral Citation Number: [2023] EWCA Civ 659

Case No: CA-2023-000119

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MRS JUSTICE ARBUTHNOT
FD22P00457

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 June 2023

Before:

LORD JUSTICE BEAN

LORD JUSTICE MOYLAN

and
LORD JUSTICE SNOWDEN

- -

Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)

- -
- -

Edward Devereux KC and Professor Rob George (instructed by **Field Seymour Parkes Solicitors**) for the **Appellant**
Will Tyler KC and Marisa Allman (instructed by **Slater Heelis Solicitors**) for the **Respondent**

Hearing date: 4 April 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Moylan:

1. The father appeals from the order made by Arbuthnot J ("the judge") on 22 December 2022 by which she dismissed the father's application for an order in respect of his child, A, who was born in early 2021, on the basis that the courts of England and Wales did not have jurisdiction to make orders in respect of A.

2. The judge's decision was based on her finding that A was habitually resident in Zambia and not England and Wales both at the date of the father's application (dated 24 June 2022 and issued by the court on 6 July 2022) and at the date of the hearing in November 2022. A had been wrongfully retained by the mother in Zambia on a date not specifically determined by the judge but which was, at the latest, 23 May 2022 when the father sent a text to the mother formally withdrawing his consent to A remaining in Zambia. A, since her birth, and both her parents were habitually resident in England and Wales when they all travelled to Zambia on 8 March 2022 for what was intended, as found by the judge, to be a short trip. The mother and A have remained there since then.

3. There are three Grounds of Appeal.

   (1) The judge was wrong when she decided that the relevant date to assess habitual residence, for the purposes of determining jurisdiction, was the date of the hearing and not the date of the application;

   (2) The judge's decisions that A was habitually resident in Zambia at the date of the application and at the date of the hearing were both wrong;

   (3) The Judge was wrong when she decided that article 7 of the 1996 Hague Child Protection Convention ("the 1996 Convention") did not apply in this case because A had been wrongfully retained in a non-Contracting State.

4. When I gave permission to appeal, it appeared to me that the case raised broad issues as to the application of the Family Law Act 1986 ("the FLA 1986") and the 1996 Convention, in particular the date at which, for the purposes of determining jurisdiction under article 5 of the 1996 Convention, the court decides where the child the subject of proceedings is habitually resident. Whether it is the date of the application or the date of the hearing is an issue which has divided the judges of the Family Division. However, during the course of the hearing it became apparent that it was not necessary to deal either with the arguments as to the relevant date for the purposes of article 5 or the scope of article 7. This was because this appeal could be determined on a relatively narrow basis since, as explained below, it is clear that if A's habitual residence had changed from England and Wales to Zambia (a non-Contracting State to the 1996 Convention) during the course of the proceedings, the relevant date for the purposes of determining jurisdiction would be the date of the application. Further, if, on the other hand, A remained habitually resident in England at the date of the final hearing then, even on the mother's case, this court would have jurisdiction. Accordingly, the primary issue was whether the judge's decision as to A's habitual residence, in particular at the date of the application, was wrong.

5. That issue would not be determinative of the appeal because the mother raises an issue as to the nature of the order being sought by the father and whether it is within the scope

of the FLA 1986 at all. The mother submits that the father was not seeking an order within the scope of that Act but was seeking an order solely under the court's inherent jurisdiction. On the mother's case, jurisdiction to make such an order depended on the application of the 1996 Convention.

6. The father is represented by Mr Devereux KC (who did not appear below) and Mr George. They challenge the judge's findings as to A's habitual residence, in particular as at the date of the application. It is submitted: (a) that the judge applied the wrong approach because she appeared to consider that A could become habitually resident in Zambia simply by having "some degree of integration" there; and (b) that, in any event, the judge's analysis was flawed because it failed to take into account a number of relevant factors. Other submissions were made as to the relevant date for the assessment of habitual residence and as to the applicability of article 7 of the 1996 Convention.

7. The mother is represented by Mr Tyler KC (who did not appear below) and Ms Allman. They submit that the judge's findings that A was habitually resident in Zambia at the date of the application and at the date of the hearing are unimpeachable. In addition to their submissions as to the nature of the order sought by the father, as referred to above, they also made submissions as to the relevant date for the assessment of habitual residence and article 7.

Background

8. The background, in brief, is as follows.

9. The father is a UK national. He is aged in his late 30s and has always lived in England. The mother was born in Zambia but lived in England from about 2001 when she was aged 12. She is now in her early 30s.

10. The parties met in England in 2016 and started living together here in 2017. A was born in England in early 2021.

11. As set out in the judgment below, the "mother travelled regularly to Zambia during the parents' relationship, sometimes on her own and sometimes with the father". She "had an idea for a business" there, which the father financially supported. She rented a property which, from January 2021, was a four-bedroomed house.

12. The mother and A visited Zambia for a period in October and November 2021.

13. The mother was unwell from December 2021 or January 2022 with the father and maternal grandmother, who lived in England, being largely responsible for caring for A.

14. The parents and A travelled to Zambia on 8 March 2022. They travelled on return tickets and with a small amount of luggage. Most of A's clothes and other belongings remained in the family home as did the mother's. The mother contended that the trip was "for an indeterminate period" but the judge found that this was intended to be a "short trip of a fortnight or so, to go to the paternal grandfather's memorial service and for the mother to take her business plans forward".

15. The father returned to England on 20 March 2022. The judge found that, at some point before 23 May 2022, the mother decided not to return to England "but to make her life either in Zambia or South Africa".

16. On 23 May 2022, on legal advice, the father sent an electronic message to the mother in which he said that he was withdrawing his consent to A remaining in Zambia. He subsequently went to Zambia in early June 2022 and sought to reach an agreement with the mother that she and A would return to England. No agreement was reached.

17. The father returned to England and commenced proceedings. The mother and A have remained in Zambia. There have been proceedings in Zambia.

Proceedings

18. The father's application is dated 23 June 2022 and was issued on 6 July 2022. It was made in Form C66 which is headed "Application for Inherent Jurisdiction order in respect of children". An order was sought for the return of A from Zambia.

19. Although the application was in Form C66, in his substantive statement in support, the father made it clear that he contended that the courts of England and Wales had jurisdiction based on A's habitual residence here. He was not seeking an order under the court's inherent jurisdiction based on the child's UK nationality. In his first statement the father said that he sought A's return home to England; that he wanted to be "reunited" with her; and that he considered she needed a relationship with both parents. In his second, substantive statement he made clear that he was seeking wide-ranging orders concerning A. He dealt in some detail with "Welfare Considerations" which included matters the father considered relevant to each element of the welfare checklist. He set out that A's welfare was "best served by living in the UK" and his primary position that he and the mother should "co-parent A and work together in her best interests". He wanted "to play an active role in A's life" and suggested that, initially on her return to England, he would have contact with her for a few hours during the week and at weekends. This time would be "built up at a pace with which A is comfortable". He also said that, alternatively, if the mother did not want to return to England, he was "capable of …. caring for A".

20. The father's case was that the mother had wrongfully retained A in Zambia and that A remained habitually resident in England both at the date of the application and at the date of the substantive hearing before the judge. It was submitted that the English court had jurisdiction under either article 5 or article 7 of the 1996 Convention or, alternatively, under section 3 of the FLA 1986.

21. The mother's case was that A was habitually resident in Zambia both at the date when the proceedings were issued by the father and at the date of the final hearing before the judge and that, accordingly, the English court did not have jurisdiction under article 5 or section 3. She also contended that the father had consented to A remaining in Zambia or had acquiesced in her doing so.

Judgment

22. On the issue of habitual residence, the judge referred to Hayden J's decision of *In re B (A Child) (Custody Rights: Habitual Residence)* [2016] 4 WLR 156 ("*Re B*"). The judge set out the list of propositions from that case, at [17], which included:

> "(i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (*A v A*, adopting the European test)".

The case to which Hayden J referred was *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] AC 1 ("*A v A*"), which I deal with further below. Also in Hayden J's list was:

> "(x) The relevant question is whether a child has achieved *some degree of* integration in social and family environment; it is not necessary for a child to be *fully* integrated before becoming habitually resident (*In re R)* (emphasis added)."

This was a reference to *In re R (Children) (Reunite International Child Abduction Centre intervening)* [2016] AC 76 ("*Re R*"), in which, at [16], Lord Reed referred to the need to consider the "stability of the residence" and not whether it was permanent and, at [17], said that it was "necessary to assess the degree of integration of the child into a social and family environment in the country in question". I also deal further below with this case.

23. I propose to set out the judge's analysis of the issue of habitual residence in full:

> "Findings - Habitual residence
>
> 43. I bear in mind the principles set out above. In terms of her integration into Zambia, A was 12 months old when she arrived in Zambia in March 2022. At that was dependent on her main carer who was her mother. By June 2022 she was aged 16 months old and she was 20 months old by the date of the hearing in November 2022. By then she had spent over a third of her life in Zambia. She was with her mother, a maternal grandmother she knew from England, and an extended maternal family who lived around her.
>
> 44. I have to consider her mother's integration when enquiring into A's situation. The mother, who was born in Zambia, has become integrated into Zambian life since to Zambia. This would have occurred rapidly. She lived in a large rental villa which she had furnished, she had a fledgling business and had the maternal grandmother and maternal aunt living close to her. The mother had spent about four months in Zambia when she was pregnant and had visited with A in late 2021 for about three or four weeks.

> 45. By the time of the application made by the father in these proceedings in June let alone by the time of this hearing in November 2022, with her primary carer being integrated into a family and community life in Zambia, A would have become very familiar with her surroundings and would have felt settled in Zambia.
>
> 46. Although I considered that the mother was A's primary carer, it was clear in the weeks leading up to their departure in March 2022, when the mother had been ill, that the father had been playing an important role looking after them both assisted by the maternal grandmother. He was a "hands-on" father particularly during this period.
>
> 47. Other signs of integration in Zambia, were that A had been attending a nursery twice a week and I accepted that A was making friends and mixing with cousins.
>
> 48. In terms of the stability of A's lived experience in Zambia, some of the points overlap with observations I have made above. The mother had a home in Zambia. She had left her four bedroomed villa and moved to live with the maternal grandmother in or near Lusaka by the time of the hearing. That too would provide the stability of a family home to A.
>
> 49. The mother had other close family members in Zambia, A had age-appropriate possessions and furniture first in the villa and now in the maternal grandmother's home. I noted that A had been having the appropriate inoculations and was registered at a clinic in Zambia. This was a child who was settled into a community and family life in Lusaka. What was lacking in her life was contact with her father and the paternal family based in England and Wales.
>
> 50. An important factor when considering A's habitual residence is that the mother had unilaterally changed it from England and Wales to Zambia. As can be seen from below, I do not find the father consented to this move. This lack of consent was a significant factor to be weighed in the balance. Prior to the trip to Zambia he was assisting with A. In my judgment though, the factors showing stability and her integration into a life in Zambia outweigh the lack of consent.
>
> 51. At a point before the father's application to this court in June 2022 and well before the hearing in November 2022, I find it clear that this young child had achieved "some degree of integration in a social and family environment" in Zambia."

24. Later, at [121] in her judgment, the judge repeated the same formulation, as set out in [51], to explain her conclusion on the issue of habitual residence:

> "I have found that [A] had achieved some degree of integration and therefore she was habitually resident in Zambia before the father made his application to this court on 23rd June 2022 and several months before the hearing before me on 28th November 2022."

25. The judge dealt with the issue of consent and acquiescence at greater length and in a distinct part of the judgment under the heading "Findings – Consent". She referred to a number of other factors, not included within her analysis of habitual residence, when rejecting the mother's case that the father had consented to or acquiesced in A remaining in Zambia. These included that the parties had planned a "short trip" to Zambia in March 2022; that at "some point before 23 May 2022 and probably soon after the father left Zambia on 20 March 2022, the mother had decided not to return to England but to make her life either in Zambia or South Africa"; that the mother "was asking [the father] to finance a move to South Africa"; and that in August 2022 the mother wrote to the father that "she would return to England within two weeks" if the father paid her a specified sum of money or, for a lesser sum of money "if he financed her move to South Africa".

26. The judge decided that the relevant date at which to determine where A was habitually resident, for the purposes of establishing the court's jurisdiction under article 5 of the 1996 Convention, was the date of the hearing.

27. The judge also decided that article 7 of the 1996 Convention did not apply. She concluded that it only applied when a child moved from one Contracting State to another Contracting State.

28. The judge also, briefly, considered the question of whether the father's application was a Part I order within the FLA 1986. She referred, again, to *A and A* and also to *H v R and The Embassy of the State of Libya* [2022] 2 FLR 1301 ("*H v R*"). She concluded that the father had sought only a "bare inward order" which was not a Part I order. This meant that the provisions of sections 2 and 3 of the FLA 1986 did not apply but that, if they did, the relevant date was the date of the hearing.

Submissions

29. I only propose to set out a very brief summary of the parties' respective submissions.

30. On the issue of habitual residence, Mr Devereux acknowledged the hurdle he had to surmount in challenging a finding of fact but he submitted that the judge's analysis was inadequate and flawed. This was because, first, the judge appeared, wrongly, to consider that the test for habitual residence was solely whether A had "achieved some degree of integration" in Zambia.

31. Secondly, he submitted that the judge's analysis of the issue did not engage with a number of fundamental factors which were relevant in any proper determination of A's habitual residence and which, if properly included, would have led the judge to a different conclusion. The judge had failed to include within her analysis both factors which were relevant to the nature of A's connections with England and factors which were relevant to the nature of A's connections with Zambia. These included that the judge had rejected the mother's case on consent and found that the mother had only

intended to go to Zambia for a few weeks and had initially intended to return to England; that there had been no pre-planning in respect of any move to Zambia; that the mother had been living in England for 20 years and her connections with England were much closer than her connections with Zambia; that the mother had left nearly all her and A's personal belongings in England; that, until March 2022, A's home with both parents had been in England; that her father and paternal family remained in England; and that, importantly in respect of the stability of A's residence in Zambia, in the period after March 2022 the mother's intentions had varied in that she had considered moving to South Africa, as well as spending two weeks there in May 2022 looking at accommodation, and had proposed returning to England.

32. In respect of the relevant date for the purposes of determining jurisdiction under article 5 of the 1996 Convention, Mr Devereux submitted that habitual residence should be decided at the date of the application, not the final hearing. However, in addition, he submitted that, if A's habitual residence had moved from England to Zambia between the date of the application and the date of the final hearing, the relevant date was the date of the application. This was because of the effect of sections 2, 3 and 7 of the FLA 1986.

33. In respect of the third Ground of Appeal, Mr Devereux submitted that the provisions of article 7 of the 1996 Convention meant that England retained jurisdiction.

34. As to the form of the father's application, Mr Devereux submitted that this had been made under considerable time pressure. He also drew our attention to the father's initial statement in which he said that he was concerned about the effect on his relationship with A if they were not "reunited" and that it was important for A to have a relationship with both parents. I have referred above to other comments made by the father in his second statement.

35. Mr Devereux accepted that, if his appeal was successful, the issue of habitual residence would need to be remitted for rehearing because, in essence, he could not submit in this case that there would be no need for oral evidence.

36. Mr Tyler submitted that the judge's findings in respect of habitual residence cannot be impeached and that the father's criticisms were more about form than substance. The judge had directed herself correctly; had properly focused on A's situation; had heard oral evidence; and was well placed to determine where A was habitually resident. Matters of weight were for the trial judge. Mr Tyler accepted that the section in the judgment in which the judge had analysed the issue of habitual residence could have been fuller but, he submitted, reading the judgment as a whole, the judge sufficiently considered the relevant factors to sustain her decision.

37. As to the application of the 1996 Convention, Mr Tyler submitted that it does not apply when a child is not habitually resident in any Contracting State. On the issue of the relevant date under the 1996 Convention, for determining whether the court has jurisdiction based on habitual residence, Mr Tyler submitted that is the date of the hearing. This meant that, if by the date of the final hearing A had become habitually resident in Zambia, the 1996 Convention would not apply. Equally, if A was habitually resident in Zambia at the date of the father's application, the 1996 Convention would also not apply. During the course of the hearing, Mr Tyler accepted that the issue of

jurisdiction in those circumstances would fall to be determined by the provisions of the FLA 1986, subject to the order being sought falling within the scope of that Act.

38. On that issue, Mr Tyler submitted that the father's application was not within the scope of the FLA 1986. He submitted that it sought a bare return order of the type which had been found not to be within the scope of that Act by the Supreme Court in *A v A*. Accordingly, the jurisdiction provisions of that Act did not apply. It was, however, an application which fell within the scope of the 1996 Convention and, accordingly, he submitted that the courts of England and Wales would only have jurisdiction if they had substantive jurisdiction under that Convention.

39. As to article 7 of the 1996 Convention, Mr Tyler submitted that it only applies as between Contracting States so that it only applies if a child, who was habitually resident in a Contracting State, is abducted to another Contracting State. He relied on a number of matters including the wording of Article 7(3).

Legal Framework

40. I propose only to address the issues relevant to the determination of this appeal, namely habitual residence; when the 1996 Convention applies; and whether the application made by the father was within the scope of the FLA 1986.

Habitual Residence

41. I have referred above to what Hayden J said in *Re B*, at [17(i)] and [17(x)]. The former derives from what was said in *A v A* which, in turn, derived from what was said by the CJEU in *Proceedings brought by A* [2010] Fam 42, at [44], namely that:

> "the concept of "habitual residence" under article 8(1) of the Regulation must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment."

It is also right to note that Lady Hale referred to this in *A v A*, at [54(iii)], as being the "test adopted by the European Court".

42. It is clear, however, not only from *Proceedings brought by A* itself but also from many other authorities, that this is a shorthand summary of the approach which the court should take and that "some degree of integration" is not itself determinative of the question of habitual residence. Habitual residence is an issue of fact which requires consideration of all relevant factors. There is an open-ended, not a closed, list of potentially relevant factors.

43. In *Proceedings brought by A*, the CJEU had earlier dealt with the issue at greater length, as follows:

> "[37] The "habitual residence" of a child, within the meaning of article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case.
>
> [38] In addition to the physical presence of the child in a member state, other factors must be chosen which are capable of showing

> that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.
>
> [39] In particular, the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration.
>
> [40] As the Advocate General pointed out in para 44 of her opinion, the parents' intention to settle permanently with the child in another member state, manifested by certain tangible steps such as the purchase or lease of a residence in the host member state, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that state.
>
> [41] By contrast, the fact that the children are staying in a member state where, for a short period, they carry on a peripatetic life, is liable to constitute an indicator that they do not habitually reside in that state.
>
> [42] In the light of the criteria laid down in paras 38-41 of this judgment and according to an overall assessment, it is for the national court to establish the place of the children's habitual residence."

44. The broad nature of the analysis can also be seen from Lady Hale's later comments (in a minority judgment but reflecting, on this issue, the majority judgment of Lord Wilson) in *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038, when she referred, at [59], to whether the residence had "the necessary degree of stability" and when she said, at [60]:

> "All of these factors feed into the essential question, which is whether the child has achieved a *sufficient* degree of integration into a social and family environment in the country in question for his or her residence there to be termed "habitual"." (emphasis added)

The same can be seen from what Lord Reed said in *Re R*:

> "[17] As Baroness Hale DPSC observed at para 54 of *A v A*, habitual residence is therefore a question of fact. It requires an evaluation of all relevant circumstances. It focuses on the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It is necessary to assess the degree of integration of the child into a social and family environment in the country in question. The social and

> family environment of an infant or young child is shared with those (whether parents or others) on whom she is dependent. Hence it is necessary, in such a case, to assess the integration of that person or persons in the social and family environment of the country concerned. The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce."

45. I refer to the above, not to put forward any gloss on the meaning of habitual residence, which the Supreme Court cautioned against in *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 606 ("*Re B 2016*"), at [46], but simply to demonstrate that "some degree of integration" is not a substitute for the required global analysis.

46. I would add that, self-evidently, a test of whether a child had "some degree of integration" in any one country cannot be sufficient when a child might be said to have *some* degree of integration in more than one State. This is why, as referred to in my judgment in *Re G-E (Children) (Hague Convention 1980: Repudiatory Retention and Habitual Residence)* [2019] 2 FLR 17 ("*Re G-E")*, at [59], the "comparative nature of the exercise" requires the court to consider the factors which connect the child to each State where they are alleged to be habitually resident. This is reflected in Mr Tyler's written submissions when he referred to the relevance of a child's "degree of connection" with the State in which he/she resided before they arrived in the new State.

47. In *Re G-E*, I also quoted the "expectations" set out by Lord Wilson in *Re B 2016*, at [46], which bear repeating, namely:

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

48. I have already dealt with the legal approach to habitual residence at some length in this judgment but, finally, I would refer to *In re B (A Child) (International Centre for Family Law, Policy and Practice intervening)* [2020] 4 WLR 149 when, at [83]-[89], in addition to *Re B 2016*, I referred to the CJEU's decision of *Proceedings brought by HR (with the participation of KO) (Case C-512/17)* [2018] Fam 385 and to Black LJ's (as she then was) judgment in *In re J (A Child) (Finland) (Habitual Residence)* [2017] 2 FCR 542 ("*Re J*"). Black LJ, at [57], referred to "the relevance of the circumstances of

a child's life in the country he has left as well as the circumstances of his life in his new country" and, at [62], she said:

> "What is important is that the judge demonstrates sufficiently that he or she has had in mind the factors in the old and new lives of the child, and the family, which might have a bearing on this particular child's habitual residence."

The 1996 Convention

49. Article 5 of the 1996 Convention provides:

> "(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property."

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. Further, as I also think is agreed, *if* the relevant date is the date of the final hearing, article 5 would not apply in this case if A ceased to be habitually resident in England and Wales between the date of the father's application and the date of the final hearing.

50. The fact that article 5 does not apply if a child is not habitually resident in a Contracting State can be seen, for example, from the *Explanatory Report* on the 1996 Convention by Professor Paul Lagarde. This addresses that issue, at [39], and also addresses, at [42], the effect of article 5 when a child's habitual residence changes during the course of proceedings from a Contracting State to a non-Contracting State:

> "[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."
>
> and
>
> "[42] … in the case of a change of habitual residence from a Contracting State to a non-Contracting State, Article 5 ceases to be applicable from the time of the change of residence and nothing stands in the way of retention of jurisdiction, under the national law of procedure, by the authority of the Contracting State of the first habitual residence which has been seised of the matter."

51. This is reiterated 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 which states, at [4.11]:

> "Where the child's habitual residence changes from a Contracting State to a non-Contracting State during proceedings for a measure of protection, the principle of *perpetuatio fori* also does not apply. However, Article 5 of the Convention will cease to be applicable from the time of the change of the child's habitual residence. Nothing therefore stands in the way of a retention of jurisdiction by the authorities of the Contracting State under their non-Convention rules (i.e., outside the scope of the Convention)."

The FLA 1996

52. The relevant provisions of the FLA 1986 are sections 1, 2, 3 and 7.

53. Section 1(1) sets out those orders which are within the scope of the Act. They include:

> "(a) a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order"; and
>
> "(d) an order made by a court in England and Wales in the exercise of the inherent jurisdiction of the High Court with respect to children –
>
> (i) so far as it gives care of a child to any person or provides for contact with, or the education of, a child; but
>
> (ii) excluding an order varying or revoking such an order …"

54. Section 2 provides:

> "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—
>
> …
>
> (ii) the condition in section 3 of this Act is satisfied.
>
> …
>
> (3) A court in England and Wales shall not make a section 1(1)(d) order unless—

> (a) it has jurisdiction under the Hague Convention, or
>
> (b) the Hague Convention does not apply but—
>
> (i) the condition in section 3 of this Act is satisfied, or
>
> (ii) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection."

55. Section 3 provides:

> "3 Habitual residence or presence of child.
>
> (1) The condition referred to in section 2(1)(b)(ii) of this Act is that on the relevant date the child concerned—
>
> (a) is habitually resident in England and Wales, or
>
> (b) is present in England and Wales and is not habitually resident in any part of the United Kingdom …"

56. Section 7 deals with the interpretation of certain expressions including "the relevant date":

> "(c) "the relevant date" means, in relation to the making or variation of an order—
>
> (i) where an application is made for an order to be made or varied, the date of the application (or first application, if two or more are determined together), and
>
> (ii) where no such application is made, the date on which the court is considering whether to make or, as the case may be, vary the order …"

57. The effect of these provisions was considered in *A v A*. I would first note Lady Hale's observation, at [19], that the "omission of a reference to section 2(3)(b)(i) from section 3(1) appears to be an oversight which does not alter the sense of the provisions".

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.

60. Another issue addressed in *A v A* was whether the orders which had been made by the court in that case were within the scope of the FLA 1986. The mother in that case had made an application under the inherent jurisdiction but the focus of Lady Hale's judgment was on two orders which had made the children wards and had ordered their return from Pakistan to England. She decided, principally by analysing the terms of the orders which had been made, that they were not orders made under section 8 of the Children Act 1989 nor were they orders within the scope of section 1(1)(d) of the FLA 1986.

61. The same issue, namely whether a case was within the scope of the FLA 1986, was considered by Peel J in *H v R*. In that case, as in the present appeal, an application had been made in Form C66. An order was sought "under the inherent jurisdiction for wardship and an inward return order". Peel J noted, at [26], that in *A v A* Lady Hale had "described the bare inward return order made under the inherent jurisdiction in that case as not encompassing care or contact and therefore not falling within s 1(1)(d) of the" FLA 1986. He then, by analysing the applicant mother's statement and the content of an order which had been made, concluded, rightly in my view, that the case was within the scope of the FLA 1986. As he said, at [27], the mother "did not seek solely an inward return order; she sought substantive child arrangements orders and secured such orders from the court on 17 June 2021".

62. The above cases demonstrate that, in each case, it will be necessary for the court to decide on which side of the line the application and/or the orders made by the court fall. Are they within the scope of either sub-section 1(1)(a) or sub-section 1(1)(d) or not? In my view this should be more a matter of substance than form and will include, as Peel J did in *H v R*, consideration of the applicant's statement.

Jurisdiction in this Case

63. As set out above, the father's case is that the relevant date for the purposes of determining jurisdiction under article 5 of the 1996 Convention is the date of the application. The mother's case is that it is the date of the final hearing. This would mean that, if A was not habitually resident in England and Wales at the date of the father's application or at the date of the final hearing, the 1996 Convention would not apply (for the reasons set out above, namely that article 5 of the 1996 Convention only

applies if the child *is* habitually resident in a Contracting State). Equally, the provisions of the FLA 1986 would not give the courts of England and Wales jurisdiction because, in summary, A would not have been habitually resident or present here at the relevant date for the purposes of section 3, namely the date of the application.

64. If A was habitually resident in England and Wales at the date of the final hearing then, even on the mother's case, the courts here would have jurisdiction under article 5.

65. If A was habitually resident in England and Wales at the date of the father's application but not at the final hearing then, on the father's case, the courts here would have jurisdiction under article 5. Further, as referred to above, even on the mother's case as to the relevant date for the purpose of article 5 of the 1996 Convention, the courts of England and Wales would have jurisdiction. This is because, as explained above, if the father is right, article 5 of the 1996 Convention would not apply to give jurisdiction to any Contracting State. It would, therefore, "not apply" within the meaning of sub-sections 2(1)(b) and 2(3)(b) leaving jurisdiction to be determined by sub-sections 2(1)(b)(ii) and 2(3)(b)(i) and sections 3 and 7 of the FLA 1986.

66. Under these provisions, the courts of England and Wales have jurisdiction if, as set out in section 3, "on the relevant date the child concerned … is habitually resident in England and Wales". The "relevant date" is defined in section 7 as the date of the application.

67. Accordingly, as set out above, it is not necessary to decide what the relevant date is for the purposes of article 5 of the 1996 Convention. As any observations would be obiter and as the issue is being addressed more directly in another appeal which has been heard, I do not propose to deal with it in this judgment.

68. In summary, the courts of England and Wales would have jurisdiction if A was habitually resident here at the date of the father's application, even if the father is wrong as to the relevant date for the purposes of article 5 and even if A became habitually resident in Zambia by the date of the final hearing. This is because, pursuant to the provisions of the FLA 1986, the date for determining this court's jurisdiction would be based on A's habitual residence at the date of the application. Further, I would just mention that the courts of England and Wales would have (on the mother's case) and retain (on the father's case) jurisdiction if A remained habitually resident here at the date of the final hearing.

Determination

69. Although, in some respects, the prior question is whether the order sought by the father is within the FLA 1986, I propose to start with the issue of habitual residence and the judge's determination that A was habitually resident in Zambia at the date of the father's application and at the date of the hearing before the judge. As relied on by Mr Tyler, I bear well in mind Lord Reed's observation as to "the limited function of an appellate court in relation to a lower court's finding as to habitual residence": *Re R*, at [18]. However, I consider that, to adapt Lord Reed's following words, this is a case in which the lower court has *not* applied the correct legal principles to the relevant facts.

70. First, it is a fair reading of the judgment that the judge wrongly narrowed the relevant approach to being solely whether A had achieved some degree of integration in Zambia.

This can be seen, in particular, from the judge's observation, at [121], that "I have found that [A] had achieved some degree of integration and therefore she was habitually resident in Zambia before the father made his application". This was not an isolated observation because it reflects what the judge had said at [51], as set out above.

71. In addition, however, even if the judge sought to apply the proper legal approach then, as Mr Devereux submitted, her analysis of the facts relevant to her determination of A's habitual residence (paragraphs 43 to 51 of her judgment) was insufficient. The relevant paragraphs referred only, or almost exclusively, to matters relating to A's integration in Zambia and it is not possible to read the judgment as somehow including other relevant matters within that analysis.

72. There was no reference to other relevant factors such as the nature and extent of A's previous and continuing connections with England. There can be no doubt that this was A's home and the place of her habitual residence when she went, for what was intended to be a short visit, to Zambia on 8 March 2022 and was then unilaterally retained by her mother in Zambia. In my view, as in the case of *Re B*, and again "adopting what Black LJ said in *In re J (Finland)*, … the judge did not carry out a sufficient comparative or balancing exercise of the factors connecting" A with Zambia and England. Indeed, the judge undertook no comparative analysis to explain or justify how and why A's habitual residence became so quickly established in Zambia. Nor, indeed, was there included within this analysis any reference to the mother considering living in South Africa or, if certain terms were agreed, returning to England.

73. Having regard to the circumstances of this case and bearing in mind the matters referred to by Lord Wilson in *Re B*, it seems to me that, on paper, the case that A was habitually resident in England and Wales at the date of the application is a strong one. A had been retained by the mother in Zambia at or about the end of March 2022, with no pre-planning at all and with all her paternal family and her primary home throughout her life remaining in England. The mother's intentions as to where she planned to live were, at least, open to question. However, I consider Mr Devereux was right to accept that the issue of habitual residence should be reheard. The parties had given oral evidence on that issue at the hearing before the judge and it would be difficult to exclude the prospect of a judge at a rehearing deciding to hear short, focused, evidence again.

74. Is it necessary for the court also to determine where A was habitually resident in November 2022? In my view, it is not, at least for the purposes of determining whether the English court has jurisdiction. If A was habitually resident at the date of the application, the English courts have and retain jurisdiction even if A became habitually resident in Zambia by the date of that hearing. If, on the other hand, the court was to decide that A was not habitually resident here at the date of the application, the English court would not have jurisdiction and would not have acquired it later.

75. I next deal with the issue of whether the order sought by the father was within the scope of the FLA 1986. It is clear to me that it was. I can explain why very briefly.

76. In my view, if the father's statements are properly taken into account, it is clear that the father was in fact not seeking just a return order. He was seeking orders relating to care and contact, in particular as set out in his second, substantive, statement. For example, he made clear that if, contrary to what he hoped she would do, the mother did not return with A to England, he was "capable of meeting all her needs and caring for her safely".

In other words, one of the orders that he was seeking, as an alternative, was that A be placed in his care. This is an order within the scope of section 1(1)(d) of the FLA 1986 and very probably also section 1(1)(a).

77. It is not, therefore, necessary to deal with Mr Tyler's further submission as to the impact of the 1996 Convention on the court's inherent jurisdiction. As referred to above, he submitted that an application for a return order falls within the scope of the 1996 Convention and, accordingly, the courts of England and Wales only have jurisdiction to make such an order if they have substantive jurisdiction under that Convention. This submission raises a number of questions as to the nature of the court's inherent jurisdiction and the scope of the 1996 Convention which do not need to be addressed in this appeal. However, I would simply note that it might seem "rather strange", as Lady Hale said in *Re J*, at [19], in respect of the Court of Appeal's interpretation of article 11, that:

> "A procedure which had been adopted for many years by the English court in order to effect the summary return of an abducted child from this country to his home country had apparently been precluded by a Convention, which was designed "to improve the protection of children in international situations."

The context of the present case is different, but it would appear strange that the 1996 Convention limited the court's powers in the way suggested when it is accepted, as set out above, that it does not do so if section 3 of the FLA 1986 applies.

Conclusion

78. It is, therefore, regrettably, necessary for the case to be remitted for a rehearing (before a different judge to be nominated by the President of the Family Division) on the issue of A's habitual residence at the date of the father's application subject, of course, to the parties agreeing a welfare resolution in A's best interests.

Lord Justice Snowden:

79. I agree.

Lord Justice Bean:

80. I also agree.