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Case No: FD19P00044

IN THE HIGH COURT OF JUSTICE – FAMILY DIVISION

Courtroom No. 47
1st Mezzanine, Queen's Building
The Royal Courts of Justice
Strand
London
WC2A 2LL
18th April 2019

B e f o r e :

MR TEERTHA GUPTA QC
[SITTING AS A HIGH COURT JUDGE]

AB
and
XY

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MS C RENTON appeared on behalf of the Applicant
MR GRATION appeared on behalf of the Respondent

HTML VERSION OF JUDGMENT

MR GUPTA QC:

Introduction

1. This is a prepared oral judgment. I shall be correcting the transcript of this judgment in due course and shall correct any infelicitous language and may add or amend to my reasoning although my decision is clear and will, of course, remain the same. [I received the transcript on 4 September 2019 and have amended it and added my decision on costs.]

2. The application before me was issued on 24 January 2019 and is for the summary return of a child Z, to

Malta pursuant to the 1980 Convention, otherwise called 'The Convention'.

3. The defence is raised that the child was not habitually resident in Malta at the material time and/or under Article 13(b) of the Convention. This of course is a summary process but I have allowed limited oral evidence from the parents on the factual issue of the child's habitual residence. Both counsel, Miss Renton for the father and Mr Gration for the mother, claimed that the documents spoke for themselves and that they entirely support their respective and opposite cases. Obviously, I needed to hear from the parents to provide the much needed context of those documents and I have been greatly assisted by it. Indeed, in many respects it has been key to my decision.

4. I am concerned with a little girl aged just 21 months old, Z, who was born on [a date in] 2017. She is the beloved daughter of her parents, AB, the applicant father and XY, the respondent mother. The father hails from Malta, the mother from England. They met on an Internet matching site in August 2015 in England and married in England via civil ceremony on [a date in] 2017, 13 days before Z was born. By November 2018, they had effectively separated and the mother had started English divorce proceedings, issued on 2 November 2018 and served on the father in Thailand on 24 November 2018. By anyone's reckoning, this has been a relatively short whirlwind romance. The reality for young Z is that she will grow up with her parents not living together. I sincerely hope and expect that she will be spending a great deal of time in each of her parent's care during her childhood.

5. I caution myself at the outset, Z is very young; to say that she has integrated because of an appointment here or there, for example dentist in Malta, when she only had one tooth, a paediatrician's appointment in Malta, when she was six months old (the paediatrician advising the parents that she should then start to socialise), to my mind would be placing, from her perspective, too much weight on factors which would have had a far more important bearing on my thinking had she been older. It is the overall picture of her integration with which I am concerned.

6. On 21 October 2018, the mother came to London with Z from Sicily, on a one-way flight which she had booked on 27 May 2018, with the father's knowledge. She has remained here since, now around about six months. The father arrived on 27 October in England but then left from London on a pre-booked family trip to Thailand on 4 November, which was due to return on 24 February 2019. The mother and child were booked on that flight but did not go. No further flight to Malta from London had been booked to take place, but it is the father's case that Z was a habitually resident in Malta at the time and that the mother retained the child in England and then declared her decision not to go on with the relationship by issuing English proceedings for divorce on 2 November 2018.

7. This is a case where the child travelled a great deal during the time when she was in the joint overall care of her parents. The following chronology of her movements is worthy of repetition:

    i. As I said the parents married in a civil ceremony in England on 5 June 2017.

    ii. From [a date in] 2017, when Z was born, up until 4 October, Z remained in England.

    iii. She then left for Belgium with her parents on 4 October where she stayed one night and then on 5 October through to 6 October 2017, she is in Germany,

    iv. 6 October to 24 October 2017, she was in the Czech Republic with her parents.

    v. 24 October through to 26 October 2017, she was in Slovakia.

    vi. 26 October through to 11 November 2017, she was in Hungary.

    vii. 11 November 2017, through to the 12, she was in Slovakia.

    viii. On 12 to 25 November she was in Italy/Sicily.

    ix. On 25 November 2017, until 11 December 2017, she was in Malta with both her parents and on or around 10 or 11 December 2017, through to 17 December 2017, Z was in the UK with her mother.

x. 17 December through to 17 February, she was in Malta and at that stage, Z attended 18, three or so hour sessions, at the First Steps Nursery in Malta and was enrolled to stay in Nicky's Nursery in Malta in October 2019.

xi. On 17 February until 22 February 2018, Z was in the UK with her mother.

xii. From 22 February 2018 until 3 March, she was in Malta with both her parents.

xiii. From 2/3 March until 5 March 2018 she was in Italy.

xiv. She then went with her parents on a skiing trip from 5 March to 24 March 2018, she was placed in a crèche while her parents went skiing.

xv. On 24 March until 3 June, Z was back in England with both her parents. She attended the blessing of her parent's marriage and her own Christening/Baptism on 6 May.

xvi. 2 or 3 June through to 7 June, she was in France.

xvii. 7 June to 9 June of last year, she was in Italy.

xviii. 9 June through 10 July 2018 she was in Malta, where she was christened there again.

xix. On 10 July until 14 July she was in Italy.

xx. 14 July 2018 to 26 July, she was in Malta with both her parents.

xxi. 26 July until 2 August, she was with her mother in the UK and she was then back again in Malta on 2 August until 3 September and then she went to Sicily with both her parents on 3 September, all the way through to 21 October, (about six weeks) and then from Sicily her mother brought her as I have already mentioned to England and she has been here since 21 October 2018.

8. L has therefore taken seven flights in her young life and travelled by car (which is a Maserati the father bought in England by procuring loans in Malta) through the year on a number of occasions. She has also lived in Italy for a number of weeks and after her initial five months in England, she has spent an appreciable time in Malta, England and in total, over two months in Italy. The majority of her life, up to October 2018 was in England but this is not really an arithmetical exercise. It's the quality of her time in Malta and England that I need to look at.

The Law

9. The law on habitual residence is agreed and can be summarised thus: as Black LJ, as she then was, stated in *J (A Child) (Finland) (Habitual Residence)* [2017] EWCA Civ 80:

> 'The context for any consideration of habitual residence is the five decisions made by the Supreme Court on the subject since 2013, namely *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60, [2014] AC 1, sub nom *Re A (Children) (Jurisdiction: Return of Child)* [2014] 1 FLR 111 ("*A v A*")*; In re Z (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 75, [2014] AC 1017, sub nom *Re KL (A Child) (Abduction: Habitual Residence: Inherent Jurisdiction)* [2014] 1 FLR 772; In *re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1, [2014] AC 1038 sub nom *Re LC (Children) (Abduction: Habitual Residence: State of Mind of Child) ("Re LC*"); In *re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2015] UKSC 35, [2016] AC 76, sub nom *AR v RN (Habitual Residence)* [2015] 2 FLR 503; *Re B (A child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4, [2016] 2 WLR 557'.

The message from these cases, as Black LJ said in paragraph 27 of her judgment from *Re J*:

'The message from these cases is that the European formulation of the test to be found in *Proceedings brought by A* Case C-523/07, [2010] Fam 42, is the correct one and accordingly the "concept of habitualising 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." The position can be found set out, for example, in the passage in Baroness Hale's judgment in A v A (supra) commencing at [45], where she dealt with Proceedings brought by A and also with the additional observations made in Mercredi v Chaffe (Case C-497/10PPU) [2012] Fam 22) about the relevance of the child's age and the need for "stabilité"'.

10. What is also very clear is that the identification of a child's habitual residence is a question of fact. It may be helpful if I set out paragraph 54 of *A v A* here, because in it Baroness Hale drew threads together. She said:

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

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

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

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

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

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

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

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

'29. Nothing that I say in this case is intended in any way to deviate from these well-established principles, further explained/developed in the subsequent Supreme Court authorities, culminating most recently in *Re B* [2016], to which I now turn in a little more detail. In *Re B* [2016], the particular focus of the court was on the point at which a child loses his or her habitual residence. This was material to whether the English courts had jurisdiction to entertain an application concerning the child which had been made in this country less than two weeks after the child and her mother had left to live in Pakistan permanently. The finding of Hogg J had been that the child and her mother had lost their habitual residence here upon their departure from the country, although she considered it probable that they had not acquired habitual residence in Pakistan at that stage.

30. It is interesting to note Lord Wilson's comment at [39] of *Re B* [2016] that habitual residence

requires "not the child's full integration in the environment of the new state but only a degree of it", and his observation that it is clear that in certain circumstances, the requisite degree of integration can occur quickly. He particularly noted that Article 9 of Brussels IIA expressly envisages a child's acquisition of a fresh habitual residence within three months of his lawful move to another Member State. As he said, in *A v A* Baroness Hale had declined to accept that it was impossible to become habitually resident in a single day. He also remarked, at [45], on the unlikelihood of a child being in limbo without a habitual residence, saying:

> "45. I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts *down* those first roots which represent the requisite degree of integration in the environment of the new state, *up* will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it." (emphasis in the original)

31. It is also worth noting that Lord Wilson said at [42], when looking at Recital 12 to Brussels IIA, that:

> "if the interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former."

This further underlines that the "default setting" (as I might loosely call it) is that a child will have a habitual residence somewhere.

32. At [46] Lord Wilson went on to make three "suggestions" about the point at which habitual residence might be lost and gained. He said:

> "One of the well-judged submissions of Mr Tyler QC on behalf of the respondent is that, were it minded to remove any gloss from the domestic concept of habitual residence (such as, I interpolate, Lord Brandon's third preliminary point in the *J* case [1990] 2 AC 562), the court should strive not to introduce others. A gloss is a purported sub-rule which distorts application of the rule. The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him: (a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state; (b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."

11. The dicta in *B (A Minor: Habitual Residence)* [2016] EWHC 2174 (Fam), summarised the various authorities relating to the termination of a child's habitual residence in the following way:

> '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).
>
> ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the

circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, Re KL).

iii) In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': A v A (para 80(ii)); Re B (para 42) applying Mercredi v Chaffe at para 46).

iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (Re R);

v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (Re LC). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.

vi) Parental intention is relevant to the assessment, but not determinative (Re KL, Re R and Re B);

vii) It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (Re B); (emphasis added);

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

ix) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (Re R and earlier in Re KL and Mercredi);

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 (Re R) (emphasis added);

xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (A v A; Re B). In the latter case Lord Wilson referred (para 45) those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move;

xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (Re R).

xiii) The structure of Brussels IIa, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, "if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former" (Re B supra);'

Paragraph 18 of Black LJ's judgment, as she then was:

'If there is one clear message emerging both from the European case law and from the Supreme

Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child. The approach must always be child driven. I emphasise this because all too frequently and this case is no exception, the statements filed focus predominantly on the adult parties. It is all too common for the Court to have to drill deep for information about the child's life and routine. This should have been mined to the surface in the preparation of the case and regarded as the primary objective of the statements. I am bound to say that if the lawyers follow this approach more assiduously, I consider that the very discipline of the preparation is most likely to clarify where the child is habitually resident. I must also say that this exercise, if properly engaged with, should lead to a reduction in these enquiries in the courtroom. Habitual residence is essentially a factual issue, it ought therefore, in the overwhelming majority of cases, to be readily capable of identification by the parties'.

12. The authority of *Re L-S (A Child)* [2017] EWCA 2177 has also been brought to my attention, where a three-month-old child was adjudged to have gained habitual residence in USA in two months, 25 February 2016 through to 25 April 2016, despite the fact that the mother claimed to have been unsettled and unhappy there. However, in that case, the mother's primary position was that she never lost her initial habitual residence during the five years that she lived in the USA, during which she had become married and lived with the father – see paragraph 19 in that judgment. Of course, the child remained continuously American throughout that period, before being brought to England. Thus, on the facts of it, I find this authority of little use.

13. Conversely I found the well known decision of the CJEU in [*Mercredi v Chaffe*], C-497/10EDU [2012] (Fam) 22, of greater assistance. Paragraph 51:

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

52 In the main proceedings, the child's age, it may be added, is liable to be of particular importance.

53 The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant.

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

55 That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the Court's case law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant'.

13. It is accepted by all concerned that Z was habitually resident from birth in England until she arrived in

Malta, via a seven-week road trip with her parents through Europe. Pursuant to the decision of *UD v XB*, C-393/18 PPU, she could not be habitually resident anywhere else. Paragraph 52 of that judgment says as follows:

> '52 Thus, the Court has held that the recognition of a child's habitual residence in a given Member State requires at least that the child has been physically present in that Member State (judgment of 15 February 2017, W and V, C-499/15, EU:C:2017:118, paragraph 61).
>
> 53 It follows from the considerations set out in paragraphs 45 to 52 above that physical presence in the Member State in which the child is allegedly integrated is a condition which necessarily must be satisfied before assessing the stability of that presence and that 'habitual residence', for the purposes of Regulation No 2201/2003, may not be established in a Member State which the child has never been to'.

The central question in this matter

14. The central question for me to decide, therefore, is whether drawing together all the strands of evidence as I find them, and having been guided by the dictum I have just quoted and considered carefully during my deliberations, Z lost her lost her habitual residence in the weeks after she left England on 4 October 2017 and gained Maltese habitual residence after she arrived there on 17 December 2017, which was reinforced by further periods of time in Malta, whenever she went back to England or elsewhere.

The competing cases

15. The mother's case is that Z has always been habitually resident in England, despite her trips abroad. The father's case is that in view of the mother's decision in 2016, to rent out her home in Hungerford, to give up her job in England and to spend time in Malta with the father and other factors, these illustrate a move to Malta. He asserts that this in turn resulted in Z, after she was born and when she moved in October 2017, becoming habitually resident in Malta by the end of the following year in 2017 and certainly by the time that she was attending the First Steps Nursery in Malta in January/February. If there is any doubt about that, he would say that by the time Z came back to Malta in June 2018 and again in August 2018, for a month each time, she gained her Maltese habitual residence then, even if she had lost it before then, which he does not accept.

16. The oral evidence of the father was something that I obviously considered very carefully, as well as that of the mother. He was educated in England in his latter school years and he was understandably still emotional about the last of his nuclear family. I found him on occasions to be very frank in his description of how matters developed from his perspective but as I shall explain later, I found his approach to be quite egocentric or self-centred. He said in his oral evidence that his life had changed in a way, in the autumn of 2013 when he ended a seven-year relationship because his then partner did not want any children and wanted marriage and his focus had always been to have a child and so consequently he recalibrated his work environment and started working remotely. He confirmed that he was a Maltese taxpayer and that his net income was approximately €4,700 a month and he pays approximately 36.5% tax. He met the mother, as I have said earlier on, using a dating website and he listed his location as being available to meet in Malta or London. He had spent days and weeks in England in 2014 and in 2015, he spent six consecutive weeks in England. He confirmed that after the relationship had begun, when he went back to Malta, in March 2016: :

> 'Caroline understood I could no longer remain in the UK. We wanted to carry on our relationship and Caroline would come and visit for a maximum of a few days every three weeks or so and I would pay for every return trip. She stayed with me in all the period at least and then she said she would relocate in June 2016. That was the only way our relationship was going to continue. She gave up her job. She had been working for about 10 years and the understanding, as he said in oral evidence, was that at any point in time if she felt uncomfortable then she also had a possibility of leaving and as a gesture he paid her €1,000 in cash when she arrived at the airport to enable her to leave if she ever wanted to'.

17. I pause there in saying that this shows how insecure that move was. It is not usual, when one is relocating, in my experience, to be presented with a cash sum to enable one to leave immediately or thereafter because the

whole aim of a relocation is a settled intention to move.

18. C-179 in the bundle is a letter, which I feel I must quote. The mother wrote it in August 2018, during one of her stays in Malta, that was during the last time that she was in Malta, she was in Malta from 2 August until 3 September 2018 with Z and the father,:

> 'I do not like confrontation and avoid it at all costs, not good at expressing myself, especially when I care about it. I get stuck at communication. You are a strong man and from a different educational background and I can't argue with you in the same intellectual way. I am happy in Malta but it is a complete change in my life, I am finding my feet but I will have wobbles. I am a woman and I am emotional. I do not react the same as you. You need to understand and I can be irrational and I am not perfect. There are things I need to do my way which are important for me and might not always be right for you. Mum and Charles definitely like you and dot, dot, dot, but we come from different backgrounds and cultures. Thailand is amazing but, again, very different for me and I am trying to adjust there'.

19. The father's case is that there is only one explanation for this letter, which is that it illustrates entirely that the mother moved to Malta and integrated in Malta and at her new habitual residence in Malta and of course the authorities I mentioned earlier have been cited to assist me in concluding that even an insecure move can result in a change in residence. However, I did not see the letter as supportive of the move, when I read it in full and knowing about the €1,000, which came up in oral evidence from the father, as I did. The fact is that the couple were having difficulties in the summer of 2018 in Malta, after a 10-week stay in England and a further week in England in late July and of course, their then further six-week stay in Italy.

20. Before I turn back to the father's evidence, it is clear that the father owns a delightful property in Malta and that was a place where the mother, and eventually mother and child, were staying in when they came to Malta and that is the father's property. However, the mother, in her oral evidence, confirmed that she had not moved any furniture from her garage in England to that property and there are questions that come up when one is looking at relocation, if this was a planned relocation which resulted in a new habitual residence in Malta, one has to ask oneself: why was this couple flitting about all the time, as I have set out in the chronology of L's young life, up until October 2018, the burden of proof, of course, to establish Maltese habitual residence is on the applicant within these Hague proceedings. That is, of course, the father.

21. Going back to the father's evidence, it was no doubt exciting for them for the mother to discover she was pregnant, and that they were having such an enjoyable time travelling extensively. They were a young couple and they were travelling near and far. Page C53 is an email that her mother wrote to her then tenant about August 26, 2016, where she says as follows, this is the tenant in her property in England:

> 'Hi Marish[?], I hope you are well and having a good August. It looks like England has been having some nice weather. It has been very windy in Malta. I wanted to update you on my plans and let you know that we will be returning to Hungerford on 23 October, we are very happy for you to stay until 22 October, if you would like to. I will stay in Hungerford for the majority of winter and then most likely leave for Malta again in the spring. So if you're looking for a similar arrangement, for next spring/summer then I would be very happy if you would like to rent my house again but completely understand that your plans may have changed, whether you are looking for something more permanent. All the same I will have the utility bills transferred to us…'

22. The father confirmed that there was a short-term let and due to return back to Hungerford on 22 October. He talked of skiing trips, trips to Portugal, Christmas of 2015 in England, ideas of going to the Far East and then pausing those plans. He said, 'Caroline understood where I was to be based. It was her decision that she wanted Maltese citizenship but she had the means to return at a moment's notice'. As far as he was concerned, in his oral evidence, all the antenatal care being in England was merely a low key administrative decision. He said in his oral evidence that there is just a good public funded health care system in Malta and that in between January to March 2017, the couple stopped considering Malta as a venue for the birth, simply because the weather was a bit too hot plus the maternal grandmother would not be there and plus a civil marriage would still be in England. However, he says they always intended to return to his home in Malta.

23. I pause there and observe that those factors, that antenatal care and postnatal care was carried out with regards to Z, in England and that the mother's case is that this was a planned birth, the father's case is that actually they did not plan to have a baby but they were not surprised when Mother became pregnant and the decision to have a child in England was as I said, a low key administrative decision. I have to say I consider the mother's case to be more likely: that it was a planned pregnancy and that it was planned that this child would be born and cared for in England. The antenatal care having been conducted here and the postnatal care having been conducted here.

24. The immunisations that Z had after she was born, C-126, took place on 27 July 2018 in England, as indeed did all her inoculations. By comparison, Z saw a paediatrician only once in Malta. She saw a dentist when she had one tooth in Malta and I find these negligible in comparison to the medical care that she has had in this country.

25. The father, in his oral evidence, confirmed to me that that there is a Maltese agreement that has been signed by the parents and he confirmed in his evidence that there was no discussion about registering young Z for school in England but that actually the First Steps was arranged on the advice of the paediatrician in Malta and it was around that time, Z was six months old, for her to start socialising with other children and to give her mother and father a bit of a break.

26. Understandably, he became quite emotional when he started talking about members of his family and everyone being delighted about L's arrival in Malta. Well, on further clarification, it became apparent that obviously for whatever reason, there were certain members, key members of L's paternal family, such as her grandfather, that she has never met. The real person – the main person who she's met from her parent's family is her paternal Aunt E and her immediate family but the mother's evidence was that she saw them every two weeks or so when she was in Malta. The picture, conversely, that the mother painted of her time when she is with Z in England, was of being or getting hands on assistance from the maternal grandmother and indeed her two sisters, L's maternal Aunts, who have their own children.

27. The father painted a very sad picture of being surrounded by clothes and toiletries and the mother's hairdryer and radio, in Malta, after she left Sicily to come to England in October 2018 and he said that there was quite a deal of clothes in the wardrobes, left behind. This probably is a man who is bereft at the loss of, as once he said, of his nuclear family. He confirmed that the plan was to take not much stuff to Thailand. The property is as I said earlier on, in Malta, a delightful property, 2000 square feet, two bedrooms, plus a third one which they use as a dressing room and he confirmed that for the mother to gain Maltese residence, which she had applied for, she had to confirm that she had a Maltese home and she took down the address, the father's address, whereas the father, when he applied for English residence, which he has applied for and been granted, conversely, he said he put down his hotel in London, his family hotel. The father hails from a family based business. His family has a business based in Malta and the most successful strand of that was, as he put it, hotel and mixed used developments, and international hotels, which is why he is able to avail himself of preferential rates to stay at those family hotels, not only in England but elsewhere in the world.

28. The father said, in his evidence that the mother came and visited on a number of occasions in Malta and he had seen her in England and that, as far as he was concerned, she then made a decision to move to Malta in 2016 in June. I find that strange, bearing in mind the mother, who is in her 30s, who has worked and lived in England for a decade, would make that final decision after three or four short trips to Malta, long weekends, to Malta and the father agreed to that proposition in cross-examination. In fact, even if I do accept that she relocated there, which is contrary to my findings, especially bearing in mind the email that I just read out to her tenant where she said she is coming back and she is not renting the place out long term, the whole thing would have changed when she discovered that she was about to become a mother.

29. Going back to the movements of the parents, before they discovered that they were going to be parents, I can say that it was obviously a peripatetic international romance that they were involved in and to a certain extent that carried on after Z was born because they were still travelling a great deal. At C-134, the father's evidence at paragraph 9, refers to him deciding; obviously this was before Z was born in March 2016, to return to live in Malta because of the 'social exclusion' that he was facing. In other words, he was having difficulties with the mother's family. He said in evidence, it was not a difficulty he was having with them, it was a difficulty they were having with him, which I am afraid illustrates, as I say, his self-centred approach.

30. However, despite his decision, the couple then obviously lived in the house in England in Hungerford.

31. The former again is useful evidence - the mother wanted to give birth in England because the mother and her family were there but the father has not accepted the strong connection that the mother has in England. It is relevant because obviously when one is looking at habitual residence, one needs to consider how deep the emotional and practical 'roots' are. If one uses the well-known 'seesaw analogy' of Lord Wilson - the longer and deeper the roots, the more difficult is to say that that they are being uprooted easily over a short period of time.

32. One has to bear in mind what the mother says, at paragraph 2.36, in her statement, which having heard from the father, and having read all the documents, I accept:

> 'D's background could not have been more different to mine. He is the son of the Hotelier AP and he and his immediate family remain involved in a business. Whilst the original hotel was in Malta, the family now owns hotels across Europe, including the five star dot - hotel in London and maintain bases in each location. This has meant that D and his siblings have lived a somewhat peripatetic existence. D went to boarding school in England and Brown University in the US. He spent significantly more time outside Malta than in the country, since I have known him and I believe this has always been the case. My impression is that it is not just business which kept him away but also to some degree a feeling that Malta was rather provincial [inaudible] compared to the other places, he could easily spend time, due to family interests and work. I do not know D's precise role within the family business, but he was certainly not prevented to office service and he was a perpetual traveller before we met and remains so now'.

33. Of course, I bear in mind that in the aftermath of Mother moving to England in October 2018 with Z and Father not liking that decision. The father still did not return to Malta, rather he went to Thailand for a number of months, albeit came back to Malta for a few weeks and then went back to Thailand via England.

34. The father confirmed that between 30 April 2017 and 4 October 2017, he was in England for the longest continual period on his life, living at the mother's property in Hungerford. I may have those dates wrong but it was a long period that was spent there. C-56, he accepted that he had put down the Hungerford property, that is to say 42 Ramsbury Drive, Hungerford, RG17 OSG, as the property that he was staying at when he was looking at buying a a skiing chalet in the Alps. That was in 2016. He was obviously putting out the fact that that was his permanent residence at that stage and his evidence to me of deciding in March 2016 to *move back* to Malta shows me that he was really not considering himself even at that stage to be living full time in Malta. Yes, 23 October 2016 through to 4 October 2017, is only a 'snapshot' in time and I was cautioned rightly, by Miss Renton. Actually, what I am focussing on, as I remind myself and the parties, is the habitual residence of Z and what she herself experienced during her early months and years and obviously that is linked to her carers, because of her young age. What the parents themselves were doing about their own habitual residence in the months and years leading up to L's arrival in their lives is relevant context for her own habitual residence.

35. The father confirmed that every four or five weeks he would go back to Malta, two or three days, but he said that he was located in the UK, 'without a doubt always Malta will be my base'. I could understand him saying that. However, as I have said I have to concern myself with L's habitual residence. I can easily see that in the same way that the father is saying Malta is his base, the mother would say that England was hers. Yes, she had rented her property in Hungerford to pay, she said, the mortgage and she gave up her job, she said, to have the freedom of travel with her new partner, which I entirely accept, having seen the type of travelling that they have done, she could not hold down a job at the same time. However her own mother's property, which is where she is now staying, and which is the address that she put down on the divorce petition, has always been available to her and she did not buy a property later, she did not get a job in Malta. Therefore, these issues really shed a limited amount of light on the habitual residence as far as she is concerned.

36. L was born in [a date in], obviously 2017, into the Hungerford home. She was living there. The maternal aunt showed her how to bathe and feed Z and that shows me, obviously because of physical presence there because of the assistance the mother and father gained, there was a supportive social and familial environment there and Z was obviously habitual resident there. The as I have said, earlier on question is did

she then lose that habitual residence via her move to Malta in the subsequent months.

37. By comparison to L's maternal family bonds, the father said, very clearly in his oral evidence: *'My father and I are estranged'. He has never met her – the step-mother – 'we do not communicate at all. I don't believe my older brother has seen Z but maybe in passing in Prague. He was not in the right place to deal with that at that stage, emotionally, meaning he was getting divorced'*. The main person, as I said, the only person that really comes to mind as having seen Z whilst in Malta, of the family is the father's sister and on the mother's evidence it was every two weeks or so. Conversely, by comparison, the familial environment in England from L's perspective is greater and deeper and more involved. As the father said, I touched on earlier on, *'I didn't have issues with the mother's family. They have issues with me'*. I do not know whether one can read into that, an inability for the father to accept other people's perspectives and to understand what this particular young lady that he married was thinking, when she decided to give birth in England. It was obviously not simply a low-key administrative decision but rather something that she had thought carefully through and she wanted to be surrounded by her nearest and dearest.

38. Going back to the chronology that I set out at the beginning of this judgment, every time that they went to Malta, (because these trips originated from England, I say 'went to Malta'), the trips were always punctuated by trips to England and indeed trips to places like Italy but Mother is always returned back to see her family, no doubt for succour and support with a very young child.

39. The father confirmed that the email to Chiswick House School, which is dated 11 December 2017, was sent with his knowledge. This I found was quite a key document. It is C-17. It reads as follows: it was sent by the mother to Chiswick House School and St Martin's College, which is based in Malta, as I said, the father accepted it was jointly written by him, but sent by the mother. It says as follows:

> 'Dear Roberta, D and I had great pleasure in meeting you last Thursday at Chiswick House School. Thank you for sending on the information. We feel reassured that Z would benefit from the philosophy and methodology enjoyed by the school. After considering our position, we have decided to look no further here in Malta. Our only concern is that right now, we are uncertain, whether we will be here or in the UK, when Z is at enrolment age. Due to this, we are wondering if the school could reserve a place for Z by registering her, while at the same time considering postponing collection of the contribution enrolment fees until a later date. We appreciate this is a break from convention and while I accept it may not be possible we remain hopeful nonetheless. We look forward [inaudible]'.

Father says, actually this was just merely a cost saving exercise to try and keep things open without them spending any money. The mother's position is that actually it means exactly what it says; 'we were indeed uncertain about L's future'. I have to say, I prefer the mother's evidence in this and the logic of it.

40. A month later on 18 January 2018, the parents from the father spent €120 registering the child at Nicky's Nursery to start in October 2019. I find this was really a low cost reservation for a place but not an indication that there is habitual residence at that time, that is to say, January/February 2018 that was necessarily Maltese. Yes, she had attended, Mr Gration calculated around about 18 or so sessions at the First Steps Nursery but looking at the receipts from that which are at C-160 and 161, one can see that these are again low cost €200, €230 after a registration fee of €150, low costs payments for effectively day care for a six month old, while no doubt the mother has the respite and the ability to do other things, such as in the father's case the mother to the polo ground nearby and try and learn the sport

41. L at that age could hardly have been expected to have integrated socially or otherwise in the environment, due to the short period of time. Initially there followed a 10-week period in England, where the parents live in the Cotswolds, where Mother went back to her parent's place and Z came to Malta on occasion, where she was then christened and when the parents had a blessing of their marriage, no doubt with Mother's family and friends attending and I noticed that Mother's evidence which is not gainsaid was that the grandmother assisted in the organisation of the blessing of the wedding.

42. The longest period of time that Z was in Malta was between 17 December 2017 and 17 February 2018 and she attended those drop in nursery sessions at First Steps during that time because then she went back to England for a period of time. When she came back on 22 February, even though it had been paid for, she did

not go back to the nursery, that was the Mother's case, the father could not really challenge it that it illustrates that these were drop in nursery sessions that were simply a place for her to be, while her mother and father managed to get a bit of respite.

43. The father's lifestyle is something that one has to bear in mind, as described by the mother in her written evidence, which I have quoted. The mother obviously in her letter states: 'Thailand is amazing but again very different for me and I am trying to adjust'. It reflects the reality of the situation that the father's aims were just carry on his previous lifestyle and he went to Thailand twice after Z came to England with her mother to in October 2018.

44. The mother in her oral evidence of course confirmed that she was going to have difficulties flying with Z to Thailand and there are emails that show that the father was giving an ultimatum: saying I am in Thailand and you are going to have to come out to see me. For example in C-91, a long email, the father sent, through an intermediary on 8 November 2018, to the mother:

> '…despite this I nonetheless have little objection to coming to collect you and Z from the UK to make the trip out to Thailand though you will have to buy me my tickets. You have the opportunity to show me that you are a hundred percent behind our relationship by returning with me last time from the UK, but you won't show me that you are even at 50%'.

I will touch on this later on but this really is another dimension to this case where the father kept on saying after the mother brought the child to England, 'come to Thailand' and even saying, 'Well, you've really got to come to England with me, returning with me this last time to the UK'. Malta in the contemporaneous correspondence between the parents is simply not mentioned. The first time Malta is actually mentioned is when the father goes back to Malta unbeknownst to the mother and completes (on 14 December 2018) an affidavit in support of his Hague Convention application and then flies out, , on 24 or so of December 2018 without trying to see his daughter or making any communications direct about returning to Malta. This was illogical behaviour and does not support his case, unfortunately for him.

45. The father was very honest in explaining and accepting that actually the day-to-day care of Z was conducted by her mother and that actually he had only really spent a maximum of four hours or so looking after her by himself to allow Mother to do something else. She is the primary carer but I ask myself, what does that mean, when one looks at habitual residence? I am guided, of course, by the cases that I mentioned earlier on. Surely a first-time mother who has availed herself of antenatal and postnatal care in England and lives close to her own mother, these all provide the building blocks for the child's habitual residence being in England and integrated in this environment, and if that is to be uprooted, using the seesaw analogy, then there has to be something very similar to be in place in Malta, and I find it was not.

46. Every time the seesaw starts to pivot towards Malta, because the couple was in Malta with Z, it goes back, tips back, the mother comes back here for an appreciable period of time with the father or goes elsewhere with the child. A six-week trip to Italy, right at the end shows that really there was no integration in Malta at any stage really, to the extent that one can be satisfied to say the child became a habitual resident in Malta and lost her English habitual residence that she had gained in her first few months of her life. In many respects the father's honesty on those factual points such as well, 'Mum is the main carer', has assisted me greatly in this finding of habitual residence decision and the jurisdiction decision.

47. I have heard very eloquently from Father's counsel and in closing submissions, Miss Renton mentioned the paucity, lack of the nursery arrangement in England in comparison to a nursery place being in Malta. There are two points I have to say about that. One is that how does a low-cost arrangement in October 2018 reflect on the situation in Malta in January 2018, when the family then went back to England for an appreciable period of time? Secondly, of course, it speaks volumes that the mother's social and familial environment, in England, in which she did not need to reserve any nursery place. She does not need one in England, she has two sisters, she has a mother and she has the ability to no doubt have that extra care without needing to resort to nurseries.

48. The medical treatment, the meeting with the paediatrician in Malta, the dental registration, I see these as nominal in comparison to the family funded immunisations that took place here at C-16, we have the inoculations of the child and the check-ups of the child which were on 21 August 2017, 18 September 2017,

11 December 2017. Again, these are all indicators, that show me how, by comparison with Malta, the child's English habitual residence had not been disturbed to any great or appreciable extent .

49. When the father was asked about Z seeing his family and he referred to the fact that he has 25 immediate cousins in Malta but he then referred to Z seeing his cousin Paul in France and his sister in England and in Malta, as the mother said that the paternal aunt was only seen in Malta, every couple of weeks or so. This is an international family. The father does so it is very difficult, it is almost like an conjurer's 'shell game' going on where one stops and says, 'Where is the shell?': Where is the habitual residence? Well, in L's case it never changed it is always in England because the child kept moving too much for her to be integrated anywhere else.

50. C-76, is what I had mentioned earlier on, indicators from the father and contemporaneous messages at the time from the father where he is saying as follows:

> '… despite this Caroline, I am willing to put all this behind us, should you do the right thing by our family and come back to the UK with me next Thursday. Please do the right thing. Don't desert your family. Come back, please, please, please. From the very best [inaudible] that I want for us, rather than anything else, please come back. XXX'.

That is obviously a very emotional position. However, he is talking about Sicily and going back to England. He is not talking about going back to Malta; the reason he is not talking about that is because, at that moment in time, he did not see Malta as being the base for L.. They had another trip booked. In my judgment, I found that L's English habitual residence never changed.

51. In an un usual move for an applicant in a 1980 Hague case, the father then blocked communication between himself and the mother, as is apparent from an email dated 1 November from a gentleman whose initials are NT, who is a mutual friend, 'a friend of ours', dated 1 November 2018, and it says as follows to the mother:

> 'Hi C, sorry, I didn't get in touch last night. I met D as planned yesterday. He didn't tell me much that you don't know already. In summary, as you know, his main issue is your parents. He feels you should focus on your new family, my words not his, not your old family, again, my words, not his. It's not the end of the road for him but its days away. For there to be a chance of your marriage working he would want a proposal offered from you with how much you would see your family. He talked about six days a year for you and Z together and some additional time for you but without L. He also mentioned that E is in London too at the moment and yesterday apparently she sent an email from him. My suggestion is as follows; unless you decide yourself you need contact him as soon as possible. <u>He will go to Thailand</u> (my emphasis) on Sunday, if he doesn't hear from you and then for him it's over. You need to ask me to meet to discuss things. I think you should contact him through E. He has blocked you on his mobile. When you asked to meet, he is saying you want things to work if you do and that you will make suggestions as to how frequently you will see your parents, if you are prepared to listen to him. If I was you, E is in London, I would ask that E sits in on your chat with D, if you do see him preferably with E, you will need to explain, what it was that caused/drove you to leave Sicily with Z without him and against his wishes. [Inaudible] I will call you again, later this morning to check that this email and has got to you. N'.

52. The father is 50 years old. The mother is 36. His excommunication of the mother when she had his then 16-month-old child speaks volumes of his ultimatum approach to their relationship and his unilateral approach to his own travel plans. He would say to me, 'Well, the mother left me in Sicily', but he followed to England soon after and then took a longer flight to a third country without even trying to see Z or communicate directly with the mother. These are the actions of a parent not seeking the return of a child to her home country but actually acknowledging that she is already safe in her home country, a country where she is most integrated, England. Even though he came back to England, from Thailand in December, in transit to Malta and the mother's address was on the divorce petition, her current address (her mother's address, which he no doubt knew well). He did not go and see her there or try and see Z but went to Malta and filled in the paperwork for this application and as I said, went back to Thailand (via London) until the end of February. These are actions that are not corroborative of an overall picture of Maltese habitual residence.

53. There is a letter dated 19 December 2018 from the solicitors that are dealing with the divorce, the father's solicitors and that is at C-104, and I have read that and reread that carefully. They were not instructed, , to say, 'Return Z to Malta for the father would like to see L'; the only time that Z is mentioned is, '*Furthermore, we also put you on notice that should your client seek to raise the same allegations … … in respect for the parties' daughter L… they will be vigorously defended*'. This is talking about the particulars in the petition.

54. As I said, these are not corroborative of a parent seeking in the summary return of his child to the country of his or her habitual residence.

55. Moving on to the mother's evidence, if it is not already obvious, I found her a more compelling witness than the father and she confirmed that she has been receiving child benefit for Z since 2017 and it has been continuous throughout and she had not applied for it anywhere else. She confirmed, as I have just read there that her communication with the father was practically blocked from late October to early November 2018 onwards. There is a key email from the father which is dated 11 November, C-93, which I think is worthy of repetition within this judgment which says as follows: By this time the mother had issued her divorce proceedings with the father did not know because they had not been signed at that stage but he was still saying as follows:

> 'C, you left me in Sicily against my will. You would have had in any case had the week in the UK. You took our daughter with you against my will [without my consent. The law is not there?] for any other reason but for these situations. You can talk all you like and wail all you like. [Your actions speak volumes?]. The family is here in Thailand for the moment. We both decided this over a year ago. If I remember correctly you are my wife. Maybe you should start behaving like one and fly out to Thailand with our daughter in order to start rebuilding our relationship free from all interference from your parents. Please let me know as soon as possible what your intentions are, as I know that you will [want to pretend?] that you have any desire to reunite and rebuild. Kind regards, D'.

56. Obviously, again, this is highly emotionally charged but one has to extrapolate from that that, as the mother said, as far as she could see that he was hoping that she would go to Thailand and carry on the relationship and then this is conduct which is not corroborative of her habitual residence in Malta and immediate summary return to Malta.

57. As far as the mother was concerned reading the subsequent emails, where the father on 13 November simply said to the intermediary, '*Kindly stop all forwarding all further communication received from C and are intended for me' and the intermediary says, 'Good afternoon', to the father, 'Good afternoon, D. Just received this from [the mother] from what it's worth, I think you should come back to England as soon as possible and deal with this maturely and properly. N*'. Those actions led the mother to believe, as she said, 'I figured the father wanted me to stay in England. He asked us to go to Thailand. My parents paid for the flight and of course he was in England on 28 October and then returned to Thailand on 4 January'. There are previous messages from the father, where he says, this is all in July where he says things like this, C-72:

> 'Whatever C, I am [inaudible] enough blame against me bragging that I have not paused on one hand and made promises I never made. There is absolutely no point in being with me as you are only intending to be confrontational, which you are every time you go back to your parents. C, stay there. You once turned to me into a threatening tone and told me not to make you choose between your parents and me as then it is always between your parents forcing you with the choice [inaudible] or worse to be blamed for the parents' behaviour as she taunts me. Enough, C'.

58. Then at C-44: 'I am telling you now to stay there as I don't care to continue to spend time living in this kind of misplaced way and lack of appreciation'. [Inaudible] in England by saying it is understandable with no communications that I have been [taken to between?] the parents from October onwards save the affidavit, the father's affidavit, [inaudible] that the mother, but the mother was right in thinking, 'Well, I was thinking that we can simply stay in England', which is exactly what he did because he never went to Thailand, it is understandable.

59. The mother that I have had oral evidence from and read evidence from does not strike me as somebody who

would have moved, especially moved with a very young child in December 2017, without there being a fanfare, a lock-stock-and-barrel move and possibly members of her family coming out initially to meet her or go out with her to help her with the baby or to visit in the first few weeks. This shows to me that the arrival on 17 December 2017 with Z until they went back to England on 17 February was a trip as part of the peripatetic lifestyle that the mother more latterly had enjoyed and one should not read into it any more than that. She confirmed in her oral evidence that she has always been very close to her family and I accept that and as a mother of a young child, he is not the main carer of the child, I can imagine and I have read and I have heard that she has had support from her family especially her mother. That leads one into the English habitual residence having not been disturbed, in which her English habitual residence not having being disturbed. She confirmed she is in England from L's perspective, she has got her grandparents there, her two maternal aunts and her mother has lots of friends and that she spends a lot of time with these people.

60. There was an argument between the parents, in the summer of last year about buying property in England, there are messages about promises being broken. The mother said during her oral evidence that she wanted to settle down. I find that obviously the parents were arguing about buying a property and if that is accepted by both of them, the question is, if the mother had moved finally to Malta in 2016 and all that was clear, why on earth would they be arguing two years later about buying a property in England. The reason is probably because they were coming at it from two completely different angles, Father thinking he was based in Malta, Mother believing that she is based in England. From L's perspective, her habitual residence is in England because of the factors I have already mentioned in the legal approach that has to be adopted in this case.

61. This is one of those rare cases when none of the contemporaneous correspondence between the parents illustrates the wish of an applicant in The Hague, for the child to return to the originating country.

62. The father has failed to discharge the burden of proof on him and establish the child having Maltese habitual residence at the relevant period of time or really at any juncture in her young life and any proceedings concerning her, if there are any proceedings, will have to be in England probably in a the Family Court that is local to her maternal grandparent's home in Wiltshire.

63. In due course, with the correct safeguards in place, I am sure that Z will spend a great deal of time in Malta visiting her father and probably be there for as long for as he would have been in Malta with her, all things being equal, had the couple stayed together.

End of Part One of the Judgment
Part Two- Costs

The Mother has submitted a written application for costs and I have been waiting for the transcript of my main judgment to arrive before making a decision on the subject. It arrived on 4.9.19 while I was away on vacation.

1. **The mother's case is:**

"It is submitted that, from the evidence (and the analysis of that evidence contained within the judgment) it ought to have been plain to the father that the child remained habitually resident in England, with the result that these 1980 Hague Convention proceedings should never have been brought. Notwithstanding this, the mother has had to spend a total of £36,193.20 defending the application.

As is clear from the evidence that she has filed, the mother is not independently wealthy. This is money that she has had to borrow in order to fund her defence. The father is independently wealthy, yet has had the benefit of non-means, non-merits public funding."

2. **The father's case is succinctly put thus:**

"When habitual residence is raised, the point must be fully explored. In Re **R (A Child: Habitual Residence) [2014] EWCA Civ 1031** the judgment of Parker J was set aside as having been too narrowly focused. In Re **F (A Child) [2014] EWCA Civ 789** the decision of the trial judge was set aside on the ground that the issue had not been satisfactorily explored. The Court cannot come to a final determination as to habitual residence "*until a proper opportunity has been given to all relevant parties to adduce evidence and make submissions*". The point is problematic for court and practitioners alike. That there are 5 Supreme Court

cases in 5 years illustrates the point. … the following matters inter alia militated in favour of a finding that the child Z was habitually resident in Malta: [and then cites 16 points] … In the light of the foregoing factors it cannot be said that that the father was unreasonable in contending in this application that that L's habitual residence was Malta. "

3. The law is summarised by the father's counsel thus:

"In **Re D 2017 EWHC 284** Ms Pamela Scriven QC sitting as a Deputy High Court judge addressed summarised the rules and the case law. The court is requested to consider the assistance given by that judgment. That there are only three reported cases in 33 years of the Hague Convention 1980 in force is of interest in itself

In **Re T (Costs: Care Proceedings: Serious Allegation Not Proved) [2012] UKSC 36, [2013] 1 FLR 133**, Lord Phillips of Worth Matravers said (at para [11]):-

a. "*In family proceedings, however, there are usually special considerations that militate against the approach that is appropriate in other kinds of adversarial civil litigation. This is particular true where the interests of a child are at stake. This explains why it is common in family proceedings, and usual in proceedings involving a child, for no order to be made in relation to costs."*

b. *He went on to say (at para [44]):-*

c. *"we have concluded that the general practice of not awarding costs against a party, including a local authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that accords with the ends of justice..."*

2. The problem in these cases is that the applicant is always in receipt of non-means tested public funding whereas the respondent is not. This is by virtue of **the Legal Aid Sentencing and Punishment of Offenders Act 2012 ["LASPO 2012"] s 26: -**

i. *"(1) Costs ordered against an individual in relevant civil proceedings must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including—*

(a) *the financial resources of all of the parties to the proceedings, and*

(b) *their conduct in connection with the dispute to which the proceedings relate.*

ii. *(2) In subsection (1) "relevant civil proceedings", in relation to an individual, means—*

(a) *proceedings for the purposes of which civil legal services are made available to the individual under this Part, or*

(b) *if such services are made available to the individual under this Part for the purposes of only part of proceedings, that part of the proceedings."*

3. The father's case is that the costs claimed are extraordinarily high (I disagree with this - in my experience for a contested final Hague matter that lasted more than one day £36,000 odd seems reasonable). And further submits:

"The father agrees that his extended family is wealthy but states that he is estranged from his family's wealth. He has earnings as a consultant of around £49,000 pa net. He bought the family car with a loan in 2017. His evidence is that he has borrowed from his siblings for legal fees with Vardags. The fact that he is sometimes able to stay at Corinthia hotels at reduced rates does not equate to liquid assets or income. His assets are not liquid. The father states that he is drowning in debt and that his finances are strained so that he may not be

able to afford representation in future. AND: It is submitted that it is wrong to take a "stab in the dark" at assessing reasonableness and quantum of an order to pay in a large sum of money, on the basis of limited information, particularly when the CFC is seized of all financial matters."

4. However it is plain to me that however destitute the father may claim to be he obviously lives a comfortable, jet-setting lifestyle , whereas the mother lives in her own mother's home while her own home has had to be rented out to pay the mortgage. There is a plain disparity of finance and unfairness in this particular case, when it comes to costs.

5. Mr Gration submissions on the law are as follows:

"In **SB v MB (Costs) [2014] EWHC 3721 (Fam) a**t §4 of his judgment, Mr Justice Hayden recited the following:

"4. Both party's legal teams agree on the framework of the law relating to the determination of costs in applications of this kind. The following common ground has been identified:

i) The High Court has jurisdiction to award costs in first instance cases brought pursuant to the 1980 Hague Convention. It is trite that it has such powers in applications made pursuant to the inherent jurisdiction though, for the reasons set out in my substantive judgment, that is of merely academic relevance here;

ii) Though there are few reported cases of cost orders having been made against applicants in this Hague Convention jurisdiction, the basis of the power to award costs was analysed and confirmed by Ryder J (as he then was) in EC-L v DM (Child Abduction:costs) [2005] EWHC 588 (Fam), [2005] 2 FLR 772. There Section 11 of the Access to Justice Act 1999 was in focus and the Family Proceedings Rules 1991 that then applied. However, the principles identified in the case continue to hold, by parity of analysis, with the framework of the Family Proceedings Rules 2010;

iii) In each case where a costs application is made there should be an inquiry into the merits EC-L v DM (Supra)

> 'it should be the expectation in child abduction cases that the usual order will be no order as to costs, but where a parties conduct has been unreasonable or there is a disparity of means then the Court can consider whether to exercise its jurisdiction in accordance with normal civil principles';

iv) It is misconceived to talk of a 'presumption' of 'no order' for costs at first instance in either Hague Convention cases or children cases more generally. In Re J (Children) [2009] EWCA Civ 1350 Wilson LJ, as he then was, referred to the 'general proposition' of no order as to costs applied to a 'paradigm' situation. In Re T (Costs: Care Proceeedings: Serious Allegation Not Proved) [2012] UKSC 36 'reprehensible behaviour' or 'an unreasonable stance' were identified as markers for an adverse costs order;

v) FPR 2010, r 28.1CPR 1998 r 44.3 do not circumscribe the Judge's discretion on costs and invite the Court to consider 'all the circumstances'. It should of course have regard to the matters set out at CPR rule 44.2 (4) and (5):

> (4) 'in deciding what order (if any) to make about costs, the Court will have regard to all the circumstances, including –
>
> a) the conduct of all the parties;
>
> b) whether the party has succeeded on part of its case, even if that party has not been wholly successful;
>
> c) any admissible settlement by a party which is drawn to the Court's attention, and which is not an offer to which costs consequences under para. 36 apply.
>
> The conduct of the parties include-

> d) conduct before, as well as during, the proceedings and, in particular, the extent to which the parties followed the practice direction – pre action protocol or any relevant pre action protocol;
>
> e) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> f) the manner in which a party has pursued or defended its case or a particular allegation or issue;
>
> g) whether a claimant has succeeded in a claim, in whole or in part, exaggerated its claim.

vi) It is generally undesirable to award costs where the consequence of such order is likely to exacerbate hostile feelings between parents to the ultimate detriment to the child."

6. I add that I am also guided by Lady Hale's dicta in **Re S (A Child) (Costs: Care Proceedings) [2015] UKSC 20 [2015] 2 FLR 208, [2015] 1WLR 1631 (emphasis added)**

> **Baroness Hale of Richmond [30]** Secondly, however, are there circumstances other than reprehensible behaviour towards the child or unreasonable conduct of the proceedings which might justify a costs order in care proceedings? It is clear from the authorities cited above that there may be other such circumstances in private law proceedings between parents or family members. Should care proceedings be any different?
>
> **[31]** I do not understand that Lord Phillips of Worth Matravers, giving the judgment of the court in *Re T Children) (Care Proceedings: Costs) (CAFCASS and Another Intervening)* [2012] UKSC 36, [2012] 1 WLR 2281, sub nom *Re T (Costs: Care Proceedings: Serious Allegation not Proved)* [2013] 1 FLR 133, was necessarily intending to rule out the possibility that there might be other circumstances in which an award of costs in care proceedings might be appropriate and just. That would be to ascribe to para [44] of the judgment the force of a statutory provision. Such a rigid rule was unnecessary to the decision in that case and cannot be treated as its *ratio decidendi.*
>
> **[32]** On the other hand, it *was* necessary to the decision in that case that local authorities should not be in any *worse* position than private parties when it comes to paying the other parties' costs. There is an attraction in regarding local authorities in a different light from private parties, because of their so-called 'deep pockets'. But, as Lord Phillips of Worth Matravers observed, at para [34]:
>
> > 'Local authorities have limited funds. Their costs in relation to care proceedings are met from their children's services budget. There are many other claims on this budget. … No evidence is needed, …, to support the proposition that if local authorities are to become liable to pay the costs of those [whom] they properly involve in care proceedings this is going to impact on their finances and the activities to which these are directed. The court can also take judicial notice of the fact that local authorities are financially hard pressed, …'
>
> While it is true that appeals are comparatively rare and their costs comparatively low compared with the costs of care proceedings generally, that is not by itself a good reason for making an exception in their case.
>
> **[33]** But nor should local authorities be in any *better* position than private parties to children's proceedings. The object of the exercise is to achieve the best outcome for the child. If the best outcome for the child is to be brought up by her own family,

> there may be cases where real hardship would be caused if the family had to bear their own costs of achieving that outcome. In other words, the welfare of the child would be put at risk if the family had to bear its own costs. In those circumstances, just as it may be appropriate to order a richer parent who has behaved reasonably in the litigation to pay the costs of the poorer parent with whom the child is to live, it may also be appropriate to order the local authority to pay the costs of the parent with whom the child is to live, if otherwise the child's welfare would be put at risk. (It may be that this is one of the reasons why parents are automatically entitled to public funding in care cases.)

7. Doing the best that I can to provide for fairness in this matter, and guided by the law cited above, my findings in the main judgment and the father's bizarre conduct of ex-communication and seeking the child to go to Thailand rather than Malta at a key moment in the chronology, and then seeking a 1980 Hague Convention return to Malta, amongst other matters, I have decided that these parents should *share* the costs of this litigation and that means that the father needs to pay the mother one half of her costs of and occasioned by these Hague convention proceedings i.e. £18,096.60 within 28 days of receipt of this judgment.

End of Part II of the judgment