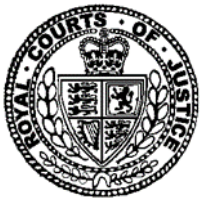

Neutral Citation Number: [2021] EWHC 2305 (Fam)

Case No: FD21P00196

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 August 2021

Before :

THE HONOURABLE MRS JUSTICE ROBERTS DBE

- -

Between :

JC — **Applicant**

- and -

PC — **Respondent**

- -
- -

Mr Christopher Hames QC and **Ms Jacqueline Renton** (instructed by Stewarts Law)
for the applicant father
Mr James Turner QC and **Ms Jennifer Perrins** (instructed by Charles Russell Speechlys)
for the respondent mother

Hearing dates: 4 and 5 August 2021

- -

APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Roberts :

1. This is an application made by the father of two children who seeks orders in respect of their summary return to England from Brazil where they are currently residing. His substantive application was issued on 24 March 2021. Pursuant to section 8 of the Children Act 1989 he sought orders in private law proceedings which are intended to regulate the children's future living arrangements including a prohibition on their removal from the jurisdiction of England and Wales on an interim basis. There are currently parallel proceedings ongoing in Brazil initiated by each of the children's parents. As yet there has been no substantive resolution of those proceedings although the courts in that jurisdiction have made interim holding orders. The children's current situation is far from satisfactory. It requires urgent resolution for reasons which I shall explain.

2. As a preliminary issue, and in circumstances where the family members are all in Brazil, the father must first establish that this court has jurisdiction to make the orders which he seeks. It is agreed, both as a matter of law and fact, that the resolution of this issue turns on whether either or both of the children have retained their former habitual residence in this jurisdiction or whether, as the mother now claims, they have acquired a new habitual residence in Brazil. If the court finds that it has jurisdiction on the basis of habitual residence, Mr Turner QC on behalf of the mother submits that the court must nevertheless decide whether or not to accept jurisdiction. It is the mother's case that all and any welfare issues pertaining to the children's future should be left for determination in the Brazilian courts which are now seised of matters at the behest of both parents.

3. On 16 April 2021, shortly after the issue of the father's current application, Arbuthnot J made a series of case management directions. She directed the preparation of a CAFCASS report in relation to the wishes and feelings of the children in relation to their current living arrangements and listed the matter for a preliminary hearing in relation to jurisdiction over one and a half days. That is the hearing which came before me on 4 August 2021 in the urgent business vacation list. There is a further hearing listed on 13 and 14 September 2021 to determine the substantive issue of the children's summary return to their former home in London in the event that this court decides it has jurisdiction and that it is appropriate to exercise that jurisdiction.

4. A very significant amount of material has been lodged with the court for the purposes of today's hearing. I have no fewer than four separate electronic bundles which include not only the parties' written evidence with voluminous exhibits but also material relating to the Brazilian proceedings. In addition, I have been provided with an extensive bundle of authorities. Mr Christopher Hames QC with Ms Jacqueline Renton represents the father, JC. Mr James Turner QC with Ms Jennifer Perrins appears on behalf of the mother, PC. The issue of the separate representation of the children in these proceedings has been canvassed but, correctly in my judgment, any decision in

relation to that issue has been postponed. I now have the benefit of a detailed report from Ms Huntington, an experienced CAFCASS officer who has been assigned to this case from the central London family team based in the Royal Courts of Justice.

5. In view of the time constraints, I have not heard any oral evidence although I have read all the material in the bundles. I have also had the benefit of detailed written and oral submissions made by each of Mr Hames QC and Mr Turner QC.

6. Before turning to the competing legal arguments, I propose to set out the background which informs the family's current situation.

Background

7. The two children at the centre of this dispute are C (who is now 13 years old) and P (who is 6 years old). The father and mother are both Brazilian nationals by birth although each acquired British nationality as long ago as 2010 as a result of the extensive time they have lived in England. Thus, they now hold dual nationality, a status which is shared by each of their children. The father is a senior banker who works in London for one of the major international banks.

8. The parties married in 2001. Over the course of the last twenty years, they have lived in the United States and Spain but London became their established family base in 2004. C was born here in 2008. By 2010, they were living in a home they had purchased in south-west London. For a period of about a year from 2014 to 2015, the family moved to São Paolo which is where P was born. Within three weeks of his birth, they returned to London. They purchased a new family home in the same street in south-west London where they remained for the next four years. In 2019, they moved to a more substantial home in the Richmond area. The children have been educated privately in central London throughout most of the time they have been in school. The move to Richmond meant a change of school for each of the children. C became a pupil at a well known local day school close to the family home, as did her younger brother. Each was a private fee-paying school chosen for these children by their parents. There is no evidence of any disagreement between them as to those choices.

9. The pattern of family life was thus firmly embedded in London. There is no issue between the parties but that, at this point in time, the entire family was habitually resident in this jurisdiction. The father continued his profession as a banker based in central London. The family had the benefit of help in the home, including various nannies and, later, a housekeeper, but the mother's role was essentially at home with the children. The children's schools and social networks were here. Apart from 2019, there were regular trips each year to visit the extended families in Brazil when the children were able to spend time with their grandparents and other family members.

10. There is evidence in the material before the court, which the mother does not dispute, that her health has been fragile during the marriage. She has exhibited to one of her written statements a letter from her long-term treating psychiatrist, Dr R. She has been working with the mother since the early part of 2007 as a result of previous concerns about a mixed disorder of anxiety, depression and an eating disorder. These issues had plainly affected both parties during the course of the marriage and there is much in the written evidence about the extent of these difficulties and their impact on family life. For the purposes of this judgment, I need say no more about the factual disputes between the parties which require no resolution in relation to the issue of the children's habitual residence. Despite the obvious demands of the father's profession on his time, each of these parents appears to have played a full role in both their children's lives.

11. The growing tensions within the marriage appear to have been exacerbated by the domestic confinement which the Covid-19 pandemic created. C reported to her tutor and house master "frequent arguing at home and shouting between her parents". Towards the end of the summer in 2020, the mother was due to travel to Brazil for some planned surgery. She flew to Brazil on 9 November 2020 leaving the children in the care of the father in London. Initially she stayed with her parents-in-law in São Paolo. On 20 November 2020 the father flew out to join her with the children. It is common ground that, at that point in time, neither had any fixed intention to undertake a permanent family relocation to Brazil. The father's case is that there was never any intention that this should have been anything other than one of their regular breaks to see family (the 2019 Christmas/New Year visit having been missed) and, perhaps of greater importance, to reunite the family in the circumstances of the mother's recent surgery. Flights were booked for their return to London, as a family. However, international travel restrictions in Brazil prevented the family from returning on those original flights and there they have remained for the last eight months as a result both of those restrictions and the mother's subsequent initiation of proceedings in that jurisdiction.

12. The essence of the mother's case is that the family ended up in Brazil in the midst of the parents' marital crisis and her own health issues with the longer-term plans for a relocation to Brazil only taking shape and being confirmed over the following weeks and months. She disputes the father's case that this was no more than one of their regular planned breaks which was brought forward as a result of the mother's surgery. What is clear from the evidence is that, without notice to the father, by 4 February 2021, the mother had formally instructed matrimonial lawyers in Brazil. By 10 February 2021 they were formally authorised to act on her behalf in the proceedings pursuant to a power of attorney which she signed on 10 February 2021. Her divorce petition was served on the father the following month on 11 March 2021. He was served at the property at which they were all then living and it appears that he had no prior notice of the proceedings or the issue of the mother's divorce petition. As will become apparent, she appears to have taken these steps to bring the marriage to an end at the same time as the parties were negotiating the purchase of an apartment in São Paolo. There is an

issue between them as to whether or not this was intended to be a holiday home (as the father contends) for use during their regular trips to see family in Brazil or (on the mother's case) part of an intended relocation from London to São Paolo.

The proceedings in Brazil

13. There are now two sets of proceedings in Brazil in relation to the children. The first has been referred to in this application as "the custody proceedings" issued in the local 'State' Court' in São Paolo. These were initiated by the mother as an adjunct to her divorce proceedings in order to address the day-to-day arrangements for the children together with issues of custody and contact, the father having been required to leave the property in which the family had been living following service of the divorce petition. He has cross-applied in those proceedings in relation to the interim arrangements for the children. The second set of proceedings was instigated by the father's Brazilian lawyers in the Federal Court pursuant to the 1980 Hague Convention. In the context of those proceedings, the father is seeking the summary return of the two children to the jurisdiction of England and Wales.

14. Initially the mother secured an order for custody of both children. She claimed in those proceedings that the hostility between the parties made it impossible to implement a shared arrangement in relation to the children. The father appealed that order. Judgment on the appeal was delivered on 19 March 2021. The appeal judgment is within the material before the court. It is clear from that judgment that the court was ruling on an 'interlocutory' basis 'without prejudice to later examination'. As a result of the 'high level of litigiousness between the parties, which makes it difficult for the shared custody', the court confirmed that the mother should have interim sole custody of both children.

15. Within the context of his 1980 Hague Convention proceedings, the father applied for interim permission to return to London with the children in the light of the fact that they were due to return to their London schools. This application was heard on 20 May 2021. The court decided that, given the dispute between the parents in relation to the facts, the court would require further evidence from each. The father's interlocutory application for the immediate return of the children to England was dismissed. Thereafter further evidence was put before the court which included evidence of C's clearly stated wish to return to her home and her life in London which she said she was missing very much. As I shall explain, C was herself receiving psychological support in relation to a number of issues and anxieties. The father's case was that her inability to return home was exacerbating the child's stress and damaging her relationship with her mother whom she saw as being responsible for preventing her return home. On 21 June 2021 the Federal Court declined to interfere with the earlier interlocutory decision of the court on the basis that the substantive application under the Hague Convention should take its course.

16. The most recent order in the "custody proceedings" was made on 22 July 2021. By this stage C had effectively 'voted with her feet' and refused to return to her mother's home at the end of a period of contact with her father. By that stage, the father was reporting that their daughter was depressed, unhappy and very distressed at having to remain in Brazil. She was said to be "communicating suicidal thoughts". The court was made aware of this development and sanctioned a change in "the mother's provisional custody" of C who, it acknowledged, had suffered emotional damage as a result of the parental conflict, the changes to the children's routine, and the uncertainty of her current arrangements in Brazil. Given the existence of the Hague Convention proceedings in the Federal Court, the State Court determined that the "custody proceedings" should be stayed on the basis that the parties would engage in mediation. It is of significance that the court's judgment records in clear terms "the risk of more significant harm to the children's interests" and the potential for further deterioration in C's condition "incurring a risk to her own physical integrity". It granted "the permanence of the minor C under her father's care, without, however, changing the mother's provisional custody until a mediation session is carried out between the parties".

17. Thus, as matters currently stand in Brazil, the parties are temporarily occupying separate premises in São Paolo on the basis that C is living with her father and P with his mother. C is not attending school other than to participate remotely in long-distance learning with her school in London. On 1 March this year, the mother enrolled P in a local school in São Paolo which he continues to attend on a daily basis. The father maintains that he gave no consent for that step.

18. The father remains very concerned about the potential delay in resolving matters in the Brazilian courts if the Hague Convention application is to run its course before there is any finite resolution for these children in terms of a return to what he contends is their home in London. He has obtained a report from a specialist lawyer who practises in Brazil and has significant experience of similar cases. Professor Nadia de Araujo has confirmed in her report dated 23 March 2021 that, in circumstances where an application for summary return is defended on one of the limited basis for which the Convention provides, there is likely to be considerable delay in securing a resolution for the children at the centre of the process. Such cases appear to take between one and a half to two years to reach the first point of adjudication in the Federal Court. In very few cases does the court grant a request for return to the country of the child's habitual residence in advance of that judgment. First appeals usually take between one and two years to resolve with second appeals taking a further two to three years. She has explained that the impact of the global Covid pandemic has inevitably introduced delays particularly in those cases where a reporting process is deemed necessary. In paragraph 29 of her report, she says this:

> "Regardless of the Covid-19 pandemic, it is evident that the 6-week deadline provided for in article 11 of the Hague Convention is *not* complied with. Case

law shows that Brazil takes up approximately 6 years to render a final judgment on a request for return."

19. I do not set out in this judgment the Professor's curriculum vitae. I did not hear any oral evidence from her and her views have not been subject to forensic challenge in this court. That said, she holds, and has held, a number of academic and professional positions which appear to equip her well to provide this information which is based not only on empirical evidence but on her own professional experience. It is correct to record that this was not in any sense a jointly commissioned report but no challenge to the accuracy of its contents or conclusions was advanced by Mr Turner QC in the context of the present application.

The Law: jurisdiction and habitual residence

20. Before setting out the parties' competing arguments in relation to jurisdiction, I turn now to the law which I must apply.

21. The Brazilian courts have not yet determined the issue of where the children were, or are, habitually resident. Such orders as have been made in Brazil have thus far been based upon the children's physical presence in that jurisdiction.

22. For the purposes of English law, the court's jurisdiction to make private law orders pursuant to the Children Act 1989, section1(1)(a) (i.e. the range of orders sought by the father in his application dated 23 March 2021) is conferred by section 2 of the Family Law Act 1986. In this 'post-Brexit' era, that Act has been amended to remove all references to Council Regulation EC No 2201/2003 (more commonly known as 'Brussels IIA'). Section 2 of the 1986 Act provides as follows:-

'**2.Jurisdiction: general**

(1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless:-
  (a) it has jurisdiction under the Hague Convention [i.e. the 1996 Hague Convention], or
  (b) the Hague Convention does not apply but –
    (i) the question of making the order arises in or in connection with matrimonial proceedings … and the condition in section 2A of this Act is satisfied, or
    (ii) the condition in section 3 of this Act is satisfied.

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,

and, in either case, the jurisdiction of the court is not excluded by sub-section (2) below.'

For these purposes, section 7(c) makes it clear that "the relevant date" in section 3(1) means the date when the application was issued.

23. Orders made in the High Court whereby the inherent jurisdiction of the court is engaged pursuant to section 1(1)(d) of the 1986 Act in relation to orders giving care of a child to a named individual have been similarly amended by section 2(3) of the 1986 Act.

24. Notwithstanding the recent changes brought about by the departure of the United Kingdom from the European Union and the disapplication of Council Regulation (EC) 2201/2003 (*Brussels IIA*), the primary basis for the exercise of an international jurisdiction pursuant to the 1996 Hague Convention remains the habitual residence of the child or children who are the subject of the application before the court. The relevant provision is Article 5 of the 1996 Convention which provides as follows:-

'**Article 5**

(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.

(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.'

25. Under Article 8 of the former regime which applied under *Brussels IIA*, the habitual residence of a child for these purposes had to be established at the time the court was seised of the relevant applicant in order to establish jurisdiction. Article 5 of the 1996 Convention is silent as to when that initial determination must be made. Under the former regime, the principle of *perpetuatio fori* was engaged. If a court is seised of jurisdiction at the start of proceedings, it retains that jurisdiction until the final order is made even in circumstances where the basis of jurisdiction is lost during the course of the proceedings. However, this is not the position under the 1996 Hague Convention by reason of Article 5(2), save in cases of wrongful removal or retention.

26. Within this context, paragraph 4.10 of the Hague Practical Handbook for the 1996 Convention provides this informal guidance as to the potential effect under Article 5 of any change in a child's habitual residence under Article 5(2)[1]:

> "Where a child's habitual residence changes from one Contracting State to another at a time when the authorities of the first Contracting State are seised of a request for a measure of protection (i.e. during pending proceedings), the Explanatory Report (para 42) suggests that the principle of *perpetuation fori* does not apply and jurisdiction will therefore move to the authorities of the Contracting State of the child's new habitual residence. Where it does occur, consideration might be given to the use of the transfer of jurisdiction provisions."

27. As I have said, it appears to be accepted in this case that there has been no final determination as yet in the Brazilian proceedings as to where these children were habitually resident either on the date when the custody proceedings in the State Court were commenced or on 24 March 2021 when the father issued these English proceedings. All interim, or interlocutory, orders to date have been made on the basis that both children were physically present in that jurisdiction. Such has been the degree of parental conflict and its impact on the wellbeing of the children in terms of decision-making that the courts in São Paolo have felt obliged to intervene on an interim basis. This court has the utmost respect for those decisions and the basis upon which they were taken. Had the position been reversed, it is difficult to contemplate circumstances in which the English court would not have intervened on a similar basis.

28. The father has not yet abandoned or withdrawn his current applications for the return of the children to England in either the Federal or State Courts in Brazil. He has now issued his application in this court in the context of private law proceedings and he has done so because he maintains (i) that both children have been, and remain, habitually resident in this jurisdiction; and (ii) that the English court is the appropriate forum for the resolution of any future welfare determination in relation to the arrangements for these children. He maintains that those arrangements should be considered in the context of the domestic infrastructure which provided the framework of their day to day lives prior to the institution of the mother's proceedings locally in Brazil. Before this court can accept jurisdiction it is under an obligation to determine whether a jurisdictional basis for his application has been established. Mr Turner QC submits that it is not necessary for this court to decide the issue of habitual residence. His primary submission on behalf of the mother is that the court should not embark upon its own determination of that issue but should instead conclude on the basis of the information before it that it should leave the Brazilian courts to deal with questions concerning the children's welfare. He points to the absence of any enforcement machinery were this

[1] See 'Brexit and Family Law: The 1996 Hague Convention': Mr Justice MacDonald, Deputy Head of International Family Justice for England and Wales, 12 January 2021

court to conclude at the hearing in September that the children should be returned to this jurisdiction. He lays the blame for future delay in Brazil squarely at the door of the father. He submits that were the father now to withdraw his application under the 1996 Hague Convention, the "custody proceedings" in that jurisdiction could take their course albeit that jurisdiction at this stage is based merely on the children's physical presence in that State.

29. It has long been established that the underlying rationale for treating a finding of a child's habitual residence as the basis for an assumption of jurisdiction in relation to that child is the almost universal appreciation that decisions concerning a child's welfare are best taken in the country where he or she lives. It is those domestic courts which are best placed to decide upon the future because the court has an established context for investigating and looking to the settled trajectory of a child's life up to that point in time, even where that trajectory may have involved a chronology or events which have been inimical to his or her welfare. That is the proposition which has governed the implementation of *Brussels IIA* and it has been stated on many occasions as the international policy which drives the return to their home jurisdiction of children who have been wrongfully removed from, or retained in, a different jurisdiction which is not the state of their habitual residence.

30. In this case, there is a need for an urgent decision in relation to the arrangements for these children. The father will be required by his employers to return to London by the end of September this year. One of the children, C, is currently living with him in São Paolo, a situation which has the current endorsement of the local State Court albeit that he has been refused the interim relief he sought to return with the children to England on an interim basis. He is naturally concerned for both the children but C's situation is becoming a matter of increasing anxiety for both her parents. He has sought to engage the jurisdiction of what he perceives to be the "home" court for each of the children. That was a step he was entitled to take. In those circumstances, I regard it as a legitimate, and necessary, exercise for this court to determine whether he has established jurisdiction. That involves a determination of the children's habitual residence. The issue of whether the court should *exercise* that jurisdiction, if established, is a separate question and one to which I shall return in the course of this judgment.

31. The issue of habitual residence and the test which the court must apply has been addressed in several decisions of the Supreme Court in recent years and is well known. Aspects of its application have been reviewed recently by the Court of Appeal. There is broad agreement between counsel as to the principles which determine both the legal basis and the approach which a court is required to adopt when considering where a child is habitually resident. In this context I have been referred to a number of European and domestic authorities including the following: *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 60, [2014] AC 1 *('A v A'); In re L (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] AC 1017, [2014] 1 FLR 772; *In re LC (Children) (Abduction: Habitual Residence: State of Mind of Child)* [2014] AC 1038, *In re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2015] UKSC 35, [2016] AC 76 and *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] AC 606. These domestic judgments were delivered by the Supreme Court. In addition the Court of Appeal has recently provided helpful guidance in *Re M (Children) (Habitual Residence: 19880 Hague Abduction Convention)* [2020] EWCA Civ 1105, [2020] 4 WLR 137.

Habitual residence: the relevant test

32. The habitual residence of a child is a matter of law but the legal position involves a factual determination based upon the extent of that child's integration into his or her social and family environment. In *Re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam), [2016] 4 WLR 156, Hayden J stressed the importance of analysing this question through the lens of the relevant *child* rather than in the context of the wider adult disputes which had generated the litigation in which he or she was caught up. The test is the same whether the issue before the court arises within the context of an international dispute or under the domestic law of England and Wales: per Baroness Hale in *A v A* (above). In that case, their Lordships agreed that focus was required on "the duration, regularity, conditions and reasons for the stay" of the family in a particular territory or state. The court would investigate "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" amongst other factors which might carry weight in the overall determination of the issue. What has to be avoided in the context of this factual enquiry is any 'gloss' or overlay of separate legal concepts: it is in its essence a factual and individual enquiry into the situation and circumstances in which each individual child finds himself or herself.

33. From the authorities cited above, it is now possible to extract a list of principles which provide the framework for any enquiry into the issue of habitual residence. There is no dispute between counsel as to the application of these principles in the instant case.

    (i) Habitual residence is essentially a question of fact.
    (ii) Habitual residence does not require a child to be fully integrated in the environment of a new state; what is required is a necessary degree of integration: per Lord Wilson, *Re B*, para 39.
    (iii) It is a child-centric concept. The court is obliged to focus on the child's situation rather than his parent's situation. To the extent that the circumstances of a very young child will necessarily be determined by the situation of his main or primary care giver, different considerations are likely to be engaged when the child in question is of school age and,

in particular, when that child is a teenager or adolescent who is able to express articulate views for himself or herself.

(iv) The habitual residence of a child can be changed by the unilateral actions of one parent even where the other parent with parental responsibility for the child does not agree to the change.

(v) The intention of both parents is one relevant factor although it cannot be determinative of outcome in terms of a decision as to where a child is habitually resident.

(vi) There are no hard and fast rules about the length of time which it takes before a child can be said to have acquired a new habitual residence. Everything turns on the facts of a particular case and a particular child's situation. What the court is seeking in its enquiry is evidence of a *stable* residence rather than a permanent residence.

(vii) What is required in each case is a comparative analysis of a child's lived experience of life in the two competing jurisdictions. The analogy of the see-saw used by Lord Wilson is often put forward as a helpful illustration. As he or she establishes new roots in the jurisdiction in which he or she is physically present as a result of the move, so will the old roots of life in the jurisdiction which has been left begin to come up. It may be reasonable to assume in this context that the deeper the integration in the old 'state', 'probably the less fast his achievement of the requisite degree of integration in the new state': per para 46 of *Re B.* If the parents had moved as a unit and had undertaken a great degree of pre-planning for the move, the requisite degree of integration in the new 'state' may be likely to have taken place at a faster pace.

34. In *Re M (above),* Moylan LJ urged caution in the context of any attempt to elevate the 'see-saw' analogy to a free-standing test in itself. At paras 61 to 62, his Lordship said this:

> "61. In conclusion on this issue, while Lord Wilson's see-saw analogy can assist the court when deciding the question of habitual residence, it does not replace the core guidance given in *A v A* and other cases to the approach which should be taken to the determination of the habitual residence. This requires an analysis of the child's situation in and connections with the state or states in which he or she is said to be habitually resident for the purposes of determining in which state he or she has *the requisite degree of integration to mean that their residence there is habitual*. [my emphasis]
>
> 62. Further, the analogy needs to be used with caution because if it is applied as though it is the test for habitual residence it can … result in the court's focus being disproportionately on the extent of a child's continuing roots or connections with and/or on an historical analysis of their previous

> roots or connections rather than focusing, as is required, on the child's *current* situation (at the relevant date). This is not to say continuing or historical connections are not relevant but they are part of, not the primary focus of, the court's analysis when deciding the critical question which is where is the child habitually resident and not, simply, *when* was a previous habitual residence lost."

35. The court's task is therefore to carry out the essential analysis of the situation of the child *at* the date relevant for the purposes of establishing jurisdiction. The loss of a pre-existing habitual residence and the degree of connection with that state prior to the move remains a legitimate consideration as part and parcel of the holistic analysis but it cannot be allowed to gain a superior traction on outcome which elevates that factor alone to a dominant position within that analysis.

The relevant date for considering where the children were habitually resident

36. I have already emphasised in this judgment that the question for this court to determine is where these two children were habitually resident as at the date of the issue of the father's English proceedings[2] in order to confer potential (and parallel) jurisdiction in England and Wales. Decisions relating to their future which will be based on wider welfare considerations are not for today. They will be considered at the later hearing which has been listed in mid-September if this court accepts jurisdiction.

The mother's submissions

37. Mr Turner QC has raised an issue as to when is the relevant date for this question to be addressed and the point along the continuum when its focus should be fixed. He points to the fact that these two children had been living in Brazil for four months when these English proceedings began. On behalf of the mother he submits that the relevant date at which habitual residence must exist for the purpose of the jurisdiction of the English court was "the date of any given hearing in England". That submission is based upon what he submits is a proper construction of section 2 of the Family Law Act 1986 and Article 5 of the 1996 Hague Convention. On this basis, section 3 of the 1986 Act, on his case, is not engaged in the present case. In the alternative, he submits that, by 24 March this year when the father's English proceedings were issued, both children had acquired a new habitual residence in Brazil.

38. He submits that, to the extent that Article 7 is said to be engaged in the context of a potential finding of child abduction, the burden rests on the father to establish that Article 7 applies in a situation where only one of the relevant countries is a 'Contracting State' of the 1996 Hague Convention. In this context he submits that there is no basis for the assumption of an international jurisdiction based on Article 7 of the 1996

[2] See section 7(c) of the Family Law Act 1986

Convention because of the reference in Article 7(3) to "the Contracting State to which the child has been taken" (Brazil not being a Contracting State).

The father's submissions

39. On behalf of the father, Mr Hames QC relies for his primary route to jurisdiction on the domestic jurisdiction conferred on the court by section 3 and section 7(c) of the 1986 Family Law Act. On this basis, the court must examine the children's situations as at 24 March 2021 being 'the relevant date' when the English proceedings were issued. In this context he criticises the mother's attempt to secure jurisdiction in the Brazilian courts through what was essentially an act of wrongful retention of these children in a foreign jurisdiction which was not their home. Having achieved a situation where the whole family was present in that jurisdiction, she took legal advice, issued divorce proceedings and subsequently engaged the local State Court in interim custody arrangements. Mr Hames QC, on behalf of the father, characterises these actions a the most pernicious form of 'forum-shopping'. He submits that she has taken deliberate advantage of the children's presence in Brazil (for entirely proper and understandable reasons) to engineer a position where she can now claim that the passage of time has resulted in a change in their habitual residence thereby ensuring her best chance to secure her preferred choice of jurisdiction. Underpinning her written evidence is her wish to remain with her family in Brazil and to avoid a return to what she perceives to be a country where she no longer wishes to live as part of a family which includes the father. Mr Hames QC submits that this stance on her part amounts to an illegitimate attempt to secure jurisdiction in relation to welfare decisions when that jurisdiction can only have arisen on the basis of her own actions in taking steps which have resulted in a wrongful retention of the children away from their home in London.

40. In relation to the international route to establishing jurisdiction, Article 7 of the 1996 Hague Convention provides as follows:

> '**Article 7**
>
> (1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and
>
> (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
> (b) the child has resided in that other State for a period of least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

(2) The removal or retention of a child is to be considered wrongful where –

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above may arise in particular by operation of law of by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

(3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.'

41. It is agreed that the wording of Article 7 of the 1996 Convention is very similar to Article 10 of *Brussels IIA*.

42. It is also accepted that Brazil is not a signatory to the 1996 Hague Convention. Despite that fact, Mr Hames QC submits on behalf of the father that Article 7 applies in this case to preserve an ongoing or retained jurisdiction in this case in England and Wales. Notwithstanding the absence of any authority to support this proposition, he points by way of analogy to a case which has been decided in relation to Article 12 of *Brussels IIA* which applies equally to Article 10: *Re I (A Child) (Contact Application: Jurisdiction)* [2009] UKSC 10 at para 17.

Discussion and analysis

43. In terms of my approach to this case, I have reached a clear conclusion that the preliminary issue of establishing jurisdiction in England and Wales based upon the children's habitual residence is properly to be determined as at the date when this father issued his English private law proceedings pursuant to section 8 of the Children Act 1989, i.e. 24 March 2021.

44. If jurisdiction is established through the primary domestic route, I do not regard it to be necessary for the purposes of this stage of the enquiry to consider whether or not the

mother's proposed construction of Article 5 of the 1996 Hague Convention applies in this case. I am not attempting to pre-determine in any way the outcome of the substantive Hague Convention proceedings which are ongoing in the Federal Court in Brazil but I confess that I find it difficult to construe this as a clear case of the wrongful removal or retention of these children by their mother in Convention terms.

45. First, it is an agreed fact that the father voluntarily took the children to Brazil in November 2020 as part of a course of conduct agreed with their mother. In the first instance, he maintains that they travelled with the intention of accelerating the date of a Christmas/New Year holiday which had been planned in any event. The date which was fixed for the mother's surgery in that jurisdiction no doubt prompted in part that decision. At that point in time, and on his case, there was no question of divorce or a rupture in the continuum of family life despite the obvious tensions between them. He was no doubt anxious to reassure himself about his wife's progress and to ensure that the children could be reunited with their mother after a period of absence. It provided the opportunity to reunite the family with relatives in Brazil whom they had not seen for the best part of two years and it was part of the pattern of family life to which these children had become used.

46. Secondly, in relation to the possibility of a wrongful retention, there is no suggestion that, whilst it may well have been a clear act of opportunism on the mother's part with the entire family present in São Paolo, the mother was not entitled to issue divorce proceedings in Brazil or that the local court lacked jurisdiction to deal with them. The father has accepted jurisdiction both in relation to the divorce and financial consequences which will flow from it (save in relation to the English property). He may not have welcomed the prospect of divorce and separation but he has plainly accepted it as a consequence of the mother's wish to resile from the marriage. Further, the mother has engaged the local courts in order to determine the interim arrangements for their children whilst the father's application for the return of the children pursuant to the Hague Convention moves forward to a conclusion.

47. In these circumstances it is not necessary for me to determine whether Mr Turner QC is correct when he submits to this court that there is no question of Article 7 applying in this case so as to "freeze" the question of jurisdiction to the date when there was a wrongful removal or retention. Because I have available to me the domestic jurisdictional route provided by the 1986 Act if I find that the children, and each of them, was habitually resident in England as at 24 March 2021, I do not need to determine the extant issues of wrongful removal and/or retention nor whether the children's ongoing presence in Brazil represents a breach of the father's rights of custody.

48. In these circumstances, I turn now to examine the issue of the children's habitual residence as at 24 March 2021. For these purposes, I accept that each was habitually

resident in England on the date when they travelled with their father to São Paolo on 27 November 2020. The mother does not seek to assert otherwise.

49. The mother accepts that the parties were in a 'marital crisis' at the time when the children arrived in Brazil with their father. Her case is that she secured the father's agreement to the family remaining in Brazil in the longer term as discussions developed over the course of the parties' discussions around, and after, their arrival at the end of November 2020. She maintains that these discussions took place in the context of an attempt to heal fractured relations and preserve the marriage. She accepts that she is not advancing a case that the father travelled with the children to Brazil with the intention of remaining there from the outset. Essentially, the mother asks the court to accept that the whole family ended up in Brazil in the midst of the adults' marital crisis in circumstances where she needed to be in that jurisdiction because of her planned surgery. It is her case that longer-term plans about the future only took shape to the point of confirmation by the father after discussions developed over the course of time in São Paolo.

50. Since my enquiry unfolds through a specifically child-centric approach to the issue of habitual residence, I propose to take the circumstances of each of the children in turn. There will obviously be points of elision where their lived experience of life in Brazil and the circumstances in which they came to be present in that jurisdiction are common to both.

51. C is by all accounts (including those of her parents and the CAFCASS officer) an articulate and intelligent 13 year old. Her school describes her as "of above average ability". She has been able to express her views clearly to her parents and, through the CAFCASS officer, to the court. It is clear from what Ms Huntington says in her report that C regards her home in Richmond as being the place where she feels "safe" and it is the place which she regards as "home". That was the view she was continuing to express in July this year when she spoke to the CAFCASS officer. She has expressed herself in these terms:

> *"I've lived my whole life in London, all my stuff is there, my house, school, friends, clothes and items are there but here in brazil I don't have a home, I can't go to school because I cannot read or write Portuguese and I don't have much of my stuff here since I only packed for a month long trip."*

52. She told the CAFCASS officer that she regarded herself as British. She did not have any particular identity with Brazil and described an earlier experience of living there for a year between the ages of 6 and 7 as "absolute hell" because of unhappiness at a local school where she fell behind academically and where she was bullied. She is plainly resentful of what she regards as her inability to return "home" and attributes this aspect of her deep unhappiness to the actions of her mother. It is one of the concerns

in this case that the current situation appears to have polarised her relations with her parents. Whereas she reported feeling safe and protected when with her father, she was frequently disparaging in her comments about her mother with whom she now appears to have a strained relationship. Ms Huntington considered that she displayed some emotional immaturity in her dismissal of her relationship with her mother. However, in terms of her connection with London, she spoke in highly positive terms about her experience of school life. She can walk to school every day and lives close to all her friends. She described a settled group of peers, many of whom she now regards as established close friends who have contributed to her feelings of being settled and less anxious. She spoke about a particular teacher at school who had reached out to offer her assurance having become aware that she was experiencing a difficult situation at home amidst the arguments which she described as an ongoing feature of her parents' marriage. She was keen to ensure that the CAFCASS officer understood the extent to which she was missing her home. She is described in the report as being "desperate" to return. In this context I bear in mind that C's emotional fragility predates the onset of this litigation. Whilst living in England she had been referred to a Child and Adolescent psychiatrist because of thoughts of self-harm which she had been expressing. C told the CAFCASS officer that she felt that her pre-existing emotional difficulties had become much worse since being detained in Brazil; she described suicidal thoughts although these had been contained now that she was feeling happier in the care of her father. She was quite clear that she would not be "properly happy" until she returned home. She was continuing as best she could with on-line learning with her English school although she is concerned by the ground she is losing. She described feelings of acute unhappiness at being "trapped" in Brazil for the past seven months, a country which she described as "loud, polluted and less developed" than her home in England. She remains in "daily contact" with her friends in London and there is little, if any, evidence in the papers that she has developed any equivalent social ties or connections in Brazil. The concerning picture which emerges from this account is of an isolated and troubled teenager who is desperate to reconnect with what she regards as home and established ties in London. She described her ongoing inability to return to her home in England as a separation "from everything that she holds dear". She regards her ongoing 'entrapment' in Brazil as responsible for the significant and ongoing deterioration in her emotional and mental health wellbeing which included suicidal thoughts and a feeling of being watched.

53. Whilst Ms Huntington did not have the opportunity to reach any clear conclusion, she has noted that there were aspects of C's presentation which might be said to demonstrate "experience of alienating behaviours" or some alignment with the views of her father. Nevertheless, her professional view was that C's concerns have a rational and objective basis. In paragraph 46 of her report, Ms Huntington concludes:

> "[C] has continued to attend her English school and has maintained her connection with her friends. She is worried about her ability to access education and function more broadly in Brazil given her lack of ability to read and write

> Portuguese. At [C's] age and stage of development such a significant change and the loss of everything familiar and dear to her, in circumstances where this is against her wishes, could be detrimental to her outcomes in life, particularly in the context of her existing vulnerabilities in her emotional wellbeing and her difficult experiences of family life."

54. Each of the children remains enrolled at their respective London schools where places are immediately available for them in the event that they return to this jurisdiction. Prior to their arrival in Brazil, it appears that each of the children had a wide range of extra-curricular activities in the field of music and sport. On 1 March 2021 P was enrolled by the mother in a local Brazilian school. On the father's case (disputed by the mother) she took that step unilaterally and without his consent. P had been at that school for about three weeks when the father issued his English proceedings. Until that point in time, he had been engaging in remote learning with his English class mates.

55. P's London school has described him as "an incredibly happy and kind boy who was popular amongst his friends and well behaved". He was described as "a very mature and sensible boy" who was making good and positive progress. He was clearly happy in his current home with his mother and paternal grandmother. He described "fun" memories of life at school in London and was able to tell the CAFCASS officer about a favourite playground. As to the circumstances of his arrival in Brazil, he told the CAFCASS officer that he had "teleported" there and appeared to believe that he would be staying in Brazil. He described his London school as "pretty good" although he appeared comfortable in his new school where he said he had made friends. He appeared to know that it was his mother's wish to remain in Brazil and tht his father and sister wanted to return to London. The most important factor which he was able to identify as being a contra-indicator to a return to London was the cold weather. He confirmed that he was not worried about anything else in connection with a return although he would feel sad in this event.

56. As matters currently stand, each of these children is living with a parent in the home of that parent's maternal/paternal family. The siblings are separated from one another and there is some evidence that their relationship as brother and sister is coming under pressure as a result of that separation.

57. In the context of the intentions of these parents in relation to their children's educational and other arrangements, I look to the primary evidence of what was said to the schools and other third parties before they flew to Brazil at the end of November 2020.

58. Each of the children's London schools has written a letter confirming that their schools were closed until 8 March this year during a period of Government restrictions during which the children were involved as pupils in online learning. P's school has made it clear that they are aware of the delay to his return and his Head of Junior department has expressed a hope that he will soon return. As to the circumstances of the children's

absence, the father sent an email to the school on 26 November 2020 at a time when he had no notice of the mother's intentions to commence divorce proceedings in Brazil (and at a time when she may not have had those intentions) in these terms:

> "This is to inform the school that [P] [will] not be in school from Monday, 30th November until the end of the term. [His] mother has fallen ill in Brazil and will have to have surgery next week so I'll be taking [P] and his sister to Brazil so that we can support her. [P] will be back in school for the January term.
>
> I could not catch up yet with [P's] class teacher so if you could kindly relay the message to her it would be appreciated. I'll try to catch her during drop-off/pick up over the next days."

59. A similar email was sent to C's school confirming her return to school at the start of the new term in January 2021 after the Christmas holidays. He said in that email that their daughter was speaking to her class tutor that day to ensure that he continued to monitor her studies and assignments over the remaining two weeks of that school term.

60. On 19 February 2021, as the local travel restrictions in Brazil continued, the parents exchanged messages via WhatsApp. The mother had told the father that she was intending to meet with the new school in São Paolo were she wanted to enrol P. The father responded in these terms:-

> "But [P] will have to do his classes from London aslo *[sic]* this is the most important thing. I think this is all crazy to be honest, we have 5 weeks here, this just creates more turmoil, on top of buying the apartment, doctors, London studies, etc … I don't understand why this now, nothing will change for him, it's only more stress. I think you continue to be in denial that we are leaving … let's talk."
>
> "I want to talk about this, the decision isn't unilaterally yours."

61. On 1 March 2021 the father sent a further email to C's school to confirm that they were currently "still stranded" in Brazil because of Covid-19 related flight restrictions imposed in January. He informed the school that the plan was to return to the UK over the Easter period when the family would have more time to quarantine in accordance with UK regulations with the intention she would be returning to school from 8 March. At this point in time the father had no advance notice of the divorce proceedings which the mother had issued locally in Brazil. It is of note that she was copied into this email and raised no comment or objection to its contents. A similar update was sent to P's school. On 22 April 2021, P's headteacher confirmed that the mother herself had alerted the school earlier to inform them that he would be returning to school in April and was continuing to work hard on the school work and other activities which had been set for him. In her written evidence the mother states that she took this step

because she was anxious to keep open the option for online learning until "we were sure [P] could be enrolled at school" in Brazil.

62. I cannot resolve this factual dispute between the parties because I have not heard any oral evidence. However I regard these email exchanges as entirely in line with the ongoing attempts which the father was making to organise flights back to London for the entire family. The carrier, British Airways, had cancelled their return flights booked in November 2020 which were scheduled to depart from São Paolo on 2 January 2021. A further booking was cancelled by the airline on 6 February. The parties re-booked their departure flights for 27 March with a view to a return to London via Mexico where there were less onerous quarantine restrictions. Within the material before the court is evidence of pre-booked hotel accommodation for the entire family in Mexico booked and paid for through American Express. Each of the four family members had a confirmed booking with an arrival at Heathrow's Terminal 4 in London confirmed on 10 April 2021 via Paris on an Air Mexico flight. Those flights remained available albeit that the father and children were unable to travel because of service of the mother's divorce petition on 11 March 2021 and the currency of the proceedings she had issued locally in relation to the State Court in São Paolo.

63. The father has produced emails which he wrote to the mother in the early days of January 2021 as the 'lock down' in Brazil became increasingly inevitable. On 14 January, ahead of their scheduled return flight dates, he told her that he was considering flying back to the UK the following day before the situation became out of control when all international flights were likely to be banned. He said "…for sure, I don't want us to be stuck here". At this time, as the WhatsApp messages they exchanged show, there was no suggestion that the mother would not be returning with the family to London. They were at that stage continuing to discuss the purchase of a property in São Paolo and the respective merits of options they were considering. The mother was making enthusiastic comments about an apartment which they were looking to rent for the family from one of her friends. The father's response in the context of spending further time in Brazil was that he was "thinking one-month tops". The mother said nothing to indicate that she was looking to stay permanently in that jurisdiction and was indeed attaching a 'heart balloons' emoji sticker to her message to the father.

64. When the father and the two children arrived in Brazil in late November 2020, it is agreed that they brought with them in their suitcases only those possessions and other items which they would need for a short stay. As C complained to the CAFCASS officer, everything else was left at their Richmond home awaiting their return. There is no evidence to suggest that the mother's own preparations to travel to Brazil involved her taking more than what she would have needed for the planned surgery and the Christmas period with extended family. The London housekeeper was expecting the family to return in January 2021. In what I regard as a telling vignette, the father had left the family car in the short-term car park at Heathrow when he and the children travelled to Brazil. Arrangements had to made with the housekeeper's husband to

collect it and return it to the family home when it became clear that their original return flights had been cancelled.

65. No doubt arrangements will have been made to ensure that the children (and the parties themselves) had such clothes and other personal items as they needed during this period but the fact remains that, in terms of their possessions and the familiar comfort of home, the fabric of these children's lives remains in tact in their bedrooms and elsewhere within the family home at Richmond. They remain registered with their local doctor and dentist. Their personal savings accounts have not been closed. C has been quite clear in her understanding and expectation that they were travelling to Brazil for a holiday and to see their mother after her surgery. It appears that neither parent said anything to suggest to either of their children that, when they left the London house on 27 November to drive to the airport, they might not be coming back. Indeed, all the indications were to the contrary.

66. In her written evidence, the mother has set out the sort of plans which were put in place when they moved to São Paolo for a year in 2014. Of the move from their (then) London home, she says this:

> "When we moved to São Paolo in 2014, [the father's employer] paid for us to ship all of our belongings there. We shipped everything, including our china, furniture, personal possessions, leaving nothing behind. I remember that I even gave my cleaner in London an excellent television because we knew it would not work in São Paolo."

67. Taking this evidence as a broad canvas, it is very difficult to identify any respects in which, prior to March 2021, the children could have had any comprehension from anything said or done by their parents that they would not be returning to resume their lives in London. There had undoubtedly been a degree of upheaval in their domestic arrangements caused by what clearly began as an enforced stay in Brazil as a result of the Covid-19 restrictions on international flights. On the mother's own case as it is articulated now through Mr Turner QC, she had not been contemplating the imminent issue of divorce proceedings as those restrictions bit on what I accept to be a clear plan for the family to return to London. She raised no objections to the father's repeated attempts to get his entire family back to London. The children were continuing to engage with their London schools in terms of classwork and other assignments. Those schools were expecting them to return and their places were being kept open. As a WhatsApp from the mother makes clear, their London housekeeper was continuing to go to the London family home in order to look after the property. Whilst avoiding any undue focus on an historical or backward-looking assessment of the children's lives at this point in time, and with the collective family expectation being a return to London together on flights leaving on 27 March 2021, it is difficult to see how any significant roots in that jurisdiction had been 'pulled up'. They may have been loosened by their enforced stay in São Paolo as a result of their physical containment in that country.

There is no reliable evidence before this court of a clear and crystallised intention at that time to remain for the longer term in Brazil.

68. So to what factors does the mother point in order to support her contention that, as of 24 March this year, both children have acquired a sufficient degree of integration so as to acquire new habitual residence in Brazil ? In circumstances where the father has been unwilling to leave either child behind in that country for reasons which I entirely understand, the mere passage of time does not assist me in circumstances where the court's focus is on the position of these children as it was in the third week of March this year. I accept that there is some evidence from the CAFCASS report that, by July 2021, P had begun to acclimatize to his new arrangements and settle into school life in São Paulo. He did not start to attend school locally in São Paolo until 1 March this year. Whilst I accept that his enrolment (albeit without the father explicit consent) represented his first tentative steps towards a more formal social and educational integration with his local community, it was still very early days for this little boy in terms of school life in Brazil. He had only been a pupil at that school for less than a month when the English proceedings were issued.

69. Whilst I accept that each of his parents has played a full part in his life to date, with evidence of the father being closely involved in his London school life on an apparently daily basis in terms of the school 'runs', I accept for these purposes that P's primary sense of attachment in terms of his day to day life probably lies with his mother. It is she who, with his maternal grandmother, has been the constant presence in his life since these proceedings commenced. Given that he does not share the polarised views which his sister, C, has been expressing, it is entirely understandable that his life with his mother will have exposed him to increasing social amenities and participation in school life with his peers. That position has to be juxtaposed against the accepted fact that, up until 11 March this year, these parties were not only sharing a property together but were actively considering the acquisition of a second property in Brazil.

70. The mother points to the fact that the family's moves locally in São Paolo were to bigger and better accommodation. Whereas they had initially stayed with the paternal grandparents, they then rented accommodation in what appears to have been three separate places prior to their separation on 11 March when the father was served with divorce proceedings. That step, as I have said, must have been in contemplation in the mother's mind for over a month and possibly longer since she issued a power of attorney to her local Brazilian lawyers on 10 February this year having consulted them almost a week before that date. Both parties are now living with their respective families on the basis that C is with the father and P with his mother. They have not purchased a property in Brazil despite the fact that this was clearly the subject of discussion between them. Whilst there is a dispute as to the factors driving that plan (and I am not in a position to resolve those issues), it is clear that discussions between them began in the Summer of 2020. With extended families on both sides living permanently in Brazil (including the mother's twin sister), it probably made sense to

them both to look at establishing some form of base in Brazil to which they could come as a family when they travelled to see family and friends in that jurisdiction.

71. The property in respect of which they were considering making an offer was a fourth floor apartment in São Paolo which was being offered for £1.1 million. As late as 21 January 2021 the father was sending WhatsApp messages to the mother expressing his concerns about the offer they had made. (*"... I do want to think over the weekend about whether this is the correct decision. With our situation and my disbelief on this country [sic], I am questioning why making this investment."*) The following day he messaged the mother to express concern about the complications of owning a second property in Brazil and the demands on his time which sorting out the practical aspects of ownership would bring in terms of the local delivery of items (in this instance, it appears, a refrigerator). On 4 February 2021 (the day the mother formally consulted her Brazilian lawyers, unbeknownst to the father), he was messaging her to record the impasse they appeared to have reached. (*"I want to know if you decided about the apt. We have to decide and I am not getting where you are coming from. After all the conversations about Brazil, now you decided you do not want it ? Time is ticking and this process cannot be made again at a distance, and I will not be here until April."*)

72. On 10 March 2021, the day before he was served with the mother's divorce proceedings and unaware at that point of their existence, the father sent a WhatsApp message to the mother asking, in the absence of a response from her, whether he should cancel the purchase and recover the deposit they had paid. The following day, service of the divorce petition was effected and all and any further discussions about the proposed purchase were abandoned. The fact of the matter is that the parties did not acquire a property in Brazil and there are no ongoing discussions with regard to the same. Thus, against this backdrop of the children's somewhat peripatetic living arrangements, it is difficult to see how, and at what point, the court *could* conclude that there was sufficient stability in any one base which might point to a finding of sufficient integration in a home, a place or a particular community. Those various moves were undertaken against the wider picture including the fact that their home in London and their schools continued to be available with the collective family expectation being that they would return. If there were discussions ongoing between the parents as to how, and in what circumstances, they might salvage their marriage, there is nothing in the supporting evidence which has been put before this court to suggest that the father had consented to remain in Brazil nor that any such intention had been communicated to the two children.

73. As far as the children's routine dental and medical treatment is concerned, I accept that they visited a local dentist on what appears to have been a single occasion prior to the issue of the father's English proceedings on 24 March this year. Visits to a local doctor appear to have been similarly restricted. P saw a doctor on a single occasion at the beginning of February this year; C had what appears to be a single appointment in mid-April but nothing before. The mother confirms in her written evidence that these were

general check-ups and that both children were generally in good physical health. C's increasing distress about her situation was addressed by her parents as one would expect given her particular emotional vulnerability throughout this period. The mother took her to see a Brazilian psychologist on three occasions over a period of about a week between the last week in February and the beginning of March this year.

74. Steps were taken in February 2021 to enrol the children (and the entire family) as members of a local sports club. For these purposes they applied as local residents and used the address of the paternal grandparents. It is not at all clear from the mother's evidence whether the children had actually attended the club facilities prior to 24 March this year. She refers in her written evidence to a likely delay of some months before the family's membership was likely to be approved. It seems that P had some swimming and tennis lessons in the early part of this year but, in apparent contradistinction to her full programme of extra-curricular activities in London, C has not taken part in any similar activities locally in Brazil. She appears to be very isolated and unhappy and, according to the father's evidence, she chooses to spend most of her days alone in her bedroom with little social contact with any friends of her own age. All her social interaction appears to be via Zoom and WhatsApp with the friends she has left behind in London. The mother has arranged 'playdates' for P which she says have occurred at least once a week. She has also identified four or five friends with whom he has spent time.

75. The mother describes much family social interaction over the Christmas and New Year period between the end of 2020, the beginning of 2021 and beyond. In her written evidence she has described delightful family trips to the beach with several of the children's young cousins. In this context, I take full account of the fun and joy which I am sure these occasions brought in terms of the children's immersion in time spent with their extended families in Brazil. In this context, the time they have regularly spent over holiday periods reuniting with family and enjoying all that the local lifestyle has to offer has no doubt been a much-anticipated break in their London lives. As I have already found, that is likely to have been the reality of what the children anticipated when they left London on 22 November last year. The travel restrictions which prevented their return to London on their scheduled flights left this family in a position where they were effectively stranded in that jurisdiction. That state of affairs came about at a time when the parties' marriage was in significant difficulties. I need no persuasion at all that this mother felt a very significant sense of relief to be back in Brazil and reunited with her closest family members. She had ready access to both her mother and her twin sister and I do not doubt that they were able to offer much support as she coped with the aftermath of surgery as well as the disintegration of her marriage. When it became clear fairly early on in the New Year that the direction of travel was likely to be divorce, it is not difficult for anyone with a degree of empathy to understand why the mother was reluctant to let go of those support systems. It seems likely that the mother's intentions crystallised towards the end of January 2021 at the latest. She consulted Brazilian lawyers on 4 February 2021. At this time, the family's return tickets

to London were still open despite the fact they had been rescheduled as a result of airline cancellation. The children's English schools were being told that they were returning. Once her petition seeking dissolution of the marriage had been served, the issue of the Brazilian custody proceedings followed swiftly by the father's unsuccessful attempt to secure permission to leave with the children on an interim basis have undoubtedly prolonged the children's current sojourn in São Paolo.

My conclusions

76. Having carried out a close forensic analysis of these children's lives and the arrangements for their care in São Paolo between the end of November last year and 24 March this year, I am not persuaded that these children, or either of them, had acquired a new habitual residence in Brazil by that date. I have reached this conclusion as a result of considering the very significant amount of evidence which is now before the court and reflecting upon that evidence through the lens of the children's lived experience of the weeks and months up to the point of the issue of these English proceedings on 24 March this year. In my judgment, this period can properly be characterised as a prolonged extension of what was always intended to be Christmas/New Year break for the family in accordance with the routine which had become familiar to them whilst they lived as an international family in various parts of the world as dictated by the demands of the father's career.

77. In my judgment there is simply not the requisite degree of integration into their lives in that jurisdiction which would be required to make the finding sought by the mother. As the evidence demonstrates, the somewhat peripatetic nature of their frequent moves from one temporary home to another militates against the quality of stability which is an integral aspect of the process of integration in a new community.

78. These parents were sufficiently comfortable in financial terms to ensure that life for their children during the wholly exceptional circumstances of the Covid-19 pandemic was maintained in a manner which ensured that their material needs were met. I accept that each was trying in his and her way to do whatever was possible to make life as comfortable for the children as possible. This was an unsettling time for each of the children. It is clear from the evidence that the difficulties in the personal dynamic between the parties had impacted on the children and on C in particular. I do not regard the ongoing discussions between the parties in relation to the abortive purchase of the apartment in São Paolo as sufficient to displace the clear evidence of the absence of any consensus between them to make a permanent move to Brazil. In the same vein, the purchase of a family car in that jurisdiction when seen in the context of the purchase of a second home does not point to a stable or secure integration of the children in a new habitual residence. The fact that they have necessarily had to acquire new telephones, clothes or personal items is hardly surprising given the minimal amount which they took with them from their home in London when they set off for this trip in November 2020. As matters currently stand, neither child has a settled home in Brazil. They are

now separated as siblings and each is living with a parent in the home of that parent's family. The ability of the children as at the end of March this year to enjoy social occasions with their extended families and friends made locally or, in P's case, through his enrolment for a very short period in a local school, does not present this court with a picture of children who are sufficiently settled and integrated into a new Brazilian way of life with sufficiently stable anchors to justify a finding that they have ceased to be habitually resident in England. In the judgment of this court, that is where their home remains. That is where their schools are waiting to receive them back. That is where C appears to wish to be.

79. In the case of C, I find the arguments compelling. The views she has expressed to the CAFCASS officer could not be more clear. Even discounting some weight to allow for potential alignment with her father's wishes to return to London, they are powerful and persuasive, if not ultimately determinative. I had the clear sense through the course of reading the evidence and hearing submissions that the mother most probably accepts that this court is very unlikely to find that C's current views will enable a court to find that she is now sufficiently integrated into life in Brazil to have become habitually resident in that jurisdiction.

80. P is much younger. At 6 years old he will inevitably continue to look to his mother for the primary care she appears to have provided over the course of the last few months since they were reunited in Brazil. I do not intend to make any findings in this judgment about the extent of the role which the father played in sharing the care for his son. I have already remarked upon the extent to which he was involved with the school and with many aspects of P's life in London. The scope of my enquiry for the purposes of this judgment is the habitual residence of the children. Notwithstanding the fact that P has appeared to be content with his day to day life in Brazil and the care which his mother continues to provide, that is not the test which I have to apply. It is the extent to which that care is provided in the context of a sufficient degree of integration into his new environment which matters. Whilst the finding in relation to P's habitual residence is perhaps more nuanced than that which I have been able to reach in relation to his sister, I am persuaded that the evidence before the court is insufficient to enable me to find that he has acquired a new habitual residence in Brazil. My findings on the basis of all the evidence before the court is that he, too, retained his habitual residence in England and Wales as at 24 March this year.

81. Before moving on to the last point which I need to consider in this judgment, I propose to deal with a submission made by Mr Turner QC to the effect that the court has not had the benefit of a second statement from the mother in response to the father's reply. He criticised much of what the father said in that written reply as 'mere assertion'. In this context, I am entirely satisfied that the mother has had a full, fair and Article 6 compliant hearing. There was no provision for a further written statement from the mother in the directions which were agreed on 16 April 2021 and no provision for oral evidence from the parties. Whilst Mr Hames QC and Ms Renton had suggested in their

original position document that the court might wish to hear some oral evidence from the parties, this was not pursued and rightly so in my judgment. The mother did not wish to give oral evidence and there was no application from Mr Turner QC for an adjournment in order to allow time for further evidence. As I have said, there is already a significant quantity of written material before the court including transcripts of the Brazilian proceedings and, wherever possible in this judgment, I have relied on the underlying primary material to inform my conclusions as to the facts rather than the competing accounts given by the parties themselves.

Next steps

82. The final issue which falls for determination is whether, having established jurisdiction as of right, this court should proceed to exercise that jurisdiction in respect of the children.

83. It is accepted that the Brazilian courts have not, as yet, made any substantive determination in relation to the issue of habitual residence. The orders which the State Court in São Paolo has made to date have been interim orders which are essentially protective orders designed to regulate the period during which proceedings have been delayed in order to allow the father's substantive Hague Convention application to be heard.

84. It is clear from the evidence before the court that there is likely to be some delay before that can be achieved. Nothing which I have read from the Brazilian proceedings suggests that delay was a factor which impacted upon the decision of the Federal Court to refuse the father's application for interim permission to return with the children to England. Had that application been granted, it was open to the mother to return with the children when no doubt appropriate arrangements could have been made for the occupation of the London home in the new circumstances of their recent separation and divorce.

85. The father's application to this court is driven in part by the concern that, within a matter of weeks, he will be required by his employers to return to London and resume his role with the bank. The conditions which have allowed him to work remotely through this extended period have been lifted and he faces the prospect of having to leave his children in Brazil without any settled or fixed date for the resolution of his outstanding application. I am not dealing today with welfare issues. There is a further hearing listed for that determination on 13 and 14 September 2021. However, the situation which confronts these children requires a resolution if only on an interim basis. Whilst I cannot resolve these issues and do not seek to do so at this stage, I cannot ignore their existence as a factor in my approach to the second question which needs to be addressed.

86. On behalf of the mother Mr Turner QC submits that the Brazilian proceedings should be allowed to run their course because any order for the interim return of the children which the English court might make could not be enforced against his client. I do not accept that as a valid reason to decline jurisdiction in this case. I would not expect this mother wilfully to disobey an order made by the court after a hearing in this jurisdiction in which she had taken a full part. She has assembled a first-class legal team to represent her interests. She has not suggested that she will not comply with any order which is made in September and it may well be that, having considered the evidence on that occasion, the court will permit the children to remain where they are. I cannot and do not speculate about the outcome of that hearing.

87. Mr Turner QC further submits that the court should allow the determination of the father's application to run its course in the Brazilian courts since it was his choice to engage that jurisdiction for the purposes of his application under the Hague Convention. He has drawn the court's attention to two authorities: *Re S (A Child) (Abduction: Hague Convention)* [2018] EWCA Civ 1226, [2018] 4 WLR 108 and *Re N (A Child) (Abduction: Children Act or Hague Convention Proceedings)* [2020] 2 FLR 575. In the former case, the Court of Appeal had to consider whether a summary return order should have been made by the English court in circumstances where the mother had also issued a 1980 Convention application in the Netherlands. That was an application which was determined in the specific context of *Brussels IIA*, an international treaty to which the Netherlands was a Member State. Brazil is not, as yet, a contracting party to the 1996 Hague Convention. As is clear from the judgment delivered by Moylan J in *Re S* at para 37, "different considerations will arise when the other state is not a Member State and is not a party to any relevant international instrument ….".

88. In *Re S*, the child at the centre of the proceedings had been abducted to Greece. In the context of the father's application for a summary return, there was no issue but that the child was habitually resident in England and that his removal had been wrongful in Convention terms. The issue of delay did not arise: see para 49. Moylan LJ agreed that "it would be unwise to be unduly prescriptive about how and when the court should deploy a specific type of order available to it given the many varied situations which will arise and the need for the courts to deal with cases of abduction expeditiously": Para 39. His Lordship accepted that there may well be 'compelling reasons' why a parallel approach might be required. I do not know what findings might ultimately be made by a court in Brazil in relation to the existence of a wrongful abduction or retention of these children in that jurisdiction. I agree with the observations made by Mostyn J in *Re N* that an unfettered freedom to litigate in multiple forums seeking different forms of relief risks the potential for tensions between, and inconsistent judgments from, those jurisdictions (see para 8). However, in my judgment this is a case which is captured within the broad range of situations envisaged by Moylan LJ where the court is entitled to deploy a bespoke, albeit legitimate, solution for these children who find themselves caught between two jurisdictions. I am wholly persuaded that further delay in securing that solution is highly prejudicial to their interests.

89. Insofar as Mr Turner QC seeks to rely on the comments of MacDonald J in *K v H* [2021] EWHC 1918 (Fam) (paras 40 and 51) about the undesirability of conflicting orders in different jurisdictions, I agree entirely with those observations as a matter of principle. However, that case concerned an abduction to Sudan. The jurisdiction which the court was being asked to engage was the *parens patriae* inherent jurisdiction based on nationality alone. That is not this case. The father's current application to this court has a statutory basis in the Children Act 1989. I have found each of the children to have been habitually resident in this jurisdiction on the date when that application was issued. Far from representing an abuse of the process as Mr Turner QC maintains, the father is entitled to pursue his remedies in this jurisdiction. Whether or not the court will consider it appropriate to grant him the relief which he seeks on an interim basis remains to be seen. That is not what I am being asked to decide today. I have made it plain that this court has the utmost respect for the Brazilian courts which have thus far exercised an interim jurisdiction on a quasi-protective basis because of the physical presence of the children in that country. The issue of habitual residence has not yet been addressed by those courts. There is thus no inconsistency in the finding which this court has reached based on its overall survey of the evidence which the parties have put before the court. This is not a case of an English court overreaching the jurisdiction of a State which has assumed jurisdiction on the basis of the *primary* connecting factor of habitual residence. On the contrary, I am entirely persuaded that there exist in this particular case compelling reasons why the father's application should proceed on 13 and 14 September 2021. The father's need to return to this jurisdiction in the immediate future in circumstances where he currently has the *de facto* care of a 13 year old child whose psychological fragility is accepted by both parents is now part of the factual matrix of this case.

90. Whilst I have decided that each of these children is habitually resident in this jurisdiction, the court in September may conclude on the evidence that, in terms of a welfare decision, the same orders as those currently in place in Brazil, different orders or no orders at all are the right outcome for these children. The welfare enquiry is for the second stage of the timetable which the court approved in paragraph 11(b) of its order dated 16 April 2021. That order was a careful distillation of case management which was intended to provide the English court with an opportunity to consider the arrangements for the children if the jurisdictional threshold of habitual residence was established. That has now been done.

91. For these reasons, I propose to make a declaration that each of these children was habitually resident in the jurisdiction of England and Wales as 24 March 2021 when the father's application for orders pursuant to the Children Act 1989 was issued. On that basis, I shall direct that, in the particular circumstances of this case, the court should proceed to exercise jurisdiction over the children in order to determine whether or not to grant the relief which the father seeks. The hearing on 13 and 14 September 2021 will remain in the court's list as an effective fixture on those dates. I propose to certify

that hearing as fit for vacation business. If and insofar as further directions may be required so as to ensure that the case is effective on those dates, I will wait to receive a draft order from counsel. That order should include an agreed template which, insofar as possible, allows sufficient time for reading and delivery of judgment. As counsel are aware, it has not been possible to secure an additional day of court time during the current vacation period so as to extend the forthcoming hearing in September. It is all the more important in these circumstances that minds are focussed on the issues which the court will need to address in the context of that hearing.

Order accordingly