Neutral Citation Number: [2020] EWCA Civ 923

Case No: B4/2020/0234

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MR N EKANEY QC SITTING AS A
DEPUTY HIGH COURT JUDGE
FD19P00608

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2020

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE NEWEY

- -

RE: S (A CHILD)

- -
- -

Mr E Devereux QC and Dr R George (instructed by Dawson Cornwell Solicitors) for the Appellant
Mr H Setright QC and Ms C Baker (instructed by **Bindmans LLP**) for the Respondent

Hearing date: 13th May 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am 17th July 2020.

Lord Justice Moylan:

1. On 13 May 2020, we heard a mother's appeal from a return order made under the 1980 Hague Child Abduction Convention ("the 1980 Convention"). At the end of the hearing, we informed the parties that the appeal would be allowed and that the father's application would be remitted for rehearing. At the same time, we asked the parties to consider engaging in specialist mediation with the organisation Reunite. I now set out my reasons for agreeing with this decision.

2. I would add, as a preliminary observation, that this was a far from straightforward case, both factually and legally, and its resolution was not assisted by the fact that the mother acted in person at all stages of the proceedings until this appeal. This is not a criticism of the mother, who tried to obtain legal aid but (we were told) did not initially qualify because of her means, but it meant that her case was not presented with the clarity with which it has been presented on this appeal. The consequent effect is that this court has had a significant advantage in contrast to the Deputy High Court Judge who heard the case below. I would also emphasise that this is no criticism of Ms Baker, who acted for the father, and who appropriately sought to assist the court but could not, of course, formulate the mother's case for her.

The background

3. The child at the centre of the proceedings is M, a boy now 7 years old. He was born in Poland following a brief relationship between his parents, who are Polish nationals. In 2013, the Polish court limited the father's parental responsibility, such that he retained the right to share in the making of important decisions about M's life. In 2015, it made an order extending M's contact with his father to include alternate weekends and holiday contact.

4. In July 2018, with the father's agreement, the mother travelled with M (together with the mother's older daughter, then aged 18) to England for the purposes of a holiday. In August, the mother then told the father that she wanted to remain in England for a few months to do further work on a business that she was intending to set up. The father's case was that he was not happy about that but that he acceded to an extension on the basis that M would be returned to Poland by the end of the year. M started school in England in October 2018. In the autumn of 2018, the father, who was working in Germany at the time, visited England twice to see M. In November 2018, the mother became engaged to a Polish man who had been living in England for fourteen years and had two children of his own by a previous relationship in this country.

5. At Christmas 2018, the mother and M returned to Poland for the holidays. M spent several days with his father, and then returned to England with the mother. The father again visited M in England in February 2019. By agreement, M visited Poland over Easter 2019. He was collected by his father on 7 April and was due to be returned to his mother on 17 or 18 April. However, the father did not return M, and instead applied to the Polish court on 17 April for M to live with him. The mother applied for M's return to England under the Hague Convention, asserting that the father was retaining him away from his country of habitual residence, namely England and Wales. She also cross-applied to the Polish court for a variation to the 2015 contact order.

6. On 1 May 2019, the mother regained care of M during a period of contact agreed between the father and the maternal grandmother and she returned with M to England at the end of the month. On 3 June, she withdrew her Hague Convention application on the basis that M was back in her care and on the following day those proceedings were dismissed by the Polish court. The domestic Polish proceedings brought by both parents have continued, with hearings taking place in December 2019 and January and March 2020.

The father's 1980 Convention application

7. On 16 July 2019, the father applied to the Polish Central Authority for the return of M to Poland. Although we did not explore this during the hearing, I would assume that the application was not received by the Central Authority here until shortly before the application was issued on 29 October 2019. Standard directions were given on paper on 30 October including one for the mother to file "an answer and any evidence in support of that answer". On 13 November, a hearing took place before a Deputy High Court Judge. The father was represented by counsel and the mother was in person. A direction was made for Cafcass to prepare a report addressing M's wishes and feelings in respect of returning to Poland and the question of whether M was settled in England.

8. The Cafcass report, by Ms Lauren Doyle, was filed on 9 January 2020, after a visit to M in December. Ms Doyle did not consider that M objected to returning to Poland. As to settlement, she said this:

> "42. M has a family life and school life in England, he has friends and has adapted to the change in his country of residence. It is my assessment that he has achieved a settled status in the physical sense of being established in his community, and in an emotional and physical sense, feeling secure and stable in his current life. The court will question how a child can be considered settled when residing in the country prevents them from a relationship with the absent parent. Whilst I recognise and accept that there is an element of his psychological settlement missing, given the absence of a regular and clear pattern of time with his father, I do not believe that this has prevented him from establishing a stable life in England."

9. The final hearing took place before Mr Nkumbe Ekaney QC, sitting as a Deputy High Court Judge, on 17 January 2020. The father was represented by counsel and solicitor. The mother acted in person because, as referred to above, her attempts to get legal aid at that stage had failed. In the morning, evidence was given by both parents but not, by agreement, by Ms Doyle. The judge heard submissions after lunch and gave an ex tempore judgment that afternoon, ordering M's return to Poland.

10. Following the order, the mother obtained legal representation and on 7 February 2020 issued her Appellant's Notice. On 27 February, I granted permission to appeal. On 19 March, the parties wrote a joint letter to the judge asking him to give further reasons on one aspect and on 1 April a short document headed "Clarification on habitual residence" was circulated by the judge.

The judge's decision

11. At the outset the judge described the case as troubling and difficult. He described the history and summarised the parties' positions in this way:

> "21 So, what is the position of both parents? The father, who is the applicant, says that there was an unlawful retention of M and therefore a breach of his custody rights under Article 3 of the Hague Convention. He says that the relevant date is either a date in November, post 10 November 2018, after the mother's engagement or, in the alternative, a date in April 2019 when the mother removed M from Poland and brought him back to England. He says that if I find that those Article 3 rights have been breached, then I must order M's return to Poland, unless one of the exceptions that are stated in the legislation apply. Those would be consent under Article 13A or grave harm under Article 13B. He says neither of those exceptions apply in this case and therefore I am mandated to order M's return to Poland.
>
> 22 The mother says that there is evidence – and I put it no higher than that – of the father consenting to the arrangements, i.e. the permanent removal to England, and that although the situation was an evolving picture, the evolution of the picture was such that by January 2019 the father knew that she was going to live in England permanently. She had reconstituted a family for herself and M and that the father had visited her family in February and in April 2019 and he was quite content with the arrangements for the child living in England permanently. The mother says that even if she is wrong about that, M is so well settled here, he has a family that he has craved for, he has half-siblings, and that it would be a major disruption for him were I to order that he returns to Poland for the issues concerning his welfare to be determined."

12. It is unfortunate that the mother had not filed an answer as directed, although she did file a statement. It may be that she did not appreciate that the purpose of an answer is to specify formally which, if any, of the exceptions to an order for summary return set out in the 1980 Convention she relied upon. At all events, it can be seen that the mother was asserting that the father had either consented to or acquiesced in ("he was quite content with the arrangements") M remaining in England. Indeed, at a later point in the judgment, the judge recorded:

> "The mother told me that the father knew that she was engaged by January 2019; he understood that M was going to stay here and acquiesced in him staying here."

13. It is also clear from this earlier exchange in the course of submissions that both consent and acquiescence were live issues, but that they became intermingled and were not considered separately:

> "THE DEPUTY JUDGE: It seems to be the mother's case that she did not really obtain your client's acquiescence clearly and unequivocally. Is that what you gather from----
>
> MS BAKER: My Lord, I think your questions have gone some way to provide clarity on the mother's consent/acquiescence defence. Of course consent in ordinary terms is something very different to consent under the Convention, and so there is no criticism made of the mother for the way her case has been put thus far.
>
> THE DEPUTY JUDGE: No.
>
> MS BAKER: But it seems to me that she falls foul of the acid test set out in *Re P-J*. As my Lord has identified, there was no clear and unequivocal consent and no subsequent acquiescence."

And later:

> "MS BAKER: … We have now, I think, my Lord -- we have put the nail in the coffin, if I may, on consent and acquiescence."

14. The judge then directed himself on the law concerning Article 3. He found that the father was exercising rights of custody in July 2018 when M first came to England. In relation to habitual residence, he directed himself to the summary in *Re B (A Child) (Custody Rights: Habitual Residence)* [2016] 4 WLR 156. As to wrongful removal or retention, he noted *Re C (Children: Anticipatory Retention)* [2018] UKSC 8, [2019] AC 1, and the judgment of Lord Hughes in paragraph 51. As to the issue of consent, he cited *PJ (Abduction: Habitual Residence: Consent)* [2009] 2 FLR 105, to the effect that clear and unequivocal consent to removal is required for the defence to be established. He said that there would be a wrongful removal or retention of M unless his father consented to the requisite standard. He noted that the burden was on the mother to establish an exception on the balance of probabilities.

15. In the course of the judgment, the judge made a number of findings of fact:

- The father had consented to the holiday in July 2018.
- As time went on, the mother told the father that she had set up a business and was going to be staying longer in England. The father was led to believe that the mother and M would return to Poland but it was unclear when that would be.
- There was no evidence to show that the couple agreed in the autumn of 2018 that M's move to England would be permanent.

- By the time of her engagement in November 2018, the mother must have been seriously contemplating that she would be staying in England permanently, but she did not communicate her private thoughts to the father.

- When the mother came to Poland in December 2018 she did not indicate that she would be remaining permanently in England.

- There was a distinct lack of clarity about the basis on which the mother and M returned to England in January 2019. The mother's assertion that by that time the father understood and acquiesced in M staying here was not accepted. The father had been placed in an impossible position and he had to accept the reality. He was not consenting to it and, in any event, there were mixed messages being given by the mother that she would return to Poland with M.

- Between January and Easter 2019 the father took no steps to try to secure M's return to Poland.

- At Easter 2019, the father stayed with the mother and her fiancée. There was drinking to celebrate the father's birthday and there was an argument between the adults. It was an unsavoury incident which resulted in M being very upset.

- The agreement for M to spend time with the father in Poland in April 2019 was in the context of the father having a reasonable expectation that at some point M would return to Poland.

- On 14 April 2019, while M was with his father in Poland, the parents spoke on the telephone. In parts of the conversation the mother was reassuring the father that M would return to Poland at the end of the academic year and that he was not staying permanently in England.

16. The judge then expressed his conclusions in this way:

> "33. Applying the law to those findings, what conclusions do I draw? Ms Baker, on behalf of the father, says that the relevant date for the purposes of determining the father's application is, firstly, 10 November 2018, being the date when the mother became engaged to her partner. I am not sure that I can be as precise as that. The mother told me – and I accept this – that she did not come to a conclusion on a specific day, rather like a light switch, that she would be staying in England. Asked by me whether, in getting engaged to a man who lived in this country, who had lived in this country for 14 years, and who had two children with whom he was having good and regular contact, she was in effect in a position where she was saying that she was going to live in this country permanently. The mother, I think I am right in saying, accepted that her decision to get engaged could reasonably be seen as her decision to remain in this country.
>
> 34. The mother's engagement and reconstitution of her family in this country repudiated the father's rights of custody in that

the mother unilaterally decided that M would live permanently in this jurisdiction. It flies in the face of common sense to imagine that the mother would have agreed to the engagement without contemplating the consequences for M or on her declared intention to return to Poland. It is reasonable, in my view, to conclude that once she made that commitment the reasonable fallout would be permanence in the UK or in England and the repudiation of the father's rights, unless, of course, the father was consenting to the child remaining here. I do not find that there is evidence that he did so clearly and unequivocally.

35. If I am wrong about that, Ms Baker points out that, as an alternative, May or June 2019 when the mother removed M from Poland without the father's consent and despite being in the midst of Polish proceedings, was in breach of the father's rights of custody. I have some sympathy for that argument. The difficulty with the argument, however, is that it stretches the question of habitual residence, but Ms Baker says that the way around that concern really is to say that although habitual residence may have changed to England, at the point at which the father removed the child from the mother's care and brought him back to Poland, then the pendulum, as it were, or the seesaw, swung back to Poland and therefore his habitual residence was in Poland. I hope I have accurately and favourably reflected Ms Baker's argument. I have to say, that has some force as well.

36. So, if asked whether or not there was a breach of the father's custody rights, I would say undoubtedly in the affirmative, yes. When is the relevant date? This court says some time in November 2018. It does not endorse Ms Baker's bold point about the 10 November. The point at which the mother made the decision that she was going to be engaged to her partner in England and live here, she repudiated the father's rights of custody. I consider that those circumstances fall squarely within the repudiatory retention as defined by Lord Hughes in para. 51 of *Re C* (above). If I am wrong about that, my view is that the second date of June 2019, when the mother removed M from Poland without the father's consent and despite them being in the midst of Polish proceedings was, in my view, in breach of his custody rights.

37. I cannot agree with the mother when she says that the father consented to these arrangements. I find a dearth, if not the absence, of evidence of consent to the requisite standard. I do not believe there was clear, unequivocal consent in this case and therefore I do not find any basis for any of the exceptions that would ordinarily be considered by the court.

> 38. My decision is, therefore, that it will have to be the Polish court that determines the welfare issues that are crying out to be dealt with in this case. At the outset of the case, I asked the parties about arrangements were I to accede to the father's application for a return order. I was told that the father would be prepared to wait until the end of this half term and for the return to be effected during the half term. The mother was to find out when the half term would be and was to tell the court and I will have that discussion with the parties in due course.
>
> 39. The father offered financial assistance to the mother for flights and for the payment of accommodation. He also offered undertakings which are set out on page C157 of the bundle. He is not to attend the airport on the return date. He is not to use or threaten violence against the mother, nor to instruct or encourage any person to do so. He is not to separate or cause separation of M from his mother, save for the purposes of the contact with him. I am going to add that he is not to denigrate or, indeed, discuss the mother's family with M and, of course, he has undertaken to provide maintenance for M whilst the Polish court determines this issue.
>
> THE DEPUTY JUDGE: That is my decision, Ms Baker. Is there anything which you think I have missed out?
>
> MS BAKER: My Lord, I would be very grateful if I could just clarify one point with you.
>
> THE DEPUTY JUDGE: Yes, certainly.
>
> MS BAKER: It is in respect of the alternative May 2019 retention. You were very clear that you would find in the alternative that there was a breach of father's rights of custody. What I would invite you to clarify is whether you have found that at that stage M was habitually resident in Poland, as at the date of removal in May 2019.
>
> THE DEPUTY JUDGE: Yes."

17. It can be seen that the judge reached the following conclusions:

    (1) There had been a repudiatory retention in November 2018, alternatively in May/June 2019.

    (2) M was habitually resident in Poland in May 2019 (there was no other express finding about habitual residence).

    (3) The father had not consented to M's retention in England.

18. It will also be seen that the judge did not address:

    (1) Acquiescence.

(2) The (unpleaded) possibility of retention having occurred in August 2018.

(3) Settlement.

19. The judge was requested to, and gave, the following elaboration of his conclusions regarding habitual residence:

> "Clarification on habitual residence
>
> Whilst M made good connections in England and appears to have integrated somewhat into the mother's reconstituted family, I find ultimately that he was not sufficiently uprooted from Poland to lose his habitual residence there. In my judgment M's degree of integration in England was not such that his habitual residence in Poland changed to England primarily due to the significant degree of uncertainty that continued to exist throughout 2019 about the mother's, and thus M's, future plans, which meant that their stay in England can only reasonably be described as temporary or intermittent, for example;
>
> - There was a distinct lack of clarity from the mother about her intentions. Even after her engagement in November 2018 when I found that she formed an intention to remain, there remained a general state of flux regarding her plans and there was a lot of uncertainty about her future.
>
> - The establishment and success/failure of her proposed business would influence whether the mother stayed in England permanently or not.
>
> - There were a number of discussions between the parents and the mother sent mixed messages to the father about her intentions.
>
> - She said in terms on at least one occasion *(paragraph 30)* that she *(and therefore M)* wanted to live in Poland and not England and that the child would not be staying permanently in England.
>
> - In a telephone conversation between the parents on 14.04.2019, which the mother accepted took place, I found that the mother told that father that M would be returned to Poland at Easter that year or at the end of the academic year.
>
> - M continued to retain his links with Poland e.g. he spent periods with his father in England and in Poland. He also spent time with his maternal grandmother in Poland in April/May 2019.

- The mother applied to the Polish Court in April 2019 for permission to remove M permanently to England which presupposes that she accepted that the child was still habitually resident in Poland and that Poland was the appropriate court to make decisions about M's welfare – which is a conclusion with which I agree."

The arguments on appeal

20. On behalf of the mother, Mr Devereux QC and Dr George make these broad submissions:

(1) The judge was wrong to identify retention as having occurred in November 2018. He should have considered whether there had been a wrongful repudiatory retention in August 2018, but he did not correctly analyse the critical authority of *Re C* (above). He misdirected himself by referring to the irrelevant question of whether and when the mother had formed an intention to remain 'permanently' in England.

(2) Had the judge found a retention in August 2018, the question of settlement would have arisen.

(3) Even if the judge was right about retention having occurred in November 2018, he did not consider the law in relation to acquiescence or analyse habitual residence. Consent and acquiescence are mutually exclusive concepts, but the judge, insofar as he addressed acquiescence at all, elided it with the test for consent. He was not referred to, and did not apply, the key authority of *Re H (Minors) (Abduction: Acquiescence)* [1998] AC 72.

(4) If retention occurred in May/June 2019, the judge's analysis of the issue of habitual residence was inadequate in his judgment and flawed in his clarification. He did not explore M's connections with England in a child-focused way and he gave excessive weight to matters that were irrelevant.

(5) Given the settlement report and the length of time that M has been here, and his bond with his older half-sibling, it would be intolerable for him to be returned to Poland; alternatively, and more realistically, the sibling bond should be taken into account in exercising a discretion not to return if a defence was made out.

21. In response, Mr Setright QC and Ms Baker argue:

(1) The judge was entitled to select the date of retention that he did after the father had offered him to two possible alternatives, while the mother had not offered him any. His conclusion was reasonable and not wrong.

(2) The analysis of habitual residence, though limited, was adequate overall. The judge must be deemed to have taken the contents of the settlement report into account.

(3) The issue of acquiescence was complicated by the fact that the mother did not appear to be running that case, although it did emerge in the course of the hearing. The judge's rejection of that defence engaged with it sufficiently and was not in the round wrong.

(4) Issues of settlement or discretion were not reached. The settlement report had in any case to be read in the light of the fact that Ms Doyle's interview with M took place six months after the latest date for the retention.

(5) The case is very far from falling within Article 13(b), and the prospect of M being separated from his sibling is remote.

22. Mr Devereux and Mr Setright were in agreement that if the appeal was allowed, the matter would have to be reheard.

Analysis and Determination

23. I start by acknowledging again that the judge was handicapped, in contrast to the expertise available to this court, by the fact that the mother acted in person. As referred to above, the consequence was that the mother's case, which potentially raises a number of difficult legal issues as well as a number of factual issues, was not advanced with the requisite degree of clarity.

24. However, whilst I have every sympathy for the position the judge found himself in, the result has been that he did not sufficiently engage with the issues which had to be addressed in order for the father's application under the 1980 Convention to be properly determined. I fully accept that, as submitted by Mr Setright, the 1980 Convention requires a quick, summary process and that a judge is not required to produce an "extensive" judgment or, as he put it more colloquially, a judge is not required "to make a meal of it". However, whilst submitting that the judge had sufficiently addressed the relevant issues, Mr Setright frankly acknowledged that he could have dealt with the issue of acquiescence more fully and that, the determination in respect of habitual residence provided "narrow foundations" on which to support the judge's conclusion.

25. I do not deal with all the issues referred to above, in part because the judge at the rehearing will have to consider what issues need to be determined having regard to the way in which the case is advanced by each of the parties at that hearing. I propose to consider only, and briefly, the issues of retention, acquiescence and habitual residence.

26. As to retention, there is force in the submission made by Mr Devereux that the judge focused unduly on whether the mother had decided to remain in England *permanently* for the purposes of deciding when M had been wrongfully retained in England. I acknowledge that this could be said to be based on an unduly textual analysis of the judgment but the critical issue when determining whether a repudiatory retention has occurred is whether, as set out in *Re C*, one parent has acted in a way which repudiates the rights of custody of the other parent. Whilst a decision by one parent to make the stay in the new state permanent rather than temporary, as the parents had agreed, could form part of a repudiatory retention, it is not a necessary feature. Lord

Hughes set out the relevant approach, when the court is dealing with an alleged repudiatory retention, as follows:

> "[38] The key to the concept of early wrongful retention, if it exists in law, must be that the travelling parent is thereafter denying, or repudiating, the rights of custody of the left-behind parent and, instead of honouring them, is insisting on unilaterally deciding where the child will live. In the absence of a better expression, the term which will be used here will, for that reason, be "repudiatory retention"."

and

> "[43] … So long as the travelling parent honours the temporary nature of the stay abroad, he is not infringing the left-behind parent's rights of custody. But once he repudiates the agreement, and keeps the child without the intention to return, and denying the temporary nature of the stay, his retention is no longer on the terms agreed. It amounts to a claim to unilateral decision where the child shall live. It repudiates the rights of custody of the left-behind parent, and becomes wrongful."

and

> "[51] … The question is whether the travelling parent has manifested a denial, or repudiation, of the rights of the left behind parent. Some markers can, however, be put in place."

27. The result was, as referred to above, that the judge did not address the possibility of retention having occurred in August 2018.

28. As to acquiescence, there is a clear distinction between consent, on which the judge focused, and acquiescence which, despite Mr Setright's submissions, was not addressed by the judge in any sufficient detail. There is also force in the submission on behalf of the mother that, by formulating the issue during the hearing as being whether the father had consented to M living in England permanently, the judge did not enable the mother to advance her case that the father had acquiesced in M's remaining in England.

29. The legal approach to acquiescence remains as set out in *Re H* at p.90 E/G:

> "To bring these strands together, in my view the applicable principles are as follows. (1) For the purposes of article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said in In re S. (Minors) (Abduction: Acquiescence) [1994] 1 F.L.R. 819, 838: 'the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact.' (2) The

> subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the p abducting parent. (3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law. (4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe G that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

30. As to habitual residence, the judgment, including the clarification, does not contain a sufficient analysis of the relevant factors necessary to explain, or indeed support, the judge's conclusion as to M's habitual residence. In addition, as referred to above, the judgment contains no express finding as to where M was habitually resident in November 2018. This might seem to follow from his conclusion that M was habitually resident in Poland in May 2019 but part of the father's case was that, even if M had become habitually resident in England prior to May 2019, his habitual residence had reverted to Poland after he went there with his father in April 2019.

31. In his submissions, Mr Setright posed the question as being whether the judge needed to address the specific factors relevant to the determination of habitual residence in this case in more detail than that set out in his addendum judgment. In my view, the answer is clear that he did. His conclusion that M's "degree of integration in England was not such that his habitual residence in Poland had changed to England" is unsupported by any analysis which focuses of the position from M's perspective. The factors referred to by the judge are almost entirely directed to the mother's position, in particular her intentions and whether she had decided to stay permanently in England. I would further add that I do not consider that, as Mr Setright submitted, M's position was so heavily dependent on the mother's position that the judge's analysis might, in any event, have been sufficient.

32. Habitual residence requires the court to undertake a sufficiently broad analysis of all the circumstances relevant to the child's degree of integration in the state or states in which he/she is said to be habitually resident. I set out quotations from two decisions which together demonstrate the scope of the enquiry; that parental intention is merely one factor; and that it is stability not permanence which is relevant.

33. In *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2014] AC 1, at [48], Lady Hale quoted from the operative part of the Court of Justice's judgment in *Proceedings brought by A* [2010] Fam 42, at p.69:

> "2. The concept of 'habitual residence' under article 8(1) of Council Regulation (EC) No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some

> degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case."

She went on to say, at [54] when "drawing the threads together" that:

> "(i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.
>
> (ii) It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.
>
> (iii) The test adopted by the European court is 'the place which reflects some degree of integration by the child in a social and family environment' in the country concerned. This depends on numerous factors, including the reasons for the family's stay in the country in question.
>
> (iv) It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.
>
> (v) In my view, the test adopted by the European court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors …"

34. In *Re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 76 Lord Reed said:

> "[16] In *A v A* [2014] AC 1, para 51 Baroness Hale DPSC commented:
>
> > 'At first instance in *DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal)* [2013] 2 FLR 163, Sir Peter Singer compared the French and English texts of the judgment, which showed that the French text had almost throughout used 'stabilité' rather than permanence

> and in the one place where it did use 'permanence' it was as an alternative to 'habituelle': paras 71 et seq.'
>
> It is therefore the stability of the residence that is important, not whether it is of a permanent character. There is no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely.
>
> [17] As Baroness Hale DPSC observed at para 54 of *A v A*, habitual residence is therefore a question of fact. It requires an evaluation of all relevant circumstances. It focuses on the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It is necessary to assess the degree of integration of the child into a social and family environment in the country in question. The social and family environment of an infant or young child is shared with those (whether parents or others) on whom she is dependent. Hence it is necessary, in such a case, to assess the integration of that person or persons in the social and family environment of the country concerned. The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce."

35. Despite Mr Setright's submissions on this issue, I do not agree that the judge engaged sufficiently with the factors required to determine the issue of habitual residence and, further, it is not clear that he considered where M was habitually resident at any date other than May 2019. In addition, I consider that his brief analysis contains an undue focus on the mother's intentions as well as on the question of whether she had formed an intention to stay permanently in England.

36. For the reasons set out above, it is clear to me that the father's application under the 1980 Convention must, regrettably, be reheard, unless of course the parents can come to an agreement. Subject to the way in which they put their cases at the rehearing, the following questions would be likely to require determination:

(1) At what date did the mother retain M in England?

(2) At that date, where was M habitually resident?

(3) If M was habitually resident in Poland at that date, did the father subsequently acquiescence in the retention (this would seem to be more likely than whether the father consented in advance to the proposed retention)?

(4) If acquiescence (or consent) is established, should M nevertheless be returned to Poland?

(5) If the retention took place more than one year before the issue of proceedings on 29 October 2019, is M now settled in his new environment?

Finally, I would agree with Mr Setright that the circumstances of the case are far from engaging Article 13(b).

Lord Justice Jackson:

37. I agree.

Lord Justice Newey:

38. I also agree.