



Neutral Citation Number: [2021] EWCA Civ 1305

Case No: B4/2021/0559

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**  
**MR N CUSWORTH QC SITTING AS A DEPUTY HIGH**  
**COURT JUDGE**  
**[2021] EWFC 17**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 24/08/2021

**Before:**

**LORD JUSTICE MOYLAN**  
**LORD JUSTICE NEWEY**  
and  
**LORD JUSTICE BAKER**

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**Re X (Children) (Article 61 BIIa)**

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**Mr W Tyler QC and Mr W Tyzack (instructed by Linkilaw Solicitors LLP) for the**  
**Appellant Father**  
**Mr T Gupta QC, Ms J Renton and Ms J Perrins (instructed by Family Law in Partnership)**  
**for the Respondent Mother**

Hearing date: 28<sup>th</sup> April 2021  
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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 Tuesday 24<sup>th</sup> August 2021.

**Lord Justice Moylan:**

1. The father appeals from the order made on 1 March 2021 by Nicholas Cusworth QC, sitting as a Deputy High Court Judge, by which he determined that the proceedings in this case concerning the parties’ children are subject to the 1996 Hague Child Protection Convention (“the 1996 Hague Convention”) for the purposes of the *lis pendens* provisions in article 13.
2. The factual background, in summary, is that both the father and the mother commenced proceedings concerning the children. The father commenced proceedings in England and Wales under the Children Act 1989 (“the 1989 Act”) seeking a child arrangements order and a prohibited steps order (“the English proceedings”). The mother commenced proceedings in Russia seeking residence orders (“the Russian proceedings”).
3. The father contends that the judge’s decision was wrong in that the 1996 Hague Convention does not apply to the English proceedings because of the effect of article 61 of Council Regulation (EC) No 2201/2003 (“BIIa”). It is his case that the children were habitually resident in England and Wales at the date of the commencement of those proceedings and that, accordingly, as set out in article 61, BIIa “shall apply”. The issue of whether the children were habitually resident at that date has not yet been determined.
4. The mother contends that the judge was right to decide that the *lis pendens* provisions of the 1996 Hague Convention apply because of the effect of article 62 of BIIa. On the judge’s interpretation of article 62, as explained below, the *lis pendens* provisions of the 1996 Hague Convention apply because the equivalent provisions in BIIa do not apply in the circumstances of this case.
5. BIIa still applies to the English proceedings because of the terms of the 2020 Withdrawal Agreement between the United Kingdom and the European Union. Article 67 provides that the provisions of BIIa regarding jurisdiction will continue to apply to proceedings “instituted before the end of the transition period”. It appears that this provision is given domestic effect by section 7A of the European Union (Withdrawal) Act 2018 (inserted by the European Union (Withdrawal Agreement) Act 2020).
6. There are three grounds of appeal but I propose to focus only on the first ground which is that the judge misinterpreted and misapplied articles 61 and 62 of BIIa. By the other grounds the father contended that the mother’s application for a stay under article 13 had been raised too late, not having been raised at the outset of the English proceedings, and sought to raise a new point not argued below, namely that even if article 13 applies, the judge was wrong to decide that the English proceedings must be stayed because the principle of *perpetuatio fori* is not applied in the 1996 Hague Convention.
7. Having regard to the focus of this appeal, I set out articles 61 and 62 of BIIa now:

“Article 61

Relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children

As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:

(a) where the child concerned has his or her habitual residence on the territory of a Member State;

(b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention.

#### *Article 62*

##### Scope of effects

1. The agreements and conventions referred to in Articles 59(1), 60 and 61 shall continue to have effect in relation to matters not governed by this Regulation.

2. The conventions mentioned in Article 60, in particular the 1980 Hague Convention, continue to produce effects between the Member States which are party thereto, in compliance with Article 60.”

As can be seen, article 61(a) provides, without qualification, that BIIa “shall apply” if the child the subject of the proceedings has his or her habitual residence in a Member State. As referred to above, the judge considered that article 62 meant that the *lis pendens* provisions of the 1996 Hague Convention apply to the proceedings in this case.

8. Mr Gupta QC on behalf of the mother raised a preliminary issue and submitted that this appeal had become academic because, since the judge’s order, a final welfare determination has been made in the Russian proceedings. The effect of this determination was not clear and Mr Tyler QC for the father submitted that it was not an enforceable decision or order. We were certainly not able to conclude that this appeal was academic so it was clearly appropriate to deal with it on its merits.

#### Background

9. I only propose to set out a brief summary of the background, largely taken from the judgment below.

10. The parties have two children. The father's proceedings under the 1989 Act were filed with the Family Court on 6 November and issued on 9 November 2020.
11. As recorded in the order made at the first hearing of the English proceedings on 21 December 2020, the mother disputed the jurisdiction of this court to make substantive orders under the 1989 Act based, as I understand it, on her contention that the children were habitually resident in Russia and not in England and Wales. This led to a hearing being listed for the determination of that issue. This hearing has not yet taken place.
12. On 28 October 2020 the mother issued an application in Russia seeking residence orders in respect of the children. On 5 November 2020, "the Russian court 'returned' or rejected the ... application without issuing it, on the basis of a determination that the court lacked jurisdiction". The mother challenged this decision but, in the meantime, issued a second residence application in Russia on 13 November 2020. On 17 November, this second application was also returned by the Russian court, leading to the mother issuing a third application on 24 November 2020. This last application was accepted by the Russian court.
13. On 21 December 2020, the Russian court allowed the mother's challenge to the rejection of her first application. Further, on 20 January 2021 the Russian court "reconsidered and accepted" the mother's first application.
14. The judge decided that the Russian proceedings were first in time. It is clear that the English proceedings were parental responsibility proceedings potentially within the scope of BIIa and proceedings for measures of protection potentially within the scope of the 1996 Hague Convention. The Russian proceedings were within the scope of the 1996 Hague Convention.
15. At a hearing before the judge on 22 January 2021, the mother raised "for the first time her client's contention that Article 13 of the 1996 Hague Convention operated to require a stay of the father's Children Act proceedings in this court". It was this issue which the judge determined by his order of 1 March 2021.

#### Judgment Below

16. The judge referred to the provisions of the 1996 Hague Convention and BIIa and a number of decisions, namely *Owusu v Jackson* [2005] QB 801; *JKN v JCN (Divorce Forum)* [2011] 1 FLR 826; *UD v XB*, CJEU (Case C-393/18 PPU) [2019] 1 WLR 3083; *Mittal v Mittal* [2014] Fam 102; and *West Sussex County Council v H* [2014] EWHC 2550 (Fam).
17. The essence of the judge's decision was first, at [21], that the provisions of article 19 of BIIa did not apply because they deal "only with *lis pendens* situations between" Member States and, therefore, did not apply to the present case because one of the relevant States is Russia. Secondly, at [23]-[24], the judge addressed the meaning of article 62 of BIIa which, as set out above, provides that the 1996 Hague Convention "shall continue to have effect in relation to matters not governed by the Regulation". The judge concluded that these words meant that the *lis pendens* provisions in the 1996 Hague Convention applied to the English proceedings because: "Applying the same reasoning as that adopted ... in *JKN v JCN* and ... in

*Mittal v Mittal* ... the situation here is not ‘governed by’ Article 19 of the Regulation, but by contrast is undoubtedly governed by Article 13 of the 1996 Hague Convention, involving as this case does a *lis pendens* between the UK and a 1996 Convention country”.

18. The judge distinguished *West Sussex County Council v H*. In that case, Theis J had reached the opposite conclusion to that reached by the judge in the present case. She considered, at [30], that, having determined that the child was habitually resident in England and Wales, article 61 meant that “jurisdiction *must* be exercised under the Regulation rather than under the Hague Convention” (my emphasis). This meant that jurisdiction could not be transferred to the other relevant state, Albania, because article 15 of BIIa only permitted a transfer to another EU Member State. The judge distinguished this case on the basis that, at [26], Theis J was dealing with the transfer of jurisdiction provisions and not the *lis pendens* provisions so that *JKN v JCN* and *Mittal v Mittal* were “more directly in point”.
19. Finally, the judge considered that the recast BIIa (Council Regulation (EU) 2019/1111 of 25 June 2019) supported his conclusion because, at [27], it “will provide expressly for this situation”.

#### Submissions

20. Mr Tyler submitted that the judge misinterpreted articles 61 and 62 of BIIa. In his submission, article 61 mandates that BIIa applies to the proceedings if the children are habitually resident in England and Wales at the relevant date which, he submits, is the date when the English proceedings commenced. Mr Tyler relied on the *Practice Guide for the application of the Brussels Iia Regulation* published by the European Commission (“the *EU Practice Guide*”), which I deal with below.
21. Mr Tyler also relied on an article by Kruger and Samyn, *Brussels II bis: successes and suggested improvements*, published in 2016 in the *Journal of Private International Law* and an article by Beaumont, Walker and Halliday entitled “*Parental responsibility and international child abduction in the proposed recast of the Brussels Iia Regulation and the effect of Brexit on future child abduction proceedings*”, *International Family Law Journal* [2016] 307. The former refers, at p. 20, to the “rule” that BIIa “takes precedence” when the child is habitually resident in the EU and, at p. 23, to one of the problems this creates in that it means the transfer of jurisdiction provisions in neither BIIa nor the 1996 Hague Convention apply when the other state is not an EU Member State (as was decided in *West Sussex County Council v H*).
22. As to article 62, he submitted that parental responsibility and jurisdiction (including *lis pendens*) are matters “governed by” BIIa so that article 62 does not have the effect as determined by the judge. Article 62, he submitted, is dealing with “matters” which have no equivalent in BIIa such as applicable law which is addressed in the 1996 Hague Convention but not in BIIa. Mr Tyler again relied on the *EU Practice Guide* where, at 8.3.1, it distinguishes between BIIa which “prevails in matters of jurisdiction ...” and the 1996 Hague Convention which applies “in matters of applicable law, since this subject is not covered by the Regulation”.

23. Mr Tyler also relied on *UD v XB* in which the CJEU determined, as set out below, that article 8(1) applies to “disputes involving relations between the courts of a single member state and those of a third country”. That case also referred, at [40], to “the unification of the rules of jurisdiction (in BIIa as having) ... the objective of eliminating obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject”. Mr Tyler tied this in with the fact that none of the, then, EU Member States had given effect to the 1996 Hague Convention when BIIa was concluded in 2003.
24. Accordingly, he submitted that article 61 served the important purpose of eliminating disparity between jurisdictional regimes in operation across the EU. In his submission it would be contrary to the effective functioning of the internal market to “permit a situation whereby a child habitually resident in one Member State could be subject to a jurisdictional regime under the 1996 Hague Convention which would then cease to apply if the child were to move to another Member State”. For example, he submitted, article 13 would apply inconsistently depending on whether the Member State was or was not a contracting party to the 1996 Hague Convention. This would frustrate the intended harmonisation of the rules of jurisdiction.
25. Mr Tyler also pointed to the fact that the position has changed in that all Member States are now contracting parties to the 1996 Hague Convention. This is reflected in the recast BIIa which, by article 97, has significantly amended article 61 so as, in particular, to allow the application of the *lis pendens* provisions in article 13. Because all EU Member States are contracting parties, this will have a uniform effect across all Member States so will not conflict with the functioning of the internal market.
26. I can summarise Mr Gupta’s submissions very briefly because he supported the judge’s determination and submitted that he was right to decide that article 13 applies to the English proceedings in this case because of the effect of articles 61 and 62 of BIIa. This approach ensures that BIIa and the 1996 Hague Convention “work in harmony” in the interests of children.
27. In his submission, article 62 applies because the “situation” in this case is not “governed by” BIIa because article 19 does not apply. As a result, he submitted, recourse may be had to the 1996 Hague Convention. He relied on *Mittal v Mittal* as supporting this submission.
28. Mr Gupta also relied on the recent CJEU decision in *SS v MCP* (C-603/20 PPU) 24 March 2021 and the decision of the French Cour de Cassation referred to below. In the former, the CJEU determined that article 10 of BIIa only applies if the state to which the child had been abducted is another EU Member State. The court also made observations, relied on by Mr Gupta, about the relationship between BIIa and the 1996 Hague Convention. These included, at [56], the observation that, if article 10 applied when the child had been abducted to a third State:

“The consequence would be that the Member States, which have all ratified or acceded to the 1996 Hague Convention, would find themselves compelled to act, pursuant to EU law, in a way that was incompatible with their international obligations.”

Mr Gupta submitted that the father's case in this appeal would also result in EU Member States being required to act incompatibly with their obligations under the 1996 Hague Convention.

### Legal Framework

29. The full title of BIIa is “Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility”. By article 72, it entered into force on 1 August 2004 but very largely applied only from 1 March 2005. It replaced Council Regulation (EC) No 1347/2000 (“BII”) which had entered into force on 1 March 2001.
30. Recital 7 of BIIa provides that the “scope of this Regulation covers civil matters whatever the nature of the court or tribunal”. The scope of BIIa is set out in Chapter I, article 1:

#### “Article 1

##### Scope

1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

- (a) divorce, legal separation or marriage annulment;
- (b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

2. The matters referred to in paragraph 1(b) may, in particular, deal with:

- (a) rights of custody and rights of access;
- (b) guardianship, curatorship and similar institutions;
- (c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- (d) the placement of the child in a foster family or in institutional care;
- (e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.”

Article 1(3) sets out specific matters to which BIIa does not apply, such as adoption.

31. Chapter II of BIIa deals with “Jurisdiction”. This includes the grounds on which the courts of a Member State will have jurisdiction. Section 1 sets these out in respect of “matters relating to divorce, legal separation or marriage annulment” and Section 2 in respect of “matters of parental responsibility”.

32. Section 2 provides a number of different grounds of jurisdiction. Article 8 provides the primary, “general ground” of jurisdiction, namely the courts of the Member State in which the child is habitually resident: *SS v MCP*, at [43]. The other grounds of jurisdiction in articles 9, 10 and 12 are “special” grounds which “must be interpreted restrictively”, *SS v MCP*, at [47].
33. Article 9 deals with jurisdiction when a child “moves lawfully” from one Member State to another. It gives continuing jurisdiction (for three months and for the purpose of varying an order for access) to the courts of the Member State from which the child moved. Article 10 deals with jurisdiction in the event of child abduction and provides that jurisdiction remains with the Member State from which the child was abducted or retained until certain conditions are satisfied, one of which is that “the child has acquired a habitual residence in another Member State”. As referred to above, it has recently been clarified by the CJEU that this article only applies if the child has been abducted to and acquired habitual residence in another Member State and not a third State: *SS v MCP*. Article 12 deals with prorogation of jurisdiction in favour of the courts of a Member State.
34. Section 3 has common provisions dealing with when a court is seised (article 16) and with *lis pendens* (article 19). Article 19 provides:

“Lis pendens and dependent actions

...

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.

In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.”

35. Chapter V of BIIa deals with “Relations with other Instruments”. Article 59 deals with its relationship with conventions which then existed “between two or more Member States and relate to matters governed by” BIIa. It provides that BIIa “shall, for the Member States, supersede” those conventions.
36. Article 60 addresses the relationship between BIIa and “certain multilateral conventions”:

“Article 60

Relations with certain multilateral conventions



In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

- (a) the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors;
- (b) the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages;
- (c) the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;
- (d) the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children; and
- (e) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

It can be seen that BIIa takes “precedence” over the listed Conventions in “relations between Member States”.

- 37. The relationship between the 1996 Hague Convention and BIIa is dealt with separately in article 61, which I have set out above. Article 62 deals with the “Scope of effects”, as set out above.
- 38. One issue which arises is the meaning of the word “matters”. In my view, when used in article 62, it is used in a broad sense to include any substantive matter, such as the attribution of parental responsibility, as well as any procedural matter, such as jurisdiction. In addition to the context, including the title of BIIa, this is supported by *the EU Practice Guide* for the application of the Brussels IIa Regulation which, in the 2014 edition, states in respect of parental responsibility:

“3.1.1. Matters covered by the Regulation

The Regulation lays down rules on jurisdiction (Chapter II), recognition and enforcement (Chapter III) and co-operation between central authorities (Chapter IV) in matters of parental responsibility. It contains specific rules on child abduction and access rights.”

This is also dealt with in the section in the *EU Practice Guide* dealing with the relationship between BIIa and the 1996 Hague Convention where it is stated at 8.3.1:

“The Regulation prevails over the Convention in relations between Member States in matters covered by the Regulation. Consequently, the Regulation prevails in matters of jurisdiction, recognition and enforcement. On the other hand, the Convention applies in relations between Member States in matters of

applicable law, since this subject is not covered by the Regulation.”

39. It is also relevant to note that “matters” are not the same as “proceedings”. This can be seen, for example, from article 16 which refers to a court being seised “when the document instituting the proceedings or an equivalent document is lodged with the court”. It is also clear from article 19(2) which refers to “proceedings relating to parental responsibility relating to the same child and involving the same cause of action”.
40. BIIa was preceded by BII (the previous Regulation) which significantly reflected the content of the Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters of 28 May 1998 (“the BII Convention”). The BII Convention had been negotiated between the Member States because, at that time, the EU did not have competence in judicial cooperation in civil matters. It never came into force but, because of the degree of overlap with BII and, indeed, BIIa, the *Explanatory Report on the Convention* by Professor Borrás (“the Borrás Report”) has been regarded as a valuable guide to the interpretation of both Regulations.
41. The equivalent provisions to articles 59, 60 and 62 of BIIa were articles 38, 39 and 40 of the BII Convention and articles 36, 37 and 38 of BII. There was no equivalent to what is now article 61, the 1996 Hague Convention having been included in what is now article 60 (namely article 39 of the BII Convention and article 37 of BII).
42. It is important to note that, in respect of children, the scope of BII was limited by article 1(1) and article 3 as follows:

“Article 1

1. This Regulation shall apply to:

- (a) civil proceedings relating to divorce, legal separation or marriage annulment;
- (b) civil proceedings relating to parental responsibility for the children of both spouses on the occasion of the matrimonial proceedings referred to in (a).”

and

“Article 3

Parental responsibility

1. The Courts of a Member State exercising jurisdiction by virtue of Article 2 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in a matter relating to parental responsibility over a child of both spouses where the child is habitually resident in that Member State.

2. Where the child is not habitually resident in the Member State referred to in paragraph 1, the courts of that State shall have

jurisdiction in such a matter if the child is habitually resident in one of the Member States and:

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted by the spouses and is in the best interests of the child.”

It can be seen that the jurisdictional scope of BII in respect of parental responsibility was significantly more limited than that in BIIa.

43. I now turn to consider the *Borras Report* and the *EU Practice Guide*.

44. The *Borras Report* explained the basis of article 39 of the BII Convention (what is now article 60 of BIIa) as follows:

“115. This provision contains the general rule that this Convention takes precedence over other international conventions to which the Member States are party in so far as they concern matters governed by both Conventions. The text adopted means that this Convention takes precedence and that it must therefore be compulsory to apply it in place of such other agreements. Some Member States wanted the use of this Convention to be optional in relation to one or other of the conventions listed or even to apply internal rules in its place if they were more favourable, but that proposal was rejected. Legal certainty and mutual confidence require the rule which was finally adopted whereby there is an obligation to give precedence to the application of this Convention. It should be noted in particular that, inasmuch as its scope includes matters concerning parental responsibility for a child of both spouses, this Convention takes precedence over the 1996 Hague Convention in cases in which protection of the child is linked to the divorce process, also bearing in mind that the application of this Convention is confined to children residing in the Member States. The inclusion of the 1970 Hague Convention on divorce means that this Convention must take precedence since it is also a double Convention.

“116. It should be pointed out that not all the Member States are party to all the conventions mentioned in this Article and that their inclusion in the list does not mean that the Member States are recommended to accede to them. The provision is simply a practical statement of the relationship between this Convention and other treaty texts.”

It is obviously significant for the present case that the Report: (a) identifies legal certainty and mutual confidence as *requiring* the imposition of “an obligation to give

precedence to the application of this Convention”; and (b) states that the BII Convention “takes precedence over” the 1996 Hague Convention and that it is “compulsory to apply it” *whenever* the jurisdictional requirements of the BII Convention are satisfied in parental responsibility cases, namely when “linked to the divorce process” and when the child is “residing in the Member States”. This ties in with the reference to the fact that not all Member States were parties to the listed conventions (see further below in respect of the 1996 Hague Convention). It is also relevant to note that the obligation to give precedence clearly arises even when there might be some connection with a third State and even though the article is expressed as applying “In relations between the Member States”.

45. The *EU Practice Guide* also deals with the relationship between BIIa and the 1996 Hague Convention. In the 2005 edition this is addressed at Chapter XI:

“Six Member States have ratified or adhered to the Convention to this date (June 2005): the Czech Republic, Latvia, Estonia, Slovakia, Lithuania and Slovenia. The remaining Member States, with the exception of Hungary and Malta, have all signed but not yet ratified the Convention. It is foreseen that the Convention will enter into force in the Member States once they have all ratified it in the interest of the Community. The relationship between the two instruments is clarified in Articles 61 and 62.”

At the date of the previous version (September 2004), only five Member States had ratified the 1996 Hague Convention (the Czech Republic, Latvia, Estonia, Slovakia and Lithuania). All of these became Member States on 1 May 2004. The important wording for the purposes of this appeal is when the *EU Practice Guide* states: “It is foreseen that the Convention will enter into force in the Member States once they have all ratified it in the interest of the Community”.

46. For comparison, the 2014 edition of the *EU Practice Guide* said, at section 8 under the heading “Relationship between the Regulation and the 1996 Hague Convention on child protection – Articles 61 and 62”:

“8.2. Ratification by the EU Member States

As at the time of writing [June 2014] all but two of the Member States have ratified or acceded to the Convention to date; the two exceptions are Belgium and Italy which, though, have both signed but not yet ratified the Convention. The Convention entered into force as regards each of the Member States in terms of the ratification by each. The relationship between the two instruments is clarified in Articles 61 and 62 of the Regulation.”

This makes clear that the 1996 Hague Convention is only effective in a Member State from the date of ratification not signing.

47. The *EU Practice Guide* then goes on specifically to address articles 61 and 62. In the 2005 edition, as follows:

“In order to determine whether the Regulation or the Convention applies in a specific case, the following questions should be examined:

(a) Does the case concern a matter covered by the Regulation?

The Regulation prevails over the Convention in relations between Member States in matters covered by the Regulation. Consequently, the Regulation prevails in matters of jurisdiction, recognition and enforcement. On the other hand, the Convention applies in relations between Member States in matters of applicable law, *since this subject is not covered by the Regulation.*

(b) Does the child concerned have his/her habitual residence on the territory of a Member State?

If both (a) and (b) apply, the Regulation prevails over the Convention.

(c) Does the case concern the recognition and/or enforcement of a decision issued by a court in another Member State?

Question (c) must be addressed on the basis that the rules on recognition and enforcement of the Regulation apply with regard to all decisions issued by the competent court of a Member State. It is irrelevant whether the child concerned lives within the territory of a particular Member State or not so long as the courts of that State have competence to take the decision in question. Hence, the rules on recognition and enforcement of the Regulation apply to decisions issued by the courts of a Member State even if the child concerned lives in a third State which is a contracting Party to the Convention. The aim is to ensure the creation of a common judicial area which requires that all decisions issued by competent courts within the European Union are recognised and enforced under a common set of rules.”  
(emphasis added)

48. The later editions contain similar wording. In my view, this provides clear guidance as to when BIIa “prevails”: when the child is habitually resident in an EU Member State and in respect, inter alia, of jurisdiction. I have emphasised the words from the *EU Practice Guide* relied on by Mr Tyler because they support his submission that, as article 62 states, it is dealing with matters “not governed by the Regulation” such as applicable law. Other matters, such as jurisdiction, *are* governed by the Regulation.
49. In my view, the only question about the effect of this guidance relates to the words, “in relations between Member States”, which appear in (a). This is, of course, wording that appears in article 60 rather than article 61. I would first note that, as referred to above, the *Borras Report* made clear that article 39 of the BII Convention, which had this wording, required precedence to be given to that Convention

*whenever* its jurisdictional requirements were satisfied. It did not depend on whether another EU Member State or a third State was involved. Secondly, the question at (b) would make no sense if it was only dealing with intra-EU cases. It only makes sense in the context of the other relevant State being a contracting party to the 1996 Hague Convention. This is because BIIa provides other potential grounds for jurisdiction but article 61(a) only gives priority to jurisdiction founded on the habitual residence of a child in a Member State.

50. Accordingly, under articles 61 and 62, BIIa applies if the child is habitually resident in an EU Member State and the 1996 Hague Convention does not “have effect in relation to matters” such as parental responsibility and jurisdiction because they are governed by BIIa. In simple terms, BIIa “takes precedence over” (per the *Borrás Report*) or “prevails” (per the *EU Practice Guide*) over the 1996 Hague Convention in respect of such matters.
51. Before leaving BIIa, I propose to deal with the recast BIIa which the judge considered supported his conclusion. In my view, it is supportive of the father’s case because it changes the structure of the provisions dealing with the relationship between BIIa and the 1996 Hague Convention in a way which, as Mr Tyler submitted, reflects the fact that all Member States are now contracting parties to the 1996 Hague Convention.
52. On 30 June 2016 the EU Commission published its proposal for a recast BIIa (COM (2016) 411). This set out the reasons for and objectives of the proposal including, at p. 5, that the proposal “takes account of other instruments” such as the 1996 Hague Convention. It also sets out in this context that: “With respect to the parental responsibility matters (custody, access, child protection) the courts of the Member States are bound by the *jurisdiction* rules of the Regulation” while: “Both in intra-EU cases and cases in relation to third States, the *law applicable to parental responsibility matters* is determined by the 1996 Hague Convention” (emphasis in original). This, again, supports the father’s case.
53. An Impact Assessment (SWD (2016) 207) was published at the same time as the proposal. It is a long document which covers a wide range of topics. One of the topics addressed, at pp. 115/116, is the relationship between BIIa and the 1996 Hague Convention. It is recorded that a number of respondents to the public consultation “indicated that the rules governing (the Convention’s) relationship with the Regulation do not work satisfactorily”. These included a potential conflict arising from the different jurisdictional rules in BIIa and the 1996 Hague Convention. In addition, the Swedish expert identified the issue addressed in *West Sussex County Council v H*, namely that neither article 15 of BIIa nor article 10 of the 1996 Hague Convention would be available if the other State was not an EU Member State. This was because, “according to Article 61 of the Regulation, the 1996 Hague Convention should not apply, as the Brussels IIa Regulation takes precedence”.
54. The recast BIIa is clearly intended to address the difficulties identified and contains a significant revision to the relationship between the Regulation and the 1996 Hague Convention. This is provided by article 97:

“Relation with the 1996 Hague Convention

1. As concerns the relation with the 1996 Hague Convention, this Regulation shall apply:

- (a) subject to paragraph 2 of this Article, where the child concerned has his or her habitual residence in the territory of a Member State;
- (b) as concerns the recognition and enforcement of a decision given by a court of a Member State in the territory of another Member State, even if the child concerned has his or her habitual residence in the territory of a State which is a contracting Party to the said Convention and in which this Regulation does not apply.

2. Notwithstanding paragraph 1,

- (a) where the parties have agreed upon the jurisdiction of a court of a State Party to the 1996 Hague Convention in which this Regulation does not apply, Article 10 of that Convention shall apply;
- (b) with respect to the transfer of jurisdiction between a court of a Member State and a court of a State Party to the 1996 Hague Convention in which this Regulation does not apply, Articles 8 and 9 of that Convention shall apply;
- (c) where proceedings relating to parental responsibility are pending before a court of a State Party to the 1996 Hague Convention in which this Regulation does not apply at the time when a court of a Member State is seised of proceedings relating to the same child and involving the same cause of action, Article 13 of that Convention shall apply.”

It can be seen that, by paragraph 2(c), express provision is made for the provisions of article 13 to apply when proceedings are pending in a 1996 Hague Convention country. In my view, this thorough revision of BIIa is a thorough revision and not, as the judge considered, supportive of his interpretation. If this is what BIIa meant, there would have been no need to change the wording as this could have been made clear in a recital or a revised *EU Practice Guide*.

55. I now turn to deal with the 1996 Hague Convention.

56. The relevant provisions of the 1996 Hague Convention are as follows. Article 13 deals with *lis pendens*:

“Article 13

(1) The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration.”

Article 52 deals with the relationship between the 1996 Hague Convention and other instruments:

“Article 52

(1) This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

(2) This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.

(3) Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.

(4) The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned.”

57. Article 53 provides that the 1996 Hague Convention only applies to “measures ... taken in a State after the Convention has entered into force for that State”.

58. After the conclusion of the hearing, the parties provided further written submissions dealing with the question of when the UK became a Contracting State to the 1996 Hague Convention. These submissions referred to a number of other documents including the Vienna Convention on the Law of Treaties 1969 (“the VCLT”) and the Implementation Checklist published by the Hague Conference.

59. Article 61 sets out when the 1996 Hague Convention will enter into force in a state.

“Article 61



(1) The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 57.

(2) Thereafter the Convention shall enter into force -

a) for each State ratifying, accepting or approving it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b) for each State acceding, on the first day of the month following the expiration of three months after the expiration of the period of six months provided in Article 58, paragraph 3;

c) for a territorial unit to which the Convention has been extended in conformity with Article 59, on the first day of the month following the expiration of three months after the notification referred to in that Article.”

60. The question of, “In which States and from what date does the 1996 Convention apply?”, is addressed in Chapter 3, section A of the *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*, published in 2014 by the Hague Conference on Private International Law, (“the *Practical Handbook*”) where it deals with:

“[3.1] The 1996 Hague Child Protection Convention applies only to measures of protection which are taken in a Contracting State *after* the entry into force of the Convention in that State.

[3.2] The recognition and enforcement provisions of the Convention (Chapter IV) apply only to measures of protection taken *after* the entry into force of the Convention *as between* the Contracting State where the measure of protection was taken and the Contracting State in which it is sought to recognise and/or enforce the measure of protection.

[3.3] To understand whether the Convention applies in a particular case, it is therefore important to be able to ascertain:

- whether the Convention has entered into force in a particular State and upon which date it did so; and
- whether the Convention has entered into force *as between* a particular Contracting State and another Contracting State and upon which date it did so.

...

[3.5] The Convention will enter into force in a State as follows:

- for States that *ratify* the Convention, the Convention enters into force on the first day of the month following the expiration of three months after the State deposits its instrument of ratification;
- for States that *accede* to the Convention, the Convention enters into force on the first day of the month following the expiration of nine months after the State deposits its instrument of accession.”

These provisions make it clear that states are not bound on signing the Convention but only on ratification or accession. The UK ratified the 1996 Hague Convention on 27 July 2012 and it entered into force on 1 November 2012.

61. Accordingly, applying articles 2(f) and 12(1) of the VCLT, the UK has not “consented to be bound by the treaty” by signature because the treaty does not provide “that signature shall have that effect” (nor do the other provisions of article 12(1) apply). Further, although, as submitted by Mr Gupta, article 18 of the VCLT obliges a state, which has signed the treaty, “not to defeat the object and purpose of a treaty prior to its entry into force”, article 52 expressly provides for other agreements being concluded.
62. I have not found article 52 entirely clear including because it would seem to me that BIIa is within article 52(1), having regard to when a State becomes a Contracting State. This is, however, not where it is placed in the analysis in the *Explanatory Report on the 1996 Hague Child Protection Convention* by Paul Lagarde (“the *Explanatory Report*”); for completeness, I set out his analysis below. The lack of clarity might be because the dates on which States would ratify or accede to the 1996 Hague Convention were not known and/or the lack of clarity might be because of what the *Explanatory Report*, at [174], refers to as the “ambiguity – which is perhaps not entirely involuntary” between paragraphs 2 and 3.
63. However, whatever might be the ambiguity, as explained below (paragraph 66), the effect of article 52 emerges clearly from the *Practical Handbook*, at [12.7], namely that for EU Member States, apart from Denmark, BIIa “*will prevail* where a child has his or her habitual residence in a Member State”.
64. I now set out the paragraphs from the *Explanatory Report*:

“[172] This paragraph 2 looks directly to the Convention under negotiation among the Member States of the European Union, but it is drafted in general terms and may obviously interest other States Parties to the new Convention, which might wish to enter into regional agreements, for example.

The agreements mentioned in this paragraph are those which concern ‘children habitually resident in any of the States Parties to such agreements’. The European States wanted the possibility to enter into an agreement among themselves concerning, in particular, the protection of minors, only for those children having their habitual residence on the territory of one of them.

The specification appearing in the text means that these States have, in any case, the possibility to conclude separate agreements for such children. But it does not seem that it can be interpreted as a limitation of the power of Contracting States to conclude agreements with third States. It should not be understood that this specification forbids Contracting States to conclude agreements with third States which might concern, for example, children having the nationality of States Parties to these separate agreements, whatever might be the place of the habitual residence of such children. Moreover, paragraph 3 makes no further mention of this limitation.

[173] This paragraph indicates that the separate agreements to be concluded by one or several Contracting States ‘do not affect, in the relationship of such States with other Contracting States, the application of the pro-visions of this Convention’. In other terms, the freedom to conclude separate agreements is complete, but the Contracting States which are Parties to such separate agreements may not in any case use these agreements as an argument to free themselves from their obligations towards the other Contracting States which are not Parties to the separate agreements.

[174] It must be recognised that a certain ambiguity – which is perhaps not totally involuntary – subsists as to the relations between paragraphs 2 and 3 of this Article 52. The ambiguity comes precisely from the fact that the reference to the children’s habitual residence on the territory of a State Party to the separate agreement appears only in paragraph 2. From this, two interpretations of paragraph 3 are possible. The first would consider that the restrictions contained in this paragraph concern only the agreements which are mentioned there, i.e. those which are not limited to children having their habitual residence on the territory of one of the States Parties to these agreements. The second, which seems more exact to the Reporter, and more in accordance with the literal text, would be to understand paragraph 3 as being applicable to all the separate agreements, even to those limited to children having their habitual residence on the territory of the States Parties to these agreements.

65. I would just note, in passing, that competence in respect of the 1996 Hague Convention was shared between the EU and the Member States (under the AETR doctrine established by *EU Commission v EU Council* [1971] ECR 263). The EU authorised certain Member States, including the UK, to ratify or accede to the 1996 Hague Convention by Council Decision 2008/431/EC of 5 June 2008 having previously authorised Member States to sign the Convention by Council Decision 2003/93/EC of 19 December 2002.
66. As referred to above, in my view, the effect of article 52 is made clear by the *Practical Handbook* in the section dealing with the “Relationship between the 1996 Convention and other instruments”. Chapter 12, section D provides:

“How does the 1996 Convention Affect the Operation of Other Instruments?”

Article 52

12.5 This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the Contracting States to such instruments.

12.6 This Convention also does not affect the possibility of one or more Contracting States concluding agreements which contain, in respect of children habitually resident in any of the Contracting States to such agreements, provisions on matters governed by this Convention. Any agreements concluded by Contracting States on matters falling within the scope of this Convention will not affect the application of this Convention between those Contracting States and other Contracting States who are not party to this agreement.

12.7 Currently the main instrument that fits into this category is the Brussels II a Regulation which operates between the Member States of the European Union, excluding Denmark. The material scope of the Regulation and the 1996 Convention is very similar, although the Regulation does not include rules on applicable law (note 439). As concerns the relationship with the 1996 Convention, for Member States of the European Union (excluding Denmark), *the Regulation will prevail where a child has his or her habitual residence in a Member State of the European Union (excluding Denmark), or where the recognition or enforcement of a decision issued by the competent authorities of a Member State (excluding Denmark) is sought in another Member State (excluding Denmark), irrespective of where the habitual residence of the child is.*

Note 439: It should be noted that the rules on applicable law contained within the 1996 Convention apply to children habitually resident in an EU Member State. In particular, Art. 15 of the 1996 Convention will apply if the court of an EU Member State bound by the Regulation exercises jurisdiction under the rules of the Regulation (where the ground of jurisdiction is one which exists in Chapter II of the 1996 Convention) – see, supra, Chapter 9 at para. 9.1.” (emphasis added)

The effect of this is clear: for Member States of the EU, apart from Denmark, BIIa “*will prevail* where a child has his or her habitual residence in a Member State”, other than Denmark (my emphasis) in respect of matters within the scope of BIIa which do not include rules on applicable law.

67. I now turn to the authorities to which we were referred.

68. *JKN v JCN* concerned competing divorce proceedings in England and New York. Lucy Theis QC (as she then was) decided, at [140], that the phrase “proceedings governed by” BIIa, in paragraph 9 of Schedule 1 of the Domicile and Matrimonial Proceedings Act 1973 (“the DMPA 1973”), referred to “the position where there are competing proceedings in another Member State”. This was based on the fact that the “mandatory provisions of Art 19 were (only) engaged” in cases “where the competing jurisdiction is another Member State (other than Denmark)”.
69. *Mittal v Mittal* also concerned competing divorce proceedings, in England and India. The essential issue in the Court of Appeal was whether Bodey J had had the power to stay the wife’s English divorce proceedings. This again depended on the effect of paragraph 9 of Schedule 1 of the DMPA 1973 and of article 19 of BIIa. The former gives the court power to stay “matrimonial proceedings, other than proceedings governed by” BIIa. Article 19 deals with when “proceedings relating to divorce” or “proceedings relating to parental responsibility ... brought before courts of different Member States” must be stayed. Both provisions operate in respect of “proceedings”.
70. Lewison LJ, at [48], agreed with what Lucy Theis QC had decided in *JKN v JCN* about when proceedings are governed by BIIa. He then explained:
- “The whole context of paragraph 9 of Schedule 1 to the 1973 Act concerns stays of proceedings. In my judgment in the context of a legislative provision dealing with a stay of proceedings, the proceedings are only “governed” by BIIa if BIIa tells the court how to deal with the application. Since, in my judgment, neither BIIa nor the decision of the Court of Justice in the *Owusu* case [2005] QB 801 does that (except in cases to which article 19 applies), the proceedings are not “governed” by BIIa.”
71. In *UD v XB* the CJEU addressed the issue of habitual residence for the purposes of establishing jurisdiction under article 8 of BIIa. The two States involved were the United Kingdom and Bangladesh and the primary issue was whether a child who had never been in the UK, having been born in Bangladesh, was within the scope of article 8. As explained in the opinion of Advocate General H Saugmandsgaard Øe, at [22], the UK Government took a preliminary point and argued that “the questions referred are inadmissible on the ground that article 8(1) of the Brussels IIa Regulation governs only conflicts of jurisdiction between courts of the member states”. This was because, it was argued, under the provisions of the relevant EU instruments, “the geographical scope of that Regulation is confined to situations having cross-border implications for two or more member states”. Accordingly, article 8(1) “does not apply in a dispute having links between a member state and a third state”.
72. This argument was rejected. As explained by Advocate General H Saugmandsgaard Øe:
- “[23] In that regard, the wording of that provision (article 8) indicates that the courts of a member state have jurisdiction provided that the “child ... is habitually resident in that member state at the time the court is seised” without limiting that

jurisdiction to disputes which have links to another member state.

[24] Article 61(a) of the Brussels IIa Regulation confirms this reading. Under that provision, in relations with the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996 (“the 1996 Hague Convention”)<sup>13</sup>, that Regulation applies where the child has his or her habitual residence in a member state. The Brussels IIa Regulation thus *takes precedence* over that Convention in all cases where that criterion is satisfied, without any relevance attaching to the issue of whether the dispute involves a potential conflict of jurisdiction between member states or between a member state and a third state which is a signatory to that Convention.” (my emphasis)

The Advocate General’s comment that BIIa “takes precedence ... in *all cases*” (my emphasis) in which the child is habitually resident in a Member State is obviously significant.

73. The Advocate General then referred to *Owusu v Jackson* (Case C-281/02) [2005] QB 801 in which the CJEU, at [33], had stated that the Brussels II Convention:

“was intended to facilitate the working of the internal market through the adoption of rules of jurisdiction for disputes relating thereto and through the elimination of difficulties concerning the recognition and enforcement of judgments. The court considered that the consolidation of the rules on jurisdiction relating to the disputes having a connecting factor with a third state helps to achieve that objective in that it makes it possible to eliminate the obstacles that may derive from disparities between national legislation on the subject. It inferred that the application of the general rule laid down in article 2 of the Brussels Convention, which confers general jurisdiction on the courts of the member state in which the defendant is domiciled, is not conditional on the existence of a legal relationship involving a number of contracting states to that Convention: see *Owusu v Jackson*, paras 34 and 35; see also *Opinion 1/03* [2006] ECR I-1145, paras 146–148.”

74. And, as explained by the Court in a passage which I set out in full:

“[31] In the first place, as regards the wording of the relevant provisions of Regulation No 2201/2003, it should be observed that article 1 of that Regulation, which defines its scope, specifies the civil matters to which that Regulation applies and those to which it does not apply, without making reference to any limitation of the territorial scope of that Regulation.

[32] As regards article 8(1) of Regulation No 2201/2003 itself, that provision states that the courts of a member state are to have jurisdiction in matters of parental responsibility with reference to a child who is habitually resident in that member state at the time when the matter is brought before the court concerned. Thus, nothing in that provision indicates that the application of the general rule of jurisdiction in matters of parental responsibility, which it establishes, is conditional on there being a legal relationship involving a number of member states.

[33] As Advocate General Saugmandsgaard Øe observes in points 23 and 25 of his opinion, it follows that, unlike certain provisions of Regulation No 2201/2003 concerning jurisdiction such as articles 9, 10 and 15, the terms of which necessarily imply that their application is dependent on a potential conflict of jurisdiction between courts in a number of member states, it does not follow from the wording of article 8(1) of that Regulation that that provision is limited to disputes relating to such conflicts.

[34] In that regard, article 8(1) of Regulation No 2201/2003 also differs from the rules governing recognition and enforcement laid down in that Regulation.

[35] In particular, the court has already held that it clearly had no jurisdiction to answer questions referred for a preliminary ruling concerning the recognition of a decree of divorce issued in a third state and observed, inter alia, that, in accordance with article 2(4) and article 21(1) of Regulation No 2201/2003, that Regulation is restricted to recognition of decisions delivered by a court of a member state: *Sahyouni v Mamisch* (Case C-281/15) [2016] IL Pr 35, paras 21, 22 and 33.

[36] In contrast with the rules governing the recognition and enforcement of judicial decisions laid down in Regulation No 2201/2003, that Regulation, as is apparent, in particular, from paras 32 and 33 above, contains no provision which expressly limits the territorial scope of all the rules relating to jurisdiction laid down in that Regulation.

[37] In the second place, as regards the objective of Regulation No 2201/2003, it is clear from recital (1) that that Regulation is intended to contribute to the objective that the European Union is to create an area of freedom, security and justice in which the free movement of persons is ensured. To that end, the European Union is to adopt, inter alia, measures in the field of judicial co-operation in civil matters that are necessary for the proper functioning of the internal market.

[38] By virtue of article 61(c)EC, which is one of the legal foundations of Regulation No 2201/2003, and of article 65EC,

now articles 67(3) FEU and 81 FEU of the FEU Treaty respectively, the European Union must adopt measures in the field of judicial co-operation in civil matters having cross-border implications and in so far as is necessary for the proper functioning of the internal market.

[39] Contrary to what the United Kingdom submits, in essence, such considerations do not have the consequence that the jurisdiction rule in article 8(1) of Regulation No 2201/2003 must be regarded as applying only to disputes involving relations between the courts of member states.

[40] In particular, the uniform rules of jurisdiction contained in Regulation (No) 2201/2003 are not intended to apply only to situations in which there is a real and sufficient link with the working of the internal market, by definition involving a number of member states. In itself, the unification of the rules of jurisdiction introduced by that Regulation certainly has the objective of eliminating obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject: see, by analogy, in relation to the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L299, p 32), as amended by successive Conventions on the accession of new member states to that Convention, *Owusu v Jackson* (Case C-281/02) [2005] QB 801; [2005] ECR I-1383, para 34.

[41] In the light of the foregoing, it must be stated that the general jurisdiction rule provided for in article 8(1) of Regulation No 2201/2003 may apply to disputes involving relations between the courts of a single member state and those of a third country, and not only relations between courts of a number of member states.

[42] Therefore, the court has jurisdiction to reply to the questions raised by the national court.”

Mr Gupta relied on what is said, at [33], about the application of articles 9, 10 and 15. But all that is being said is that those articles, by their very terms, depend on another Member State being involved. Those articles are, of course, still part of the provisions in BIIa dealing with jurisdiction even when, as referred to above, they might not be actively engaged in the particular proceedings.

75. The issue in *SS v MCP* was whether article 10 of BIIa meant that an EU Member State retained jurisdiction when a child had become habitually resident in a third State (not an EU Member State) following his or her abduction to that State. The CJEU’s ruling was as follows:

“Article 10 ... is not applicable to a situation where a finding is made that a child has, at the time when an application relating to



parental responsibility is brought, acquired his or her habitual residence in a third State following abduction to that State. In that situation, the jurisdiction of the court seised will have to be determined in accordance with the applicable international conventions, or, in the absence of any such international convention, in accordance with Article 14 of that regulation.”

This decision was based significantly on the wording of article 10, at [38]-[42], which makes no reference to a third State but only to “another Member State”, and on its context, at [43]-48], which is that article 10 is a “special ground of jurisdiction”. It is an exception to the general rule in article 8 and, at [45], is designed to ensure that the abduction does not lead to a transfer of jurisdiction and, thereby, lead to “a procedural advantage for the perpetrator of the wrongful act”. Accordingly, at [46], when the child has their habitual residence in a third State at the time when the proceedings are brought, article 10 “loses its *raison d’etre*”.

76. The third reason was that, at [50], the legislative history of BIIa showed that it was not intended “to apply to child abductions to a third State” which were “covered, inter alia, by international conventions such as the 1980 Hague Convention, which was already in force in all Member States at the time of the Proposal for a Council Regulation”. The court noted, at [53], that if article 10 was interpreted as giving the Member State where the child had previously been habitually resident “jurisdiction indefinitely”, article 7(1) (the equivalent in the 1996 Hague Convention of article 10 of BIIa) and article 52(3) of the 1996 Hague Convention “would be deprived of any effect”. This would have the following consequence:

“[56] The consequence would be that the Member States, which have all ratified or acceded to the 1996 Hague Convention, would find themselves compelled to act, pursuant to EU law, in a way that was incompatible with their international obligations.

[57] It is apparent from the foregoing that the specific body of rules which the EU legislature intended to establish by means of the adoption of Regulation No 2201/2003 concerns child abductions from one Member State to another. It follows that the relevant ground of jurisdiction, namely the ground deriving from Article 10 of Regulation No 2201/2003, cannot be interpreted in such a way as to apply to child abduction to a third State”.

77. This decision was relied on heavily by Mr Gupta. I do not consider that it helps his case. There are a number of reasons for this. In particular, article 10 deals with abduction which, as explained by the CJEU, was “covered” by the 1980 Hague Abduction Convention which “was already in force in all Member States”. This is very different from the situation in respect of the 1996 Hague Convention, as explained above. Now that all Member States have ratified or acceded to the 1996 Hague Convention, the recast BIIa is formulated so as to reflect this in the new provision dealing with the relationship between the Convention and the Regulation.
78. The final decision to which I propose to refer is that of the French Cour de Cassation (Civil Chamber), judgment No 557 of 30 September 2020. The case concerned the

consequences for the French court's jurisdiction of children becoming habitually resident in Switzerland after proceedings had been commenced in France. The report is very short. The basis of the decision that the French court no longer had jurisdiction appears, in part, to have been that article 8 only applied in relations between Member States. If this was the basis of the decision, then it would not be consistent with the CJEU's decision in *UD v XB*.

#### Determination

79. I can state my conclusions shortly because, in my view, the outcome is clear.
80. I start by observing that, as referred to above, article 61(a) provides, without qualification, that BIIa "shall apply" if the child the subject of the proceedings has his or her habitual residence in a Member State. This is a straightforward provision which, in its own terms, is clear and simple to apply.
81. I do not, therefore, agree with the judge when he said, at [21], that article 61 must "pre-suppose that the Regulation applies to the situation in question". Adapting the wording from *UD v XB*, at [32], "nothing in (article 61) indicates that (its) application ... is conditional on there being a legal relationship involving a number of member states". All article 61 requires, as is supported by the material referred to above, including the *EU Practice Guide*, is that the child the subject of the proceedings is habitually resident in a Member State. If the child is, then the Regulation *shall* apply. This means, subject only to the issue of habitual residence, the courts of England and Wales would have jurisdiction under article 8 because, as established by *UD v XB*, at [41], article 8 applies "to disputes involving relations between the courts of a single member state and those of a third country, and not only relations between courts of a number of member states".
82. I also do not consider that article 61(b) supports the judge's conclusion or, indeed, is relevant. The fact that this provision does not deal with enforcement in a state not bound by BIIa is not surprising. In simple terms, it could not. This provision deals with intra-EU enforcement of an order made in a Member State even if the child is habitually resident in a third State. This does not in any way undermine or affect the meaning of article 61(a).
83. Pursuant to article 61, therefore, BIIa applies in the present case if the children were habitually resident at the commencement of the English proceedings.
84. The issue, therefore, is the meaning and effect of article 62.
85. Article 62 stipulates when the Conventions listed in articles 59, 60 and 61 will "have effect". This article is addressing the relationship between those Conventions and BIIa in general terms. They will "continue to have effect in relation to matters", not proceedings, which are "not governed by the Regulation". Parental responsibility and jurisdiction are matters which are both governed by BIIa. The fact that the *lis pendens* provisions in article 19 do not apply in the present case, because the other state is not an EU Member State, does not mean that jurisdiction including *lis pendens* is not a matter governed by BIIa.

86. Article 62 is not addressing individual proceedings but, as set out in the *Borras Report*, contains “the general rule” that BIIa “takes precedence over other international conventions to which the Member States are party in so far as they concern matters governed by both”. Accordingly, in respect of a matter, such as jurisdiction, which is governed by BIIa, the 1996 Hague Convention does not “continue to have effect”. Conversely, if a matter is not governed by BIIa, such as applicable law, then the Convention will “have effect”.
87. The judge also relied on *JKN v JCN* and *Mittal v Mittal*. In my view, these decisions do not assist with the meaning and effect of articles 61 and 62 of BIIa. They were both concerned with the effect of a provision which is materially different, namely paragraph 9 of Schedule 1 of the DMPA 1973 which deals with when the court can stay *proceedings*. The issue was whether the power to grant a stay was prohibited because the “proceedings (were) governed by” BIIa. Lewison LJ decided that they were not because, at [48], BIIa “did not preclude the judge from granting the stay”.
88. Articles 61 and 62 are formulated differently and are not addressing the same issue addressed in those cases. As referred to above, these articles depend, first, on whether the child is habitually resident in a Member State. If they are, BIIa “shall apply”. Article 62 deals with the scope of the effect of articles 59, 60 and 61 and the Conventions referred to in them. This depends on whether the matter is or is not “governed by the Regulation”. This is an overarching consideration from the perspective of the Conventions and BIIa; the answer depends on the material scope of BIIa and not on the circumstances of the individual proceedings. In my view, it is clear from BIIa itself and from the *EU Practice Guide* and the *Practical Handbook* that, as the latter states at [12.7], I repeat, “the Regulation will prevail where a child has his or her habitual residence in a Member State of the European Union” save in respect of a matter, notably, applicable law, which is not governed by BIIa.
89. In the present case, the substantive legal matter, namely parental responsibility, is governed by BIIa and the rules as to jurisdiction are also governed by BIIa. The fact that article 19 is not actively engaged because the other State is not an EU Member State does not mean that the jurisdiction, including the *lis pendens* provisions, are not governed by BIIa. Jurisdiction is governed by BIIa because it is a matter within the scope of BIIa.
90. I have not found article 52 of the 1996 Hague Convention entirely straightforward but whichever paragraphs of that article in fact apply, their effect is clear as set out in the *Practical Handbook* (as just quoted). This, again, supports the conclusion that BIIa “will prevail” save when the matter is not one included in BIIa.
91. This conclusion is also supported by what is said in the *Borras Report*, at [115], about legal certainty and mutual confidence requiring the adoption of the rule “whereby there is an obligation to give precedence to the application” of the BII Convention and by what is said in *UD v XB*, at [40], as relied on by Mr Tyler. The CJEU referred to the purpose of the uniform rules in BIIa in these terms:
- “the unification of the rules of jurisdiction introduced by that Regulation certainly has the objective of eliminating obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject”.

As Mr Tyler pointed out, the differential application of article 13 of the 1996 Hague Convention as between EU Member States would have the opposite effect.

92. In conclusion, for the reasons set out above, I consider that the appeal must be allowed and the judge's determination set aside. If the children were habitually resident in England and Wales when the English proceedings commenced, BIIa applies to them, including the jurisdiction provisions, and article 13 of the 1996 Hague Convention does not apply.
93. Given my decision on the primary argument relied on by Mr Tyler, I do not propose to deal with the other grounds.

**Lord Justice Newey:**

94. I agree.

**Lord Justice Baker:**

95. I also agree.