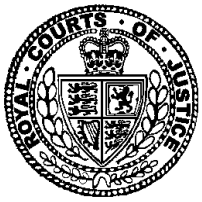

Neutral Citation Number: [2022] EWHC 1981 (Fam)

Case No: ZC21C00407

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2022

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

London Borough of Hackney	**Applicant**
- and –	
p	**First Respondent**
-and-	
N	**Second Respondent**
-and-	
H	**Third Respondent**

- -

Mr Mark Twomey QC and Mr Edward Lamb (instructed by **London Borough of Hackney**) for the **Applicant**
The Second Respondent did not appear and was not represented
Mr Henry Setright QC and Ms Anita Guha (instructed by **Dawson Cornwell**) for the **Second Respondent**
Ms Kate Hudson (instructed by **Duncan Lewis**) for the **Third Respondent**

Hearing date: 14 July 2022

- -

Approved Judgment

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

.....

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with H, a girl born on 22 September 2009 so now aged 12 years 10 months. She is represented through her Children's Guardian by Ms Kate Hudson of counsel. H's mother, L is, sadly, deceased. Her father, P, is the first respondent to the proceedings. It is believed he is living in France but a report from the relevant French local authority reports that he cannot be found. He is not represented and does not appear before the court. H's paternal grandmother, N, is the second respondent to the proceedings and lives in Tunisia. She is represented by Mr Henry Setright of Queen's Counsel and Ms Anita Guha of counsel.

2. There are two applications before the court in respect of H. The first in time is an application for a care order under Part IV of the Children Act 1989, issued on 18 August 2021. That application is made by the London Borough of Hackney, represented by Mr Mark Twomey of Queen's Counsel and Mr Edward Lamb of counsel. The second application is an application for an order for summary return under the inherent jurisdiction of the High Court made by the paternal grandmother.

3. The positions of the parties with respect of the competing applications before the court in this case have given rise to the following preliminary issues as to jurisdiction and procedure which require determination by the court at this hearing. Those issues were set out in the case management order of this court dated 28 June 2022. During the course of argument, the preliminary issues to be determined by the court have further crystalised into the following questions:

    i) Does the jurisdictional scheme under Chapter II of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility apply to care proceedings under Part IV of the Children Act 1989 and, if so, does it apply to these proceedings notwithstanding this case involves a non-Convention State?

    ii) If the jurisdictional provisions of Chapter II of the 1996 Hague Convention do not apply to these proceedings under Part IV of the Children Act 1989 involving a non-Convention State, does jurisdiction arising out of the presence of the child in the jurisdiction subsist for the purposes of care proceedings pursuant to Part IV of the Children Act 1989?

    iii) If the question of habitual residence falls to be determined in this case, whether under the jurisdictional provisions of Chapter II of the 1996 Hague Convention or otherwise, what is the relevant date for that determination?

4. In addition to these preliminary issues and depending on the decision of the court in respect thereof, the court may also be required in due course to determine as a question of fact H's habitual residence and such arguments as may be raised concerning *forum non conveniens*.

BACKGROUND

5. H's background history falls to be collated from a variety of sources. Much of the information set out below comes from correspondence from the French Central Authority to the English Central Authority, rather than from original documentation obtained from France or from Tunisia.

6. H was born in France on 22 September 2009. At points in the papers, it is asserted that H has French citizenship. It is also said that she has Tunisian citizenship. Her primary language is French, although her English is rapidly improving. H reports having lived with both parents in France until she was four years old, when her father was sent to prison. Thereafter H reports a long period of being homeless with her mother, before being in hospital for some time for reasons she cannot remember. A report dated 31 May 2018 from French social services relates that on 3 July 2015 H was found in the road suffering from hypothermia in the company of her mother, who was inebriated. Following this incident, H was placed in a children's home on 7 July 2015 and on 20 July 2015 the French court made a care order in respect of H for a period of 6 months. That order was renewed on 28 January 2016 for a period of one year. The care order was discharged on 11 January 2017 and H was returned to the care of her mother.

7. Sadly, on 22 March 2017 H's mother died suddenly. H was placed in foster care as an emergency measure and in the absence of any other family in France being in a position to care for her, the father remaining in prison. Following the mother's death, the paternal grandmother travelled to France and requested the care of H. The French court confirmed H's placement in foster care by way of a care order dated 3 April 2017 pending assessment of the paternal grandmother in Tunisia (and of a paternal uncle in Switzerland).

8. The assessment in Tunisia directed by the French court is not before this court. However, correspondence between the local authority and the Tunisian Embassy relates that the Tunisian assessment undertaken at the direction of the French Court noted the impact on H of her father's unstable situation but concluded that the paternal grandmother could offer a safe environment for H and conditions for the continuation of her education. Within this context, on 23 August 2017 the Aix-En-Provence Court of Appeal Juvenile Court granted an interim order conferring visitation and accommodation rights on the paternal grandmother until 31 August 2017. H departed for Tunisia with the paternal grandmother on 25 August 2017. On 31 August, the French court made an order placing H in the care of the paternal grandmother in Tunisia until 30 June 2018, with ongoing support from French Children's Services. The order granted the father supervised rights of access.

9. H received psychological support once in Tunisia in collaboration with the Department of Childhood Protection and the Juvenile Court in Tunisia. A report from French social services dated 31 May 2018 relates that the psychologist visited H to undertake work with her and that H made positive progress. The paternal grandmother was described as possessing good parenting skills. The father was reported as having returned to Tunisia and as having a good relationship with H. Within this context, the French proceedings were discontinued on 12 June 2018 upon the French court being satisfied that H should continue to live with the paternal grandmother in the Republic of Tunisia with the support of the extended family and Tunisian Children's Services. In late 2021,

the French court in Aix-En-Provence confirmed that there are no ongoing proceedings in France.

10. A little over three years after the conclusion of the French proceedings, H arrived in England on 19 June 2021 by way of a flight from Tunisia to London to stay with her paternal uncle. On 4 July 2021 H's paternal uncle contacted the police and informed them that H had been sent to England to "ruin his life" as the result of a family dispute. There were concerns that the paternal uncle was expressing paranoid thoughts and, when spoken to, H reported that she had been hit in the face by the paternal uncle when he had become angry discussing a family land dispute in Tunisia. The paternal uncle denied that allegation. As a result, H was taken into police protection on 4 July 2021 and placed in foster care.

11. Following H's removal, a single agency s.47 investigation was commenced during which the paternal uncle alleged that he had brought H to England because Tunisia was not safe for H and that the paternal grandmother was "sadistic". In his statement to this court, the paternal uncle asserts that H's stay in England was in order to ensure H could get away from risky individuals in Tunisia and the abuse she was being subjected to in that jurisdiction at the hands of the paternal grandmother and others. In his statement, the paternal uncle alleges that the paternal grandmother physically abused H and permitted her to be sexually abused by others. During the s.47 investigation, the paternal uncle further alleged that the paternal grandmother did not care for H but simply used her European appearance to gain social status in Tunisia, placing H at risk in that jurisdiction by dressing her in what he considered to be immodest European clothing. The paternal grandmother has denied each of these allegations. H herself has latterly reported to her foster carers that there were good and bad times with her paternal grandmother and that her paternal grandmother hit her and swore at her (referring to her as the "daughter of a prostitute"). H has also alleged that the paternal grandmother was too elderly to wash her clothes and to shop.

12. The paternal uncle further alleged during the s.47 investigation that the father was involved in people trafficking in Tunisia and that the paternal uncle had had to pay protection money to criminals to safeguard H and the paternal grandmother from the consequences of the father's criminal activity. In his statement to the court, the paternal uncle alleges that the father traffics people by boat from Tunisia to Italy in return for considerable sums of money. Within this context, he alleges that persons whom the father had agreed to traffic to Europe attended the family home in Tunisia and made threats to the family, including threats to kill. In telephone conversations with the social worker, the father has admitted being jailed for four years but asserted that this was for the offence of drug trafficking. H herself has latterly stated to her foster carers that the family were threatened in Tunisia by reason of the father's involvement in human trafficking, including threats that the family would be killed.

13. Following the s.47 investigation, H was returned to the care of her paternal uncle on 7 July 2021. However, on 13 July 2021 the paternal uncle took H to the French Embassy in London and reported that H "bullies" him. In his statement the paternal uncle further asserts that H repeatedly stated a wish to travel to France to be with her father. On that date H was returned to foster care.

14. H was moved to her current foster placement with a French-speaking Algerian family on 3 August 2021, where she remains. Since arriving in that placement, and as I have

already noted, H has made a number of allegations against her paternal grandmother, her father and her paternal uncle. H has also intimated to her foster carers that she was sexually abused whilst in foster care in France. The local authority alleges that when she arrived in her current placement, H did not appear to know how to manage her personal care. There have also been issues of H posing as an older child on online forums where naked pictures have been shown. H has been noted by her foster carers to display a lack of understanding of socialisation and boundaries.

15. Care proceedings under Part IV of the Children Act 1989 were commenced in respect of H on 18 August 2021. The local authority correctly identified on the application form that there may be an issue as to jurisdiction, specifically citing the relevant provisions of the 1996 Hague Convention. On 7 September 2021 H was made the subject of an interim care order. There is nothing on the face of the order to suggest that the position of the paternal grandmother had been considered. At that hearing, the local authority submitted that the question of jurisdiction needed to be adjudicated on as soon as possible. Within this context, the matter was listed for a hearing on 20 December 2021. In the order of 7 September 2021, the hearing was expressed to be a hearing to consider what was referred to as "a declaration of habitual residence".

16. Following the listing of the matter to determine the question of habitual residence on 20 December 2021, the case was beset by a number of delays. On 20 December the paternal grandmother, who was unrepresented, did not have the benefit of an interpreter and had not been served with translated copies of the papers by the local authority as directed. She was given party status in the proceedings, it would appear of the court's own motion. Whilst the order of 20 December 2021 required the local authority to serve the papers on the paternal grandmother and provide her with assistance to locate legal representation, it would not appear that the paternal grandmother's current solicitors were contacted by the local authority until 23 February 2022. The paternal grandmother was not served with the papers until they were provided to her solicitors on 3 March 2022, albeit the papers had still not been translated. The matter was then adjourned until 9 March 2022 for a hearing before a Deputy High Court Judge to determine the question of habitual residence. Ms Hudson on behalf of H informed this court that the *three month* delay that resulted was due to a lack of space in the court list. Regrettably, the hearing listed on 9 March 2022 was then further vacated due delays in securing Legal Aid for the paternal grandmother and adjourned to 17 May 2022. At that hearing, further submissions were made regarding the nature of the jurisdictional issues raised by this case and the matter was listed before Keehan J to determine whether the case should be re-allocated to a judge of the Family Division. As a result, the matter came before me for directions on 28 June 2022 and I listed the matter for this hearing to deal with the preliminary issues set out above.

17. The Tunisian Embassy has been notified of these proceedings and correspondence has taken place between the local authority and the Tunisian Embassy. There is a suggestion from that correspondence that proceedings in respect of H have been issued in Tunisia, although this remains to be confirmed. Within this context, the court has in the bundle a report from the Child Protection Officer in Bizerte, Tunisia dated 25 May 2022 which recommends that H be returned to the care of the paternal grandmother in Tunisia.

18. Within the foregoing context, the local authority seeks a care order in respect of H. The local authority submits that this court has jurisdiction to grant a care order in respect of

H under Part IV of the Children Act 1989 based on H's presence in the jurisdiction, in circumstance where it submits that the 1996 Hague Convention does not apply in proceedings under Part IV of the Children Act 1989 involving a non-Contracting State, in this case the Republic of Tunisia, and thus that the connecting factor of habitual residence does not arise for determination in this case. The local authority submits that such a position allows the court to "move swiftly to determine jurisdiction based on the settled common law rule concerning care proceedings, namely that presence suffices".

19. The paternal grandmother resists the application for a care order and seeks the summary return of H to the jurisdiction of Tunisia. The paternal grandmother submits that the 1996 Hague Convention does apply in proceedings under Part IV of the Children Act 1989 that involve a non-contracting State. The paternal grandmother further contends that the proper application of the jurisdictional provisions of the 1996 Convention to the facts of this case, which the paternal grandmother contends requires habitual residence to be determined for the purposes of the 1996 Convention at the date proceedings commence, demonstrates that the court does not have jurisdiction to grant a care order in respect of H, who the paternal grandmother asserts was habitually resident in Tunisia on that date. Alternatively, the paternal grandmother submits that Tunisia is plainly the more natural and appropriate forum to undertake a welfare enquiry. Within this context, the paternal grandmother submits that mere presence in the jurisdiction should, in light of developments in thinking regarding children cases involving an international element, now be insufficient to establish jurisdiction to make a care order under Part IV of the Children Act 1989. In the circumstances, the paternal grandmother submits that the court should instead make an order under its inherent jurisdiction for the summary return of H to the jurisdiction of Tunisia.

20. Having considered the competing legal submissions made by the local authority and the paternal grandmother, the Children's Guardian contends that the court has jurisdiction under Part IV of the Children Act 1989 in this case by virtue of the provisions of the 1996 Hague Convention and should make a care order in respect of H. Ms Hudson, on behalf of H, also rightly reminds the court that, interesting as the legal issues required to be determined in this case are, at the heart of this case is H. Within this context, H has expressed clearly to her Children's Guardian and to her social worker that she wishes to remain in the United Kingdom. She has maintained that she does not wish to speak to the paternal grandmother and the local authority has not, despite considerable efforts, been able to persuade H to have indirect contact with the paternal grandmother. H's expressed concern with respect to indirect contact is that the paternal grandmother always seeks to direct the conversation to the question of H returning to Tunisia, which H states she does not want. H has also stated that she misses her father and is worried for his welfare. During the last telephone conversation between the father and the social worker on 27 October 2021 the father stated that he wished H to be cared for in Tunisia by the paternal grandmother.

21. As I have noted, and to reiterate, on the facts of this case the respective positions adopted by the parties in this case on the substantive applications before the court have given rise to the following preliminary issues which require determination before the court goes on, if appropriate, to determine the substantive applications before the court:

    i) Does the jurisdictional scheme under Chapter II of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility apply to care proceedings under Part IV

of the Children Act 1989 and, if so, does it apply to these proceedings notwithstanding this case involves a non-Convention State?

ii) If the jurisdictional provisions of Chapter II of the 1996 Hague Convention do not apply to these proceedings under Part IV of the Children Act 1989 involving a non-Convention State, does jurisdiction arising out of the presence of the child in the jurisdiction subsist for the purposes of care proceedings pursuant to Part IV of the Children Act 1989?

iii) If the question of habitual residence falls to be determined in this case, whether under the jurisdictional provisions of Chapter II of the 1996 Hague Convention or otherwise, what is the relevant date for that determination?

THE LAW

Domestic Jurisdictional Framework

22. Following the departure of the United Kingdom from the European Union, jurisdiction in cases concerning children is now governed by two pieces of legislation. First, the Family Law Act 1986. As noted in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* [2014] AC 1, the principal purpose of the Family Law Act 1986 is to provide a uniform scheme for jurisdiction, recognition and enforcement of custody and related orders as between the three different jurisdictions of the United Kingdom, albeit that the jurisdictional rules created by the Family Law Act 1986 also apply as between the jurisdictions of the United Kingdom and other countries.

23. The second piece of applicable legislation is the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (hereafter, 'the 1996 Hague Convention'). The 1996 Hague Convention is incorporated into domestic law by the Private International Law (Implementation of Agreements) Act 2020. Within this context, the 1996 Hague Convention is, following the departure of the United Kingdom from the European Union, now directly implemented in domestic law by amendments made to the Civil Jurisdiction and Judges Act 1982 by s.1 of the Private International Law (Implementation Agreements) Act 2020. Section 3C of the Civil Jurisdiction and Judgments Act 1982 as amended now provides as follows:

> "**3C The 1996 Hague Convention to have the force of law**
>
> (1) The 1996 Hague Convention shall have the force of law in the United Kingdom.
>
> (2) For the purposes of this Act the 1996 Hague Convention is to be read together with the following declarations made by the United Kingdom on 27th July 2012—
>
> (a) the declaration under Article 29 of the Convention, concerning applicable territorial units;

(b) the declaration under Article 34 of the Convention, concerning communication of requests under paragraph 1 of that Article;

(c) the declaration under Article 54 of the Convention, concerning the use of French.

(3) For convenience of reference there are set out in Schedules 3D and 3E respectively—

(a) the English text of the 1996 Hague Convention;

(b) the declarations referred to in subsection (2)."

24. The Explanatory Report on the 1996 Hague Convention by Paul Lagarde states as follows in respect of the jurisdictional objectives of the 1996 Hague Convention, as articulated in Art 1(a), to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child:

> "[10] The Convention determines the State whose authorities have jurisdiction, but not the competent authorities themselves, who may be judicial or administrative and may sit at one place or another in the territory of the said State. In terms of conflicts of jurisdiction, it could be said that the Convention sets international jurisdiction, but not internal jurisdiction."

The Family Law Act 1986

25. The Family Law Act 1986 has been described as a "complex, much amended and thoroughly unsatisfactory statute" (see *Re G (Adoption: Ordinary Residence)* [2003] 2 FLR 944 at 951). Certainly, having to consider the terms of the 1986 Act is apt to bring to mind the saying, first attributed in one of its early versions to Sophocles, that "whom the gods would destroy they first make mad". It is however, well established that the scope of the Family Law Act 1986 excludes jurisdiction to make public law orders under Part IV of the Children Act 1989. Whilst Part IV of the 1989 Act empowers the court, by way of s.31 of the 1989 Act, to make a care or supervision order, the Children Act 1989 does not itself contain provisions that identify over which children the court has jurisdiction to make such orders.

26. Within this context, the domestic jurisdictional foundation for public law orders under Part IV of the Children Act 1989 is dealt with in a line of first instance authority commencing with *Re R (Care Proceedings: Jurisdiction)* [1995] 1 FLR 711. In *Re R (Care Proceedings: Jurisdiction)*, a case involving the jurisdiction of England and Wales and the jurisdiction of Jamaica, Singer J held that there was strong policy reasons why the group of children in respect of whom public law orders can be made under Part IV of the Children Act 1989 should be no less extensive than the group of children in respect of whom private law orders can be made under Part II of the 1989 Act. Relying on these strong policy reasons, Singer J held in *Re R (Care Proceedings: Jurisdiction)* that the court was entitled to apply the statutory intent not expressed in the words of the Act and to hold that the jurisdictional basis for public law orders under Part IV of the Children Act 1989 is effectively the same as the jurisdictional basis for private law orders under Part II of the 1989 Act, observing at 714 that:

> "I therefore take the view that the jurisdictional basis for an application under Part IV is effectively the same as that in relation to section 8 orders established by the Family Law Act 1986. I hold that for the court to have jurisdiction . . . the child . . . should be either habitually resident in England and Wales, which I take to mean the same as 'ordinarily resident in England and Wales' or that that child should be present in England and Wales at the relevant time, which it seems to me is the time when the application to the court is made."

27. The judgment of Singer J in *Re R (Care Proceedings: Jurisdiction)* was considered by Hale J (as she then was) in *Re M (A Minor)(Care Order: Jurisdiction)* [1997] Fam 67 in a case involving the jurisdiction of England and Wales and the jurisdiction of Scotland. In *Re M (A Minor)(Care Order: Jurisdiction)* Hale J dealt with the rationale for the exclusion of public law proceedings from the jurisdictional regime created by the Family Law Act 1986:

> "The exclusion of public law proceedings was clearly intended. Part I of the Act of 1986 stems directly from a joint report of the English and Scottish Law Commissions, Custody of Children-Jurisdiction and Enforcement within the United Kingdom (1985) (Law Com. No. 138, Scot. Law Com. No. 91) (Cmnd. 9419). Paragraph 1.28 of the Report explains that public law orders are excluded for the reasons given in paragraphs 3.4 to 3.6; the main reasons given in paragraph 3.5 are that orders conferring responsibilities upon public authorities are "different in kind" from custody proceedings; and that "the structure of existing child care law, including the jurisdictional rules and enforcement machinery, differs substantially from the structure of the law applying in custody proceedings, and could not be easily assimilated even if that course were to prove on further examination to be desirable." It is worth bearing in mind that there was not the same need to introduce a scheme for reciprocal enforcement in care cases as machinery already existed, and still exists, for the recovery of children in care (or its equivalent) who are taken from one part of the United Kingdom to another: see, for example, section 50(13) of the Act of 1989. Lastly, the whole object of the Act of 1986 scheme, as explained in paragraph 1.9 of the Report, is to provide for the different systems of law in the United Kingdom "to accept common rules of custody jurisdiction and mutually to recognise and enforce custody orders made in accordance with those rules." As reciprocity of recognition and enforcement was the main objective, it would be nonsense if public law orders were covered in one country but not in another."

28. Within this context, in rejecting the submission that by holding that jurisdiction in care cases was effectively the same as that in private law cases Singer J must have intended also to include within that the exclusionary rule in section 3(1) of the Act of 1986 relating to children who, although present here, are habitually resident elsewhere in the United Kingdom, Hale J held in *Re M (A Minor)(Care Order: Jurisdiction)* that:

> "I certainly do not read his judgment in that way. The *ratio decidendi* of the case is undoubtedly far more limited: that there is jurisdiction in public law cases in respect of children who are present here even if they are or may be habitually resident outside the United Kingdom. All his other observations are, strictly, *obiter dicta*, even including the holding that there is an

> alternative basis of jurisdiction over children who are habitually resident here. But the whole tenor of his reasoning is in favour of there being as wide a jurisdiction as possible to protect children from harm, a jurisdiction at least as extensive as that in private law cases. He did not address himself to the implications which would flow from importing the whole of the Family Law Act scheme into public law cases, for the very good reason that it did not arise in his case."

And:

> "I conclude, therefore, that there is nothing in either the Act of 1986 or the Act of 1989 to cast doubt on the proposition that the courts in England and Wales have jurisdiction to make orders under Part IV of the Act of 1989 in relation to children who are present here, irrespective of whether or not they are habitually resident either abroad or in another part of the United Kingdom."

29. The issue arose again in *Lewisham London BC v D (Criteria for Territorial Jurisdiction in Public Law Proceedings)* [2008] 2 FLR 1449, a case concerning the jurisdiction of England and Wales and the jurisdiction of the Republic of Gambia. Unlike the cases of *Re M (A Minor)(Care Order: Jurisdiction)* and *Re M (A Minor)(Care Order: Jurisdiction)*, the subject child was outside the jurisdiction at the time the matter came before the court. In *Lewisham London BC v D (Criteria for Territorial Jurisdiction in Public Law Proceedings)* Bodey J identified the same problem of there being "no statutory provision which lays down any test as to whether or not the court has jurisdiction to entertain care proceedings in respect of a given child", in contradistinction to private law proceedings.

30. In *Lewisham London BC v D (Criteria for Territorial Jurisdiction in Public Law Proceedings)* Bodey J noted that the reasoning of Singer J in *Re M (A Minor)(Care Order: Jurisdiction)* was adopted by Dame Butler-Sloss P in *Re B (Care Proceedings: Diplomatic Immunity)* [2003] Fam 16 and, having also referred to the decision of the House of Lords in *Re S (Custody: Habitual Residence)* [1998] AC 750 in which it was held that the English wardship jurisdiction over a foreign child is grounded by habitual residence, concluded as follows as regards the jurisdiction of the court to make care or supervision orders under Part IV of the Children Act 1989:

> "[21] Notwithstanding the difficulty of finding fault with the logic of Mr Speller's argument, Mr Barratt's example seems persuasive. I cannot readily think that Parliament, without saying so expressly, would have intended there to be a jurisdiction so all-embracing as to enable this court to exercise control through care proceedings over children who are both present and habitually resident in other countries. Such a 'global' jurisdiction would be a recipe for confrontation with other jurisdictions and would no doubt be found invasive the other way about. Absent some exceptional circumstance therefore (for example I suppose, in Mr Barrett's hypothetical case, if it were known that the foreign parents were planning to bring the children back into this jurisdiction for a holiday) I would decline the invitation to find that, by interpretation of s 31(1) and s 31(8) of the Act, the court has a general unrestricted worldwide public law jurisdiction over children in need; as I think there has to be some territorial limitation. Alternatively, I would

> support a self denying ordinance, whereby the court here would not in practice assert such jurisdiction in the complete absence of any ongoing connection with the child concerned.
>
> [22] That said, I am persuaded by the other arguments which Mr Speller has deployed. There are good reasons why habitual residence should be the test (as an alternative to presence) for assuming 'territorial jurisdiction' in care proceedings. These include:
>
> > (a) the overlapping nature of some of the provisions of the Children Act as between private and public law, as mentioned above;
> >
> > (b) the need to try to provide protection for children whose 'home' (habitual residence) remains in this country, even though they may not have been physically present here at the time of the issue of process; and
> >
> > (c) the logic of aligning the 'territorial jurisdictional' requirements in public law proceedings with those in wardship proceedings, where the safety and welfare of children is likewise the court's underlying objective.
>
> So, contrary to Mr Barratt's argument that Parliament would have put into the Act a 'habitual residence test' for public law proceedings if it had intended to, I prefer the argument that (the Act being silent) the court is free to adopt such 'territorial' test for jurisdiction as seems most appropriate. That, for the reasons stated, should in my judgment, be the test of the child's presence or else habitual residence."

31. Within the context of the issues raised in this case, it is important to note that subsequent authorities made clear that, under the previous dual legislative regime in respect of jurisdiction over children (comprising the Family Law Act 1986 and Council (EC) Regulation 2201/2003 (hereafter, Brussels IIa)), the common law position set out in the foregoing authorities with respect to the jurisdiction to make orders under Part IV of the Children Act 1989 was subject to the application of the jurisdictional scheme of Brussels IIa. On behalf of the paternal grandmother, Mr Setright and Ms Guha submit that this recognised the significant shift in international family law moving towards a common jurisdictional framework premised upon the concept of habitual residence, as then reflected within the jurisdictional provisions of Brussels IIa, and now reflected in the jurisdictional provisions of 1996 Hague Convention.

32. The relevant line of authority begins with *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* [2014] AC 1 in which the Supreme Court made clear, in the context of applications for an order made under the inherent jurisdiction of the High Court for the return of a child to this jurisdiction and an order making the child a ward of court, that the legislative scheme provided by Brussels IIa was the "first port of call" with respect to the question of the court's jurisdiction to make those orders:

> "[20] Thus, if the order in question is a Part I order, the first port of call is the Regulation. But if it is not a Part I order, and is an order relating to parental

> responsibility within the meaning of the Regulation, the first port of call is also the Regulation, because it is directly applicable in United Kingdom law. That, however, raises the prior question of whether the jurisdictional scheme in the Regulation applies not only in cases potentially involving two or more European Union members who are parties to the Regulation (all save Denmark) but also in cases potentially involving third countries such as Pakistan."

33. In *Re KL (A Child)(Abduction: Habitual Residence: Inherent Jurisdiction)* [2014] 1 ALL ER 999 Baroness Hale reiterated the principles set out in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* as follows:

> "[18] The Convention does not define the concept of habitual residence and it is clear that not all the states parties would apply an identical test. However, member states of the European Union (apart from Denmark) are also parties to Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (OJ 2003 L338 p 1), commonly known as the Brussels II Revised Regulation (the Regulation). This lays down a uniform jurisdictional scheme as between member states. This court held in *Re A (children) (jurisdiction: return of child)* [2013] UKSC 60, [2014] 1 All ER 827, [2013] 3 WLR 761, that the provisions giving the courts of a member state jurisdiction also apply where there is an alternative jurisdiction in a non-member state such as the United States. Hence for that purpose the courts of England and Wales should apply the concept of habitual residence as explained by the Court of Justice of the European Union (CJEU) in the cases of Proceedings brought by A Case C-523/07 [2010] Fam 42, [2010] 2 WLR 527 and *Mercredi v Chaffe* Case C-497/10 PPU [2012] Fam 22, [2011] 3 WLR 1229."

34. In *Re F (a child): (care proceedings: habitual residence)* [2014] EWCA Civ 789, the Court of Appeal considered that the decisions of the Supreme Court in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* and *Re KL (A Child)(Abduction: Habitual Residence: Inherent Jurisdiction)* to be authority for the proposition that Brussels IIa applied to determine the jurisdiction of the English court in care proceedings under Part IV of the Children Act 1989, Sir James Munby P observing as follows:

> "[10] In *Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)* [2014] EWHC 6 (Fam), [2014] 2 FCR 264, [2014] 2 FLR 151 (forthcoming) I referred (para 23) to the fact that the jurisdictional reach of the courts of England and Wales in relation to care proceedings is not spelt out in any statutory provision. By reference to *Re R (Care Orders: Jurisdiction)* [1995] 3 FCR 305, [1995] 1 FLR 711, [1995] Fam Law 292; *Re M (Care Orders: Jurisdiction)* [1997] Fam 67, [1997] 1 All ER 263, [1997] 1 FLR 456 and *Lewisham London Borough Council v D (Criteria for Territorial Jurisdiction in Public Law Proceedings)* [2008] 2 FLR 1449, [2008] Fam Law 986, I said that the rule developed by the judges of the Family Division was that what normally founds jurisdiction in such a case is the child being either habitually resident or actually present in England and

> Wales at the relevant time. However, as I pointed out (para 24), this is fundamentally modified by the Regulation commonly known as Brussels II revised (BIIR). *Re E* concerned a child from Slovakia, so my remarks there were directed to cases where there is what I called a European dimension. But the point goes much further, for it is clearly established by decisions of the Supreme Court that BIIR applies to determine the jurisdiction of the English court in care proceedings, irrespective of whether the other country is a Member State of the European Union: see *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60, [2014] AC 1, para 30, and *In re L (A Child: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 75, [2014] 1 All ER 999, [2013] 3 WLR 1597, para 18. So what I said in *Re E* applies, in principle, to all care cases with a foreign dimension.
>
> [11] The consequences of this can be spelt out very shortly:
>
> i) Where BIIR applies, the courts of England and Wales do not have jurisdiction merely because the child is present within England and Wales. The basic principle, set out in art 8(1), is that jurisdiction under BIIR is dependent upon habitual residence. It is well established by both European and domestic case-law that BIIR applies to care proceedings. It follows that the courts of England and Wales do not have jurisdiction to make a care order merely because the child is present within England and Wales. The starting point in every such case where there is a foreign dimension is, therefore, an inquiry as to where the child is habitually resident.
>
> ii) In determining questions of habitual residence the courts will apply the principles explained in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60, [2014] AC 1. For present purposes the key principles (para 54) are that the test of habitual residence is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned and that, as the social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent, it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.
>
> iii) Jurisdiction under art 8(1) depends upon where the child is habitually resident "at the time the court is seised".

35. In *Re N (Children)(Adoption: Jurisdiction)* [2017] 1 All ER 527 the Supreme Court, in a case involving an application for a care order under Part IV of the Children Act 1989, and a subsequent application for a placement order under the Adoption and Children Act 2002, concerning two Hungarian national children born in England, confirmed that it was the jurisdictional regime of Brussels IIa that governed jurisdiction in respect of the care proceedings under Part IV of the Children Act 1989, Baroness Hale stating as follows:

> "[1] The issue in this case is whether the future of two little girls, one now aged four years and two months and the other now aged two years and 11

> months, should be decided by the courts of this country or by the authorities in Hungary. Both children were born in England and have lived all their lives here. But their parents are Hungarian and the children are nationals of Hungary, not the United Kingdom. Under art 8(1) of Council Regulation 2201/2003/EC (concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility) (OJ 2003 L338 p 1), known as the Brussels II revised Regulation ('the Regulation'), the primary rule is that jurisdiction lies with the courts of the member state where the child is habitually resident. That would be England in this case. However, an exception is made by art 15, under which those courts can transfer the case to a court in another member state with which the child has a particular connection, if that court would be 'better placed' to hear the case, or part of it, and the transfer is in the best interests of the child. These children have a particular connection with Hungary, as it is the place of their nationality. The issue, therefore, is the proper approach to deciding whether a Hungarian court would be better placed to hear the case and to whether transferring it would be in the best interests of the children."

36. Within the foregoing context, it is clear that the common law position with respect to the jurisdiction of the English and Welsh courts to make orders under Part IV of the Children Act 1989, articulated in the line of authority commencing with *Re R (Care Proceedings: Jurisdiction)* in the absence of that jurisdiction being provided for by the Family Law Act 1986, was subject to the jurisdictional regime provided by Brussels IIa. Within this context, and in the context of the issues raised by this case, I pause to note that prior to the coming into force of the 1996 Hague Convention, the authors of Dicey on *The Conflict of Laws*, 15th Edn. (2012) suggested at [19-053] that, as with Brussels IIa, the foregoing position would also be subject to the rules of jurisdiction contained in the 1996 Hague Convention, as now implemented in domestic law by the Private Law (Implementation Agreements) Act 2020:

> "[19-053] Jurisdiction under Pts IV and V of the Children Act 1989, which is not covered by the Rule, exists whenever the child concerned is present in England, whether or not it is habitually resident in another part of the United Kingdom or elsewhere. However, this authority is subject to the application of Arts 8 to 13 of the Brussels IIa Regulation which extends to certain public law matters. And, upon entry into force, to the jurisdiction rules of the 1996 Hague Convention on the Protection of Children."

The 1996 Hague Convention

37. As I have noted, the 1996 Hague Convention is incorporated into domestic law by s.1 of the Private International Law (Implementation Agreements) Act 2020, amending the Civil Jurisdiction and Judges Act 1982. With respect to the scope of the Convention, its full title is 'Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children' Chapter I of the Convention is entitled 'Scope of Convention' Within Chapter I, Art 1 sets out the objects of the Convention, Art 2 defines the children to whom the Convention applies, Art 3 defines the matters that the protective measures under the Convention may deal with and Art 4 defines the matters the Convention does not apply to. Art 1 of the 1996 Convention provides as follows:

> "**Article 1**
>
> (1) The objects of the present Convention are -
>
> a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
>
> b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
>
> c) to determine the law applicable to parental responsibility;
>
> d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
>
> e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.
>
> (2) For the purposes of this Convention, the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child."

38. Art 2 of the 1996 Convention provides that the Convention applies to all children from the moment of their birth until they reach the age of 18 years. In this context, the Explanatory Report notes as follows with respect to the import of Art 2:

> "17 Unlike the 1961 Convention which by its Article 13 is declared applicable to all minors having their habitual residence in one of the Contracting States, the new Convention does not include a disposition limiting geographically the children to whom it will apply. After long discussions, it became evident that the geographical scope of the Convention varied with each of its provisions. When a rule of the Convention gives jurisdiction to the authority of the habitual residence of a child it applies to all the children having their habitual residence in a Contracting State. When a rule of the Convention gives jurisdiction to the authorities of the residence of a child, it applies to all the children having their residence in a Contracting State. When a rule of the Convention sets out a rule of conflict of laws as concerns parental responsibility, it sets out a universal conflicts rule, as in all of the recent Hague Conventions dealing with conflicts of laws applicable to children, whatever might be their nationality and wherever might be their residence."

39. As I have noted, Art 3 of the Convention defines the matters that the protective measures under the Convention may deal with, providing as follows in this respect:

> "**Article 3**
>
> The measures referred to in Article 1 may deal in particular with -

> a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
>
> b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
>
> c) guardianship, curatorship and analogous institutions;
>
> d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
>
> e) the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution;
>
> f) the supervision by a public authority of the care of a child by any person having charge of the child;
>
> g) the administration, conservation or disposal of the child's property."

40. In the foregoing context, the Explanatory Report on the Convention notes as follows in respect of measures under Art 3(a) concerning the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation:

> "[19] In specifying that the measures may bear on the attribution, exercise, termination or restriction of parental responsibility as well as its delegation, the text seems to have covered all of the situations which may affect this responsibility"

41. The Explanatory Report further states as follows with respect to the measure under Art 3(e) concerning the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution:

> "[23] The measures of placement of a child in a foster family or in institutional care are somewhat the prototypes of measures of protection and are obviously covered by the Convention, unless expressly excluded, as is placement with a view to adoption or placement following a criminal offense committed by the child (Art. 4 b and i, see below)."

42. Chapter II of the Convention deals with jurisdiction. Article 5 defines when a Contracting State will have jurisdiction by reference to the connecting factor of the habitual residence of the child. Article 6 deals with refugee and internationally displaced children and Art 7 with the wrongful removal and retention of children. Articles 8 and 9 deal with the transfer of jurisdiction. Article 10 deals with jurisdiction to take protective measures in proceedings for divorce or legal separation with respect to a child habitually resident in another contracting State. Articles 11 and 12 deal with urgent and provisional measures based on the presence of the child. With respect to Chapter II, the Explanatory Report on the 1996 Hague Convention by Paul Lagarde states as follows:

> "37 As has already been indicated above, the Convention, drawing the lessons from the difficulties of application of the 1961 Convention, is intended to centralise jurisdiction in the authorities of the State of the child's habitual residence and avoid all competition of authorities having concurrent jurisdiction (Art. 5), except for adapting the jurisdiction of the habitual residence to situations that have changed (Art. 5, paragraph 2, and Art. 7 and 14), or for the lack of habitual residence (Art. 6). The jurisdiction of authorities other than those of the State of the habitual residence would have, in principle, to have been requested or authorised by the authorities of this State, where it appears that these other authorities would be in a better position to assess the best interests of the child in a particular case (Art. 8 and 9). And if, in certain cases of urgency or of the need for provisional measures with a local effect, a local jurisdiction may be exercised autonomously, its exercise remains limited by the measures taken or to be taken by the normally competent authority (Art. 11 and 12). The only real exception to the principle of the concentration of jurisdiction is constituted by the jurisdiction of the divorce court which, under rather strict conditions, may be called upon to take measures of protection of the child (Art. 10), and this led the Commission to provide a means of solution for possible conflicts of jurisdiction (Art. 13)."

43. Article 5 of the 1996 Hague Convention provides as follows with respect to the basis of jurisdiction under the Convention:

> "**Article 5**
>
> (1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.
>
> (2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction."

44. The connecting factor establishing jurisdiction that is stipulated by Art 5 of the 1996 Convention is habitual residence. Within this context, it is a well established principle that the connecting factor should be determined by the law of the court in which the proceedings are brought, the *lex fori*. In *Chevron International Oil Co Ltd v A/S Sea Team (The TS Havprins)* [1983] 2 Lloyd's Rep 356 approved the following statement in Dicey at [1-081]:

> "A fundamental problem in the conflict of laws is whether the connecting factor should be determined by the *lex fori* or the *lex causae*. Since the determination of the *lex causae* depends on the determination of the connecting factor, it is no longer controversial among learned writers that the connecting factor should be determined by the *lex fori*. Although the reported cases are mostly concerned with domicile, it may be assumed that English law has adopted this prevailing opinion, and that, for the purpose of an English conflict rule, the connected factor will be determined by English law as the *lex fori*.".

45. Finally with respect to the jurisdictional provisions of the Convention, Arts 11 and 12 provide as follows with respect to ambit of the jurisdiction under the 1996 Convention based on the connecting factor of presence:

> "**Article 11**
>
> (1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.
>
> (2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.
>
> (3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.
>
> **Article 12**
>
> (1) Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.
>
> (2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation.
>
> (3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in the Contracting State where the measures were taken as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question."

46. As set out above, on the case advanced by the local authority the question arises in these proceedings concerning H whether the 1996 Hague Convention applies where proceedings involve a non-Contracting State, in this case the Republic of Tunisia. The following matters are relevant to the determination of that question.

47. Paragraph [42] of the Explanatory Report on the 1996 Hague Convention provides as follows with respect to the effect of Art 5(2) and a change of habitual residence (emphasis added):

> "42 Where the change of habitual residence of the child from one State to another occurs at a time when the authorities of the first habitual residence are seised of a request for a measure of protection, the question arises as to whether these authorities retain their competence to take this measure (*perpetuatio fori*) or whether the change of habitual residence deprives them ipso facto of this jurisdiction and obliges them to decline its exercise. The Commission rejected by a strong majority a proposal by the Australian, Irish, British and United States delegations favourable to the *perpetuatio fori*. Certain delegations explained their negative vote by their hostility to the very principle of *perpetuatio fori* in this field and wanted jurisdiction to change automatically in case of a change of habitual residence, while other delegations thought that it would be more simple for the Convention not to say anything on this subject thereby abandoning to the procedural law the decision on *perpetuatio fori*. The first opinion appeared to be the more exact in the case of a change of habitual residence from one Contracting State to another Contracting State. Indeed it is not acceptable that in such a situation, which is located entirely within the interior of the scope of application of the Convention, the determination of jurisdiction be left to the law of each of the Contracting States. Moreover this solution is one which currently prevails for the interpretation of the Convention of 5 October 1961. *On the other hand, in the case of a change of habitual residence from a Contracting State to a non-Contracting State, Article 5 ceases to be applicable from the time of the change of residence and nothing stands in the way of retention of jurisdiction, under the national law of procedure, by the authority of the Contracting State of the first habitual residence which has been seised of the matter, although the other Contracting States are not bound by the Convention to recognise the measures which may be taken by this authority*."

48. Within the foregoing context, the Practical Handbook on the operation of the 1996 Hague Convention observes as follows with respect to the jurisdiction of a Contracting State to take measures directed to the protection of the person or property of the child, drawing a distinction between the question of whether the Convention has entered into force in a *particular* State and whether the Convention has entered into force *as between* a particular Contracting State and another Contracting State (emphasis in the original):

> "**A In which States and from what date does the 1996 Convention apply?**
>
> **Articles 53, 57, 58, 61**
>
> 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."

49. Having set out the rules regarding whether the Convention has entered into force in a particular State, depending upon whether the State has ratified or acceded to the Convention, the Practical Handbook goes on to state as follows (emphasis in the original):

> "3.8 In terms of the application of the Convention *as between* Contracting States, this means that the Convention will apply as between Contracting States when: (1) it has entered into force in *both* Contracting States; and (2) in the case of an acceding State, provided that, if another Contracting State has the option of raising an objection to the accession, that Contracting State has not done so."

50. Having drawn the distinction between the question of whether the Convention has entered into force *in* a particular State and whether the Convention has entered into force *as between* a particular Contracting State and another Contracting State, the Practical Handbook proceeds to give a series of examples, the following extract from which is relevant in this case (emphasis added):

> "**Example 3 (c)**
>
> State E ratifies the Convention on 5 March 2007. State F accedes to the Convention on 20 March 2008. In April 2008, State E notifies the depositary of its objection to the accession of State F.
>
> The Convention enters into force in State E on 1 July 2007. The Convention enters into force in State F on 1 January 2009. However, State F's accession will not affect relations between State F and State E due to State E's objection to its accession. The Convention will not enter into force as between the two States unless and until State E withdraws its objection to State F's accession.
>
> In July 2009, an unmarried couple with two children who are habitually resident in State F, but nationals of State E, separate. There is a dispute about where the children should live, and with whom. The father brings proceedings in respect of this issue in State F. *Since the Convention has entered into force in State F, State F has jurisdiction to take measures of protection in respect of the children in accordance with Article 5 of the Convention*.
>
> The mother cross-applies to the authorities in State F for permission to relocate to State E with the children. The authorities in State F grant the mother permission to relocate and grant the father contact with the children.
>
> Following the relocation of the mother and children, the contact order is not adhered to. The father seeks to have the contact order recognised and

> enforced in State E. *Whilst the Convention has entered into force in both State E and State F, since State E objected to the accession of State F, the Convention has not entered into force as between the two States. The Convention mechanisms as regards recognition and enforcement will not therefore apply in this case*."

51. The only domestic authority dealing with the question of whether the 1996 Hague Convention applies in proceedings involving a non-Contracting State is the first instance decision of this court in *Warrington CC v T*, to which I shall come. However, both the European and domestic courts have considered that question in respect of other Conventions.

52. In *Owusu v Jackson* (Case C-281/02) [2005] QB 801, the Court of Justice of the European Union held that there was no requirement for the involvement of two contracting states to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (hereafter 'the Brussels Convention') in order for the *general* rule of jurisdiction in the Convention to be operative:

> "[23] In order to reply to the first question, it must first be determined whether article 2 of the Brussels Convention is applicable in circumstances such as those in the main proceedings, that is to say, where the claimant **and** one of the defendants are domiciled in the same contracting state **and** the case between them before the courts of that state has certain connecting factors with a non-contracting state, but not with another contracting state. Only if it is will the question arise whether, in the circumstances of the case in the main proceedings, the Brussels Convention precludes the application by a court of a contracting state of the forum non conveniens doctrine where article 2 of that Convention permits that court to claim jurisdiction because the defendant is domiciled in that state.
>
> [24] Nothing in the wording of article 2 of the Brussels Convention suggests that the application of the general rule of jurisdiction laid down by that article solely on the basis of the defendant's domicile in a contracting state is subject to the condition that there should be a legal relationship involving a number of contracting states.
>
> [25] Of course, as is clear from the Jenard report on the Convention, OJ 1979 C59, p 1, at p 8, for the jurisdiction rules of the Brussels Convention to apply at all the existence of an international element is required.
>
> [26] However, the international nature of the legal relationship at issue need not necessarily derive, for the purposes of the application of article 2, from the involvement, either because of the subject matter of the proceedings or the respective domiciles of the parties, of a number of contracting states. The involvement of a contracting state **and** a non-contracting state, for example because the claimant **and** one defendant are domiciled in the first state **and** the events at issue occurred in the second, would also make the legal relationship at issue international in nature. That situation is such as to raise questions in the contracting state, as it does in the main proceedings, relating to the determination of international jurisdiction, which is precisely

> one of the objectives of the Brussels Convention, according to the third recital in its Preamble."

53. In *In Re I (A Child)(Contact Application: Jurisdiction)* [2009] 3 WLR 1299 the Supreme Court was concerned with the question of whether Art 12 of Brussels IIa, which provided jurisdiction in respect of matters relating to parental responsibility where those matters were connected with an application for divorce, legal separation or marriage annulment in respect of which a Member State was exercising jurisdiction, was limited in its application to children who were resident within the European Union. The Supreme Court held that, in circumstances where there was nothing in Art 12 that limited the jurisdiction of the court in that manner, Art 12 could apply where the child was lawfully resident outside the EU in a non-Member state.

54. As I have already noted, in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* the Supreme Court considered the question of the extent to which Brussels IIa applied where there was a rival jurisdiction in a non-Member State. The Supreme Court held that the answer was in the affirmative and that the jurisdiction provisions of the Brussels IIa Regulation apply regardless of whether there is an alternative jurisdiction in a non-Member State. Again, the primary reason underpinning this conclusion was that there was nothing in the jurisdictional provisions of the Brussels IIa Regulation to limit its application solely to cases where the rival jurisdiction was another Member State. Rather, the Supreme Court was satisfied that the provisions of Brussels IIa merely set out that it applies where the subject matter of the litigation falls within its scope, for the reasons set out at paragraph [30] of the judgment of Baroness Hale:

> "30 The Regulation deals with jurisdiction, recognition and enforcement in matrimonial and parental responsibility matters. Chapter III, dealing with recognition and enforcement, expressly deals with the recognition in one member state of judgments given in another member state: see article 21(1). But there is nothing in the various attributions of jurisdiction in Chapter II to limit these to cases in which the rival jurisdiction is another member state. Article 3 merely asserts that in matters relating to divorce, legal separation or marriage annulment "jurisdiction shall lie with the courts of the member state" in relation to which the various bases of jurisdiction listed there apply. Article 8 similarly asserts that the courts of a member state "shall have jurisdiction in matters of parental responsibility …" Furthermore, article 12(4) deals with a case where the parties have accepted the jurisdiction of a member state but the child is habitually resident in a non-member state, thus clearly asserting jurisdiction as against the third country in question. Hence in *In re I (A Child) (Contact Application: Jurisdiction)* [2010] 1 AC 319 this court held that article 12 did apply in a case where the child was habitually resident in Pakistan. There is no reason to distinguish article 12 from the other bases of jurisdiction in the Regulation."

55. Again, as already noted, and in this context, in *Re F (a child): (care proceedings: habitual residence)* [2014] EWCA Civ 789, the Court of Appeal referred to the effect of the decision of the Supreme Court in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* as follows:

> "…for it is clearly established by decisions of the Supreme Court that BIIR applies to determine the jurisdiction of the English court in care proceedings, irrespective of whether the other country is a Member State of the European Union: see *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60, [2014] AC 1, para 30, and *In re L (A Child: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 75, [2014] 1 All ER 999, [2013] 3 WLR 1597, para 18."

56. Following the hearing, leading and junior counsel undertook further research to determine whether other international Conventions provide examples of international instruments that apply, or do not apply as between Contracting and non-Contracting States. Whilst extremely grateful for the considerable industry shown by leading and junior counsel, ultimately I am persuaded that, in circumstances where each Convention must be considered on its own terms and within the particular context in which it was agreed, there is limited utility in considering the terms of other international conventions.

57. Having regard to the decision of the Supreme Court in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)*, and by parity of reasoning, this court in *Warrington CC v T* concluded as follows with respect to the application of the 1996 Hague Convention in public law proceedings involving a non-Contracting State, in that case Gabon:

> "[34] Finally with respect to the jurisdictional framework, and within the foregoing context, the United Kingdom is party to the 1996 Hague Convention and it came into force in this jurisdiction on 1 November 2012. Gabon is not a party to the 1996 Hague Convention. However, in circumstances where this court is the court currently seised of the issue of jurisdiction, and this jurisdiction is a signatory to the 1996 Hague Convention, I am satisfied that the question of whether this court has jurisdiction in respect of K falls to be determined by reference, *inter alia*, to the jurisdictional provisions that apply under articles 5 and 6 of the 1996 Hague Convention, notwithstanding that Gabon is not a contracting state to that Convention (see *A v A (Children: Habitual Residence)* [2014] AC 1)."

58. Most recently, and whilst concerned primarily with the question of the date on which the question of habitual residence falls to be determined for the purposes of Art 5 (which I deal with below), in *H v R* [2022] EWHC 1073 (Fam) Peel J appears to have accepted that it is the general jurisdictional provisions of Art 5 of the 1996 Hague Convention that will operate to determine whether England and Wales has jurisdiction in respect of a child who is in this jurisdiction notwithstanding the proceedings involving a non-Contracting State, in that case Libya. At [45] Peel J noted as follows by reference to paragraph [42] of the Explanatory Report as set out above, having restated his concern as to the consequence of assessing habitual residence at the date of the trial:

> "[45] However, it seems to me that where the other country (in this case Libya) is a non Contracting State, the second part of the Lagarde report accurately reflects the position. If habitual residence lies in England at the date of trial before me, Article 5 is operative and on any view, England retains jurisdiction. If, however, between issue in June 2021 and hearing in April

> 2022, habitual residence transferred to Libya, then Article 5 ceased to apply, and national law became operative."

Relevant Date for Evaluation of Habitual Residence

59. Prior to the departure of the United Kingdom from the European Union, there was no conflict between the common law position with respect to the jurisdiction for making orders under Part IV of the Children Act 1989, as set out in foregoing authorities of *Re R (Care Orders: Jurisdiction), Re M (Care Orders: Jurisdiction)* and *Lewisham London Borough Council v D (Criteria for Territorial Jurisdiction in Public Law Proceedings)* and the international instrument to which that common law position was subject, namely Brussels IIa, as to the date on which habitual residence fell to be assessed for the purposes of establishing jurisdiction. The foregoing authorities made clear that, for the purposes of the common law position, the relevant date was the date on which the court is seised of proceedings. This common law approach to the date on which habitual residence fell to be assessed for the purposes of determining jurisdiction was consistently the approach under Brussels IIa, Art 8 of the Brussels IIa providing as follows (emphasis added):

> "**Article 8**
>
> **General jurisdiction**
>
> 1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State *at the time the court is seised*.
>
> 2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12."

60. Art 16 of Brussels IIa indicates that the time the court is seised means when the first proceedings are lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent.

61. By contrast, Art 5(1) of the 1996 Hague Convention does not specify the date on which the question of habitual residence falls to be considered when determining whether a Contracting State has jurisdiction under Art 5(1) to take measures directed at the protection of the child's person or property. Within this context, if the date for determining habitual residence under Art 5(1) of the 1996 Hague Convention is other than the date the court is seised of proceedings, then the common law approach to the date for assessing habitual residence as articulated in *Re R (Care Orders: Jurisdiction), Re M (Care Orders: Jurisdiction)* and *Lewisham London Borough Council v D (Criteria for Territorial Jurisdiction in Public Law Proceedings)* and the approach of the international convention that forms part of the domestic legislative framework governing jurisdiction in respect of children no longer align following the departure of the United Kingdom from the European Union.

62. The date for determining habitual residence for the purposes of Art 5(1) of the 1996 Hague Convention is not dealt with explicitly in either the Explanatory Report or in the Practical Handbook. However, the Explanatory Report does deal with the position where habitual residence changes, either to another Contracting State or to a non-

Contracting State or where the child is not habitually resident or present in the Contracting State. In this context, paragraph [42] of the Explanatory Report bears repeating, together with reference being made to paragraph [84]:

> "42 Where the change of habitual residence of the child from one State to another occurs at a time when the authorities of the first habitual residence are seised of a request for a measure of protection, the question arises as to whether these authorities retain their competence to take this measure (*perpetuatio fori*) or whether the change of habitual residence deprives them ipso facto of this jurisdiction and obliges them to decline its exercise. The Commission rejected by a strong majority a proposal by the Australian, Irish, British and United States delegations favourable to the *perpetuatio fori*. Certain delegations explained their negative vote by their hostility to the very principle of *perpetuatio fori* in this field and wanted jurisdiction to change automatically in case of a change of habitual residence, while other delegations thought that it would be more simple for the Convention not to say anything on this subject thereby abandoning to the procedural law the decision on *perpetuatio fori*. The first opinion appeared to be the more exact in the case of a change of habitual residence from one Contracting State to another Contracting State. Indeed it is not acceptable that in such a situation, which is located entirely within the interior of the scope of application of the Convention, the determination of jurisdiction be left to the law of each of the Contracting States. Moreover this solution is one which currently prevails for the interpretation of the Convention of 5 October 1961. On the other hand, in the case of a change of habitual residence from a Contracting State to a non-Contracting State, Article 5 ceases to be applicable from the time of the change of residence and nothing stands in the way of retention of jurisdiction, under the national law of procedure, by the authority of the Contracting State of the first habitual residence which has been seised of the matter, although the other Contracting States are not bound by the Convention to recognise the measures which may be taken by this authority."

And:

> "84 The rules of jurisdiction contained in Chapter II, which have been analysed above, form a complete and closed system which applies as an integral whole in Contracting States when the child has his or her habitual residence on the territory of one of them. In particular, a Contracting State is not authorised to exercise jurisdiction over one of these children if such jurisdiction is not provided for in the Convention. The same solution prevails in the situations described in Article 6, where the child has his or her residence in a Contracting State. In the other situations the mere presence of the child gives rise to the application of Articles 11 and 12, but these articles do not exclude the broader bases for jurisdiction that the Contracting States might attribute to their authorities in application of their national law; only, in this case, the other Contracting States are not at all bound to recognise these broadened bases for jurisdiction which fall outside of the scope of the Convention. The same thing is true, for even stronger reasons, for the children who do not have their habitual residence in a Contracting State, and who are not even present in one. The Commission refused to insert in the text

> of the Convention a proposal by the Drafting Committee which, inspired by Article 4 of the Brussels and Lugano Conventions, would have provided that, where the child does not have his or her habitual residence in a Contracting State, jurisdiction is, in each Contracting State, governed by the law of that State. This proposal was considered as expressing the correct interpretation of Chapter II of the Convention, but it was not retained for fear that it might itself be interpreted, following the example of the corresponding text of the Brussels and Lugano Conventions, as obligating the other Contracting States to recognise the measures so taken in application of the rules of national jurisdiction – sometimes exorbitant rules – of the Contracting States "

63. Within this context, the question of the relevant date for determining habitual residence under the 1996 Hague Convention has been considered in a number of first instance domestic authorities. In *In re NH (1996 Child Protection Convention: Habitual Residence)* [2016] 1 FCR 16 at [24], Cobb J expressed the *obiter* view that:

> "Although like BIIa, the 1996 Child Protection Convention founds primary jurisdiction on the country of the child's habitual residence, unlike BIIa, the 1996 Child Protection Convention does not specify the time at which habitual residence is to be determined; in BIIa it is specifically said to be 'at the time the court is seised', words which are absent from the equivalent provision of the 1996 Convention. [Counsel for the local authority and for the child] presented their respective submissions as if the words 'at the time the court is seised' were imported into article 5. It is not on the facts material for a determination of the issues in this case for me to identify specifically the date at which habitual residence is to be assessed; whether the evidence were to be evaluated as at 12 May 2015 (the date on which the proceedings were issued) or 21 July 2015 (the date of the hearing), the test would be unlikely to produce a different result. But as the principle of *perpetuatio fori* does not apply under the 1996 Child Protection Convention as it does under BIIa (see in this context article 13 of the 1996 Child Protection Convention) it seems to me that the phrase should be applied as at the date of the hearing (see generally, paras 38–43 of the Explanatory Report of Paul Lagarde, 1997)."

64. In *Warrington CC v T* this court expressed the, again *obiter*, view on the relevant date for assessing habitual residence under Art 5 of the 1996 Hague Convention:

> "[42] As Mr Spencer further submits, the provisions regarding the effect on jurisdiction of a change of residence during the course of proceedings pursuant to article 5(2) of the 1996 Convention, namely that the principle of *perpetuatio fori* does not form part of the Convention and thus a change of habitual residence during proceedings leads to a change of jurisdiction, tends also to support the proposition that the question of habitual residence falls to be determined at the point the contracting state in question is tasked with answering that question. Within this context, I am inclined to share the obiter view expressed by Cobb J in *In re NH (1996 Child Protection Convention: Habitual Residence)* that the question of habitual residence for the purposes of articles 5 and 6 of the 1996 Hague Convention falls to be decided as at the date on which that question comes before the court for determination, in this case at this hearing. The corollary of this conclusion is, of course, that it will be important that the question of habitual residence in cases engaging the

> 1996 Hague Convention is determined without delay, in order to avoid the question of habitual residence being determined simply by mere effluxion of time over the course of protracted proceedings."

65. In *H v R*, a case concerning children who had been taken to Libya after living all of their lives in England, Peel J expressed similar concerns regarding the impact of the date for the assessment of habitual residence under Art 5 of the 1996 Convention being the date of the hearing to those expressed by this court in *Warrington CC v T*. In particular, Peel J was concerned, as was this court in *Warrington CC v T*, that such an approach to the date for determining habitual residence would encourage delay in proceedings by parties seeking to engineer the jurisdiction of the English court by delaying the hearing.

66. Within this context, Peel J highlighted paragraph [42] of the Explanatory Report which makes clear, as set out above, that where a child ceases to be habitually resident in this jurisdiction by reason of a move to a non-Contracting State such that Art 5 of the 1996 Hague Convention ceases to apply in this jurisdiction (the situation faced by Peel J in *H v R* but not the situation faced by this court in *Warrington CC v T* in circumstances where the child in that case was in this jurisdiction), nothing stands in the way of retention of jurisdiction in this jurisdiction, under the national law of procedure. Within that context, in *H v R* Peel J considered that in such circumstances domestic law applied and the date for assessing habitual residence was, pursuant to s.3 of the Family Law Act 1986, the date that the court became seised. In *H v R* he observed as follows with respect to this approach:

> "[40] I accept that there is no specific Article to this effect, but the report is clear, and, in my view, it is logical that jurisdiction should not transfer to a non Contracting State. After all, why should a non Contracting State be fixed with jurisdiction pursuant to a Convention which it has not signed? It is equally logical that if perpetuatio fori does not apply, then the 1996 Convention gives no answer to the issue of jurisdiction if habitual residence is lost from the country of origin, and, as the Lagarde report says, the position then reverts to domestic law. This outcome avoids the unsatisfactory situation where children are in a non Contracting State, and lengthy proceedings play into the hands of a party who seeks to dispute the jurisdiction of England and Wales, including, as here, raising a challenge to jurisdiction very late in the day, so as to fix habitual residence and jurisdiction in a State with which this country has no reciprocal Treaty arrangements."

DISCUSSION

67. Having listened to the careful, comprehensive and erudite submissions of leading and junior counsel, I am satisfied that the 1996 Hague Convention is the jurisdictional scheme that governs in this case the question of whether this court has jurisdiction in respect of H, notwithstanding the involvement of the rival jurisdiction of the Republic of Tunisia, a non-Contracting State. Further, and within that context, I am satisfied that if H is not habitually resident in England and Wales for the purposes of Art 5, the common law jurisdictional basis of presence will subsist in respect of H. Finally, I am satisfied that the question of whether H is habitually resident in this jurisdiction for the purposes of Art 5(1) of the 1996 Hague Convention is the date of the hearing, and not

the date the court was first seised of these proceedings. My reasons for so deciding are as follows.

68. Before setting out my conclusions with respect to the preliminary issues before the court, it is important to articulate the factual context in which those conclusions are reached in so far as those factual matters are not in dispute between the parties. H is currently in this jurisdiction, having arrived in England on 19 June 2021. It does not appear seriously to be disputed that prior to that date H was habitually resident in the Republic of Tunisia. H has been accommodated by the local authority in foster care since 13 July 2021. Care proceedings were issued in respect of H on 18 August 2021 and an interim care order made. Serious delay within these proceedings has meant, very regrettably, that there has yet to be a definitive determination of whether this court has substantive jurisdiction in respect of H. In the circumstances, whilst it is beyond dispute that H is in this jurisdiction, the question of fact of her current habitual residence has not yet been decided by this court. Within this context, the jurisdiction in which H is currently is a Contracting State to the 1996 Hague Convention, and the jurisdiction from which she travelled over a year ago is a non-Contracting State to the 1996 Hague Convention.

Does the jurisdictional scheme under Chapter II of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility apply to care proceedings under Part IV of the Children Act 1989 and, if so, does it apply to these proceedings concerning H notwithstanding this case involves a non-Convention State?

69. In answering this question, it is important to note once again that in circumstances where no decision has yet been made as to whether this court has substantive jurisdiction in respect of H, the essential question before the court is whether the 1996 Hague Convention is the correct scheme by which to determine whether the court has such jurisdiction. Within this context, the first preliminary issue breaks down into two parts. First, and as a matter of generality, is the jurisdictional scheme under Chapter II of the Hague Convention applicable to an application under Part IV of the Children Act 1989. Second, if so, does the *jurisdictional* scheme under Chapter II of the 1996 Hague Convention apply to the proceedings concerning H in circumstances where the other State involved is the Republic of Tunisia, a non-Contracting State? With respect to the first part of the question, I am satisfied that the scheme under Chapter II of the Hague Convention is applicable to an application for orders under Part IV of the Children Act 1989.

70. In *Warrington CC v T*, another case concerning a child who had arrived in this jurisdiction from the non-Contracting State of Gabon, this court concluded as follows regarding the jurisdictional framework against which jurisdiction falls to be assessed with respect to an application for public law orders under Part IV of the Children Act 1989:

> "[30] Within the foregoing context, the jurisdictional bases for making public law orders under Part IV of the Children Act 1989 are (a) in cases commenced prior to the departure of the United Kingdom from the European Union at 11 p m on 31 December 2020, the relevant provisions of Brussels IIa or (b) the relevant provisions of 1996 Hague Convention or, where (a) or (b) do not apply, (c) the habitual residence of the child in England and Wales

> or (d) the presence of the child in England and Wales where that child is not habitually resident in any part of the United Kingdom."

71. Having heard the additional arguments advanced in this case and the additional authorities and materials cited to the court, I remain satisfied that that conclusion was correct.

72. As I have set out above, the 1996 Hague Convention has been incorporated into domestic law by the Private International Law (Implementation Agreements) Act 2020. Within this context, and by parity of reasoning with the authorities concerning the application of the Brussels IIa legislative scheme to proceedings under Part IV of the Children Act 1989, and in particular *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* at [20], the jurisdictional provisions of Chapter II of the 1996 Hague Convention will be "the first port of call" when determining jurisdiction in such proceedings in circumstances where it is directly applicable in United Kingdom law, provided orders under Part IV of the Children Act 1989 are within the scope of the Convention. This conclusion is reinforced in my judgment by the fact that in circumstances where the Family Law Act 1986 does not encompass proceedings under Part IV of the Children Act 1989, the alternative jurisdictional scheme is a common law one by reference to the authorities set out above. Within this context, where the relevant proceedings are within the scope of the *legislative* jurisdictional scheme provided by the 1996 Hague Convention, I take the view that it is preferable that the question of jurisdiction be assessed against that legislative scheme rather than the common law scheme where the former applies.

73. In construing the scope of the 1996 Convention, it is prudent to recall the observation of Lord Browne-Wilkinson in *Re H (Abduction: Acquiescence)* [1998] AC 72, [1997] 1 FLR 872, made in respect of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, that an international Convention cannot be construed differently in different jurisdictions. Rather, it must have the same meaning and effect under the laws of all Contracting States. In this context, in *R v Secretary of State for the Home Department ex parte Adan; R v Same ex parte Subaskaran; R v Same ex parte Aitseguer* [2001] 2 AC 477, [2001] INLR 44, at 517 and 56 respectively, when referring to the meaning of the United Nations Convention Relating to the Status of Refugees 1951 and Protocol of 1967, Lord Steyn observed that:

> "In practice it is left to national courts, faced with material disagreement on an issue of interpretation, to resolve it. But in so doing it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning."

74. In seeking to construe a Convention so as to give it its autonomous and international meaning, the national courts should do so in a manner that promotes the objectives of that Convention. Again, within the context of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, the domestic courts have made clear that it is the duty of the court to interpret that Convention in a purposive way in order to make the Convention work (see In *Re F (A Minor)(Abduction: Custody Rights Abroad)* [1995] Fam 224 and *Re B (A Minor)(Abduction)* [1994] 2 FLR 249). In seeking the autonomous and international meaning it is permissible for the court to consider

documents comprising the travaux préparatoires, for example in the current context, the Explanatory Report by Paul Lagarde (hereafter 'the Explanatory Report') and the *Practical Handbook on the Operation of the Hague Convention of 19 October 1996* (hereafter 'the Practical Handbook') that accompanies the 1996 Hague Convention (see *Forthergill v Monarch Airlines Ltd* [1981] AC 251).

75. Bearing in mind the foregoing principles, and as conceded by Mr Twomey and Mr Lamb on behalf of the local authority, it is clear that care orders under Part IV of the Children Act 1989 must fall within the scope of the 1996 Hague Convention. Art 3 of the 1996 Convention makes clear that the measures referred to in Art 1 of the Convention include both measures concerning the attribution, exercise, termination and restriction of parental responsibility, as well as delegation, and the placement of the child in a foster family or institutional care. Within this context, s.33 of the Children Act 1989 makes clear that the effect of a care order made under Part IV of the Children Act 1989 is, *inter alia*, to impose on the local authority a duty to receive the child into its care, to attribute parental responsibility to the local authority, to permit the local authority to exercise parental responsibility and to permit it to do so in a manner that restricts the exercise of parental responsibility by the parent or parents of the child. Further, a child who is the subject of a care order made under Part IV of the Children Act 1989 will be a looked after child for the purposes of s.22(1) of the Children Act 1989, placing a duty on the local authority under s.22A of the 1989 Act to provide the child with accommodation. Within this context, a care order plainly concerns the attribution, exercise and restriction of parental responsibility for the purposes of Art 3(a) of the 1996 Convention and may, depending on the facts of the case, concern the placement of the child in a foster family for the purposes of Art 3(e) of the Convention.

76. In the foregoing circumstances, I am satisfied that the jurisdictional scheme under Chapter II of the 1996 Hague Convention is the correct scheme by which to determine whether this court has jurisdiction to make orders under Part IV of the Children Act 1989 in respect of H, subject to that scheme applying in a case involving a non-Contracting State. Within this context, I turn now to deal with the second part of the first question, namely whether the jurisdictional scheme under Chapter II of the 1996 Hague Convention remains the correct scheme by which to determine jurisdiction in the care proceedings concerning H where the other state involved in proceedings is the Republic of Tunisia, a non-Contracting State.

77. In *Warrington CC v T*, I decided that question as follows with respect to a child who had arrived in jurisdiction from a non-Contracting State, in that case Gabon:

> "[34] Finally with respect to the jurisdictional framework, and within the foregoing context, the United Kingdom is party to the 1996 Hague Convention and it came into force in this jurisdiction on 1 November 2012. Gabon is not a party to the 1996 Hague Convention. However, in circumstances where this court is the court currently seised of the issue of jurisdiction, and this jurisdiction is a signatory to the 1996 Hague Convention, I am satisfied that the question of whether this court has jurisdiction in respect of K falls to be determined by reference, *inter alia*, to the jurisdictional provisions that apply under articles 5 and 6 of the 1996 Hague Convention, notwithstanding that Gabon is not a contracting state to that Convention (see *A v A (Children: Habitual Residence)* [2014] AC 1)."

78. Notwithstanding the detailed and careful submissions of Mr Twomey and Mr Lamb, I am again satisfied that this conclusion was correct and that the same conclusion, namely that jurisdiction falls to be determined by reference to the provisions of Chapter II of the 1996 Hague Convention, must follow in this case in respect of the care proceedings concerning H. My reasons for once again concluding that this is the position are as follows.

79. At paragraph [935.1] the authors of Clarke Hall and Morrison on Children (May 2022) suggest that, by applying the reasoning in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)*, it is arguable that (provided the subject matter of the proceedings falls within its scope) the 1996 Hague Convention is applicable even where the other State is not a Contracting State. As set out above, in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* the Supreme Court confirmed that the jurisdictional provisions of Brussels IIa operate in a case involving a non-Member State. The same position was confirmed in respect of the Brussels Convention by the Court of Justice of the European Union in *Owusu v Jackson*.

80. Mr Twomey and Mr Lamb sought to demonstrate however, that the approach taken in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* is inapt with respect to the 1996 Hague Convention. Those submissions centred on what Mr Twomey and Mr Lamb submit are the significant differences between Brussels IIa and the 1996 Convention, both in terms of their respective content and their respective scope.

81. On behalf of the local authority, Mr Twomey and Mr Lamb in particular point to the following differences between Brussels IIa and the 1996 Convention in order to make good their submission that the approach taken in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* cannot be taken in respect of the 1996 Hague Convention:

    i) Art 1(1)(b) of Brussels IIa is in mandatory terms as regards its scope, providing that Brussels IIa *shall* apply to matters relating to the attribution, exercise, delegation, restriction, or termination of parental responsibility. By contrast, Art 3 of the 1996 Convention is discretionary as regards its scope, providing that the measures referred to in Art 1 *may* deal with the attribution, exercise, termination or restriction of parental responsibility as well as its delegation.

    ii) The approach to prorogation is more limited under Art 10 of the Convention than under Art 12 of Brussels IIa. Art 10 permits prorogation only to another Contracting State, and then only when the child is habitually resident in that Contracting State. Art 12(4) permits prorogation where the child resides in a third state (interpreted by the Supreme Court in *In Re I* to mean a non-Member State).

    iii) Art 8 of Brussels IIa is subject to provisions concerning the former habitual residence of the child (Art 9), cases of wrongful removal or retention (Art 10) and prorogation (Art 12). By contrast, Art 5 of the Convention is only subject to a provision concerning wrongful removal or retention (Art 7).

iv) The Convention contains no express reference to the application of the Convention to children resident in a non-Contracting State.

v) The Convention was designed to operate internationally between Contracting States. Brussels IIa was designed to operate as between States of the European Union in the context of the aligned political and economic ambitions of those States.

82. Within this context, Mr Twomey and Mr Lamb seek to distinguish the decision in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* by reference to an analogy, namely that of the differential level of floor coverage provided by a carpet (Brussels IIa) as against a rug (the 1996 Convention). Having drawn this comparison, Mr Twomey and Mr Lamb submit that the rationale for the decision of the Supreme Court in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* is to be found in the comprehensive nature of the legal regime provided by the Brussels IIa "carpet", which rationale cannot apply to the far less comprehensive 1996 Hague Convention "rug", with its significantly more limited coverage. I am not however, persuaded by that submission.

83. At paragraph [30] in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* Baroness Hale recognised the import of the distinction in Brussels IIa, also present in the 1996 Convention in the manner I will come to below, between the recognition and enforcement provisions in Chapter III of Brussels IIa, which govern the position *as between* Member States, and the jurisdictional provisions of Chapter II of Brussels IIa which govern the various attributions of jurisdiction *in* a Member State. Having drawn that distinction, Baroness Hale was satisfied that:

> "[30] The Regulation deals with jurisdiction, recognition and enforcement in matrimonial and parental responsibility matters. Chapter III, dealing with recognition and enforcement, expressly deals with the recognition in one member state of judgments given in another member state: see article 21(1). But there is nothing in the various attributions of jurisdiction in Chapter II to limit these to cases in which the rival jurisdiction is another member state."

84. Within this context, the rationale for the decision of the Supreme Court in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* that the jurisdictional provisions of Brussels IIa applied in cases involving a non-Member State is plain. Namely that, having regard the distinction that fell to be drawn between the provisions of Brussels IIa dealing with jurisdiction *in* a Member State and the provisions dealing with recognition and enforcement *as between* Member States, there was nothing in the terms of the provisions of Chapter II of Brussels IIa governing attribution of jurisdiction that prevented their operation in a case involving a non-Member State. Within this context, and where the same distinction is manifest in the 1996 Hague Convention for the reasons I now turn to, I am not able to accept that the differences between the two instruments identified by Mr Twomey and Mr Lamb make the approach taken in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* inapt when it comes to the 1996 Hague Convention.

85. This court is concerned with the question of whether the *jurisdictional* scheme under Chapter II of the 1996 Convention applies where the proceedings concerning H involve a non-Contracting State in the form of the Republic of Tunisia. Within this context, a survey of the overall structure of the 1996 Hague Convention demonstrates that it too draws a clear distinction between the position *in* a Contracting State under the jurisdictional provisions of Chapter II of the Convention, and the position *as between* Contracting States under the provisions of Chapters III and IV of the Convention concerning the law applicable to ordering issues relating to parental responsibility as between Contracting States and the recognition and enforcement of measures as between Contracting States.

86. This distinction, between the position *in* a Contracting State under the jurisdictional provisions of Chapter II of the Convention and the position *as between* Contracting States under the provisions of Chapters III and IV of the Convention, is reinforced in the context of the 1996 Hague Convention by the Practical Handbook. Section 3 of the Practical Handbook draws a clear distinction between Art 53(1), which states expressly that the Convention shall only apply to measures taken *in* a State after the Convention has entered into force *for that State*, and Art 53(2), which expressly states that recognition and enforcement of measures only applies to those taken after entry into force *as between* the State where the measures have been taken *and* the requested State. Within this context, and in particular by Example 3c in the Practical Handbook as set out above, the Handbook makes clear that the jurisdictional scheme in Part II of the 1996 Hague will apply *in* a Contracting State even if the Convention is not yet operative *as between* the Contracting State and another State (in the example given, a State that is the subject of an objection following accession). In Example 3c, having made clear that the Convention is not in force as between State E and State F, the Handbook nonetheless confirms that (emphasis added):

> "Since the Convention has entered into force *in* State F, *State F has jurisdiction* to take measures of protection in respect of the children in accordance with Article 5 of the Convention."

87. Within the context of the distinction articulated above, Art 5(1) states in terms that judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property. Within this context, an ordinary reading of Art 5(1) of the 1996 Hague Convention indicates that it addresses the position *in* the individual Contracting State where the subject child is habitually resident in that Contracting State, as opposed to the position *as between* Contracting States or other States. There is nothing on the face of Art 5 to suggest that that article ceases to address the position *in* the Contracting State in cases in which there is, or may be, a rival jurisdiction in a non-Contracting State. Art 5(1) does not expressly exclude the attribution of jurisdiction to a Contracting State based on habitual residence simply because there is, or may be, a rival jurisdiction in a non-Contracting State. Nor does Art 5(1) imply that this is the position.

88. With respect to the latter, Mr Twomey and Mr Lamb developed extensive submissions with a view to demonstrating that the word "State" in Art 1(a), which provides that one object of the Convention is to "determine the State whose authorities have jurisdiction", should be read as "Contracting State". Within this context, Mr Twomey and Mr Lamb submit that the purpose of the Convention is to order issues relating to parental responsibility as between, and *only* as between, Contracting States, demonstrating that

Art 5 cannot have application in a case involving a non-Contracting State. However, whilst the conclusions as to the ordinary meaning of Art 5(1) set out in the foregoing paragraph are strengthened if Art 1(a) of the Convention is read as making no reference to the territorial scope of the Convention, in my judgment those conclusions remain valid if the word "State" in Art 1(a) is read as "Contracting State" having regard to the overall structure of the 1996 Convention. It remains the position that Chapter II of the Convention draws the distinction set out above and that context there is nothing in the wider provisions of Chapter II of the 1996 Hague Convention dealing with the attribution of jurisdiction which implies that Art 5 is limited in its application to cases involving only Contracting States.

89. I am not able to accept Mr Twomey and Mr Lamb's submission that the terms of Art 11(3) and 12(3) of the 1996 Hague Convention demonstrate by implication that the provisions of Art 5(1) dealing with substantive jurisdiction are limited to cases involving Contracting States to the 1996 Hague Convention in circumstances where Arts 11(3) and 12(3), dealing with urgent and provisional jurisdiction, contain the only express references in Chapter II of the Convention to measures being operative as between a Contracting State and a non-Contracting State. Arts 11(3) and 12(3) do deal with the position as between a Contracting State and a non-Contracting State where orders have been made on the jurisdictional basis of the child's presence in the Contracting State. However, Arts 11(1) and 12(1) make clear that, as with the provisions under Art 5(1) governing substantive jurisdiction, the question of whether that jurisdiction *exists* is one that arises for determination *in* the Contracting State. Within this context, in my judgment there is nothing in either Art 11(3) or Art 12(3) that, either expressly or by implication, limits the operation of Art 5(1) to cases in which the rival jurisdiction is a Contracting State.

90. It has also been said that a further argument against the jurisdictional provisions of Chapter II of the 1996 Convention applying in a case involving a non-Contracting State is that, by contrast to Brussels IIa, the 1996 Convention contains no article dealing with residual jurisdiction. In these circumstances, it is said that to adopt the approach in *A v A and another (Children: Habitual Residence)(Reunite International Child Abduction Centre and others intervening)* would impede the court's ability to utilise the inherent jurisdiction where it is needed in light of s. s2(3) of the Family Law Act 1986 in a case where a child was habitually resident in a non-Contracting State (see *Clarke Hall and Morrison on Children* (May 2022) at [935.1]). However, as I have noted, the Explanatory Report makes clear at paragraphs [42] and [84] that were the court of the Contracting State loses jurisdiction under Art 5(1) of the 1996 Convention due to the child's habitual residence changing to a non-Contracting State, Art 5 ceases to apply and the national law of the Contracting State becomes operative. I will deal further with the consequences of such a situation when I come to the second preliminary issue below.

91. In the foregoing circumstances, in my judgment nothing in the wording of Art 5(1) of the 1996 Hague Convention suggests that the application of the general rule of jurisdiction laid down by that article, solely on the basis of the child's habitual residence in a Contracting State, is subject to a condition that the other state involved in proceedings with an international element must be a Contracting State to the Convention. On an ordinary reading of Art 5(1), the question of jurisdiction is for the Contracting State, based on the connecting factor of habitual residence, independent of

the involvement of other States, contracting or non-contracting. In the circumstances, having regard the distinction that falls to drawn between the provisions of the 1996 Hague Convention dealing with jurisdiction *in* a Contracting State, and the provisions dealing with applicable law and recognition and enforcement *as between* Contracting States, I am satisfied that read in context and given their ordinary meaning there is nothing in the provisions of Chapter II of the 1996 Hague Convention dealing with the attribution of jurisdiction which limit their application only to cases involving Contracting States.

92. In my judgment, this conclusion is further supported by the Explanatory Report. The closing sentences of paragraph 42 of the Explanatory Report make clear that the jurisdictional provisions of Chapter II of the 1996 Hague Convention can operate in a Contracting State *prior to* a change of habitual residence from a Contracting State to a non-Contracting State. Within this context, those closing sentences of paragraph 42 recognise that a Contracting State can have jurisdiction under Art 5 in a case involving a non-Contracting State, albeit that Art 5 of the Convention would cease to be applicable were the child to change habitual residence to that non-Contracting state. That this is the correct interpretation of the position was recognised by Peel J in *H v R* at [45] in which he adopted the analysis in latter part of paragraph 42 of the Explanatory Report:

> "[45] However, it seems to me that where the other country (in this case Libya) is a non Contracting State, the second part of the Lagarde report accurately reflects the position. If habitual residence lies in England at the date of trial before me, Article 5 is operative and on any view, England retains jurisdiction. If, however, between issue in June 2021 and hearing in April 2022, habitual residence transferred to Libya, then Article 5 ceased to apply, and national law became operative."

93. The conclusion that there is nothing in Chapter II of the 1996 Hague Convention that suggests that the application of the general rule of jurisdiction laid down by Art 5(1) is subject to a condition that the other State involved in proceedings with an international element is a Contracting State, is also consistent in my judgment with the well established principle articulated above that the connecting factor should be determined by reference to the *lex fori*. Within this context, whether the connecting factor in Art 5(1) of Chapter II of the 1996 Hague Convention is or is not made out in a Contracting State is not, unlike issues of applicable law or recognition or enforcement under Chapters III and IV, a matter to be determined *as between* jurisdictions, but rather a matter of fact to be decided *in* the Contracting State tasked with determining whether *it* has jurisdiction under the Convention, the *lex fori* defining both what the connecting factor means and whether the connecting factor links a given issue with one legal system or another.

94. Being satisfied that the jurisdictional scheme under Chapter II of the 1996 Hague Convention is the first port of call when determining jurisdiction in these proceedings concerning H provided Chapter II of the Convention remains applicable in a case involving a non-Contracting State, for all the reasons given above I am further satisfied that Chapter II of the Convention applies in this case notwithstanding the presence in proceedings of a rival jurisdiction in the form of the Republic of Tunisia. Within this context, it is axiomatic that in order to determine whether the court has jurisdiction in respect of H by reference to that jurisdictional scheme, the court requires to ask itself

whether or not, as a matter of fact, H is habitually resident for the purposes of Art 5(1) of the Convention. In light of the foregoing analysis, I am satisfied that the court can proceed in this case to ask and answer that question under the provisions of Chapter II of the 1996 Hague Convention, notwithstanding that the case involves the rival jurisdiction of the Republic of Tunisia.

If the jurisdictional provisions of Chapter II of the 1996 Hague Convention do not apply to these proceedings under Part IV of the Children Act 1989 involving a non-Convention State, does jurisdiction arising out of the presence of H in the jurisdiction subsist for the purposes of care proceedings pursuant to Part IV of the Children Act 1989?

95. Whilst I am satisfied that the jurisdictional provisions of Chapter II of 1996 Hague Convention apply to the proceedings involving a non-Contracting State for the reasons I have given, it is nonetheless necessary to look at the question of whether jurisdiction arising out of a child's presence in the jurisdiction would subsist in this case for the purposes the application under Part IV of the Children Act 1989 if the court does not have substantive jurisdiction under Art 5 of the 1996 Hague Convention.

96. This is necessary because should the court ultimately decide that H is not habitually resident in England and Wales for the purposes of Art 5(1), Mr Setright and Ms Guha submit that the court would not, in those circumstances, have jurisdiction in respect of H based on her presence in this jurisdiction and could, in those circumstances, take measures only under Arts 11 and 12 of the 1996 Hague Convention. As I have noted, Mr Setright and Ms Guha argue on behalf of the paternal grandmother that mere presence in this jurisdiction should, in light of developments in thinking regarding children cases involving an international element, now be insufficient to establish jurisdiction to make a care order under Part IV of the Children Act 1989. Such an approach is not consistent, say Mr Setright and Ms Guha, with the modern principle, encompassed in the concept of habitual residence, that the jurisdiction with which the child has the closest family and social connection should be the jurisdiction that takes decisions concerning the child's welfare. By contrast, the local authority submits that in such circumstances the court would have jurisdiction based on H's presence under the common law principles that I have already set out above.

97. For the reasons also set out above, whilst the 1996 Hague Convention does not contain an article that expressly provides for a residual jurisdiction, the Explanatory Report and the Practical Handbook make clear that where a Contracting State loses jurisdiction under Art 5(1) of the 1996 Hague Convention in a case involving a non-Contracting State, the residual jurisdiction will be that provided by the national law of the Contracting State. As I have noted, this is clear both from paragraph 42 of the Explanatory Report and from paragraph 84 of the Explanatory Report, where the point is addressed expressly:

> "84 The rules of jurisdiction contained in Chapter II, which have been analysed above, form a complete and closed system which applies as an integral whole in Contracting States when the child has his or her habitual residence on the territory of one of them. In particular, a Contracting State is not authorised to exercise jurisdiction over one of these children if such jurisdiction is not provided for in the Convention. The same solution prevails in the situations described in Article 6, where the child has his or her residence in a Contracting State. In the other situations the mere presence of

> the child gives rise to the application of Articles 11 and 12, but these articles do not exclude the broader bases for jurisdiction that the Contracting States might attribute to their authorities in application of their national law; only, in this case, the other Contracting States are not at all bound to recognise these broadened bases for jurisdiction which fall outside of the scope of the Convention. The same thing is true, for even stronger reasons, for the children who do not have their habitual residence in a Contracting State, and who are not even present in one. The Commission refused to insert in the text of the Convention a proposal by the Drafting Committee which, inspired by Article 4 of the Brussels and Lugano Conventions, would have provided that, where the child does not have his or her habitual residence in a Contracting State, jurisdiction is, in each Contracting State, governed by the law of that State. This proposal was considered as expressing the correct interpretation of Chapter II of the Convention, but it was not retained for fear that it might itself be interpreted, following the example of the corresponding text of the Brussels and Lugano Conventions, as obligating the other Contracting States to recognise the measures so taken in application of the rules of national jurisdiction – sometimes exorbitant rules – of the Contracting States."

98. In the circumstances, the Explanatory Report makes clear that where the court of the Contracting State does not have, or loses, jurisdiction under Art 5(1) of the 1996 Convention, Art 5 ceases to apply and the national law of the Contracting State becomes operative. Within this context, whilst the 1996 Hague Convention does not contain an article dealing expressly with residual jurisdiction, paragraph 84 makes clear that the proposition that where the child does not have his or her habitual residence in a Contracting State, jurisdiction is, in each Contracting State, governed by the law of that State, is the correct interpretation of Chapter II of the Convention. Thus, were the court in this case not to have jurisdiction in respect of H under Art 5(1) of the Convention by reason of her not being habitually resident in England and Wales, and in circumstances where the Family Law Act 1986 does not deal with jurisdiction to make orders under Part IV of the Children Act 1989, the jurisdictional regime in respect of H would be that provided by the domestic common law, which allows for jurisdiction based either on habitual residence or presence as described above.

99. Mr Setright and Ms Guha submit however, that the common law principle that jurisdiction to make public law orders under Part IV of the Children Act 1989 in respect of children can be founded on the presence of the subject child in the jurisdiction is now outdated and should be discarded. During their oral submissions, Mr Setright and Ms Guha undertook a broad survey of the cardinal principles governing jurisdiction in respect of children in cases with an international element. Within this context, the oral and written submissions advanced by Mr Setright and Ms Guha on this point can be summarised as follows:

    i) The decisions in *Re M (A Minor)(Care Order: Jurisdiction)*, *Re M (A Minor)(Care Order: Jurisdiction)* and *Lewisham London BC v D (Criteria for Territorial Jurisdiction in Public Law Proceedings)* (which are not binding on this court) are not consistent with the modern approach in international cases, in which habitual residence is the sole connecting factor required to ground *substantive* jurisdiction. Rather, those authorities have been overtaken by the significant shift in international family law towards a common jurisdictional

framework premised upon the concept of habitual residence, as reflected within the core provisions of the 1996 Hague Convention.

ii) As this jurisdiction is a Contracting State to the 1996 Hague Convention, the starting point of the common law jurisdictional scheme with respect to children should now reflect the position set out in the Convention. Within this context, the Convention requires habitual residence in order to ground the *substantive* jurisdiction of the court.

iii) Within this context, Arts 11 and 12 of the 1996 Hague Convention further make clear that whilst jurisdiction to take measures based on presence exists, that jurisdiction is a limited and temporary jurisdiction and one which is subordinate to a substantive jurisdiction based on habitual residence.

iv) It is no longer necessary or appropriate for the common law to diverge from these principles articulated in the Convention and the court should now say so, with habitual residence being the connecting factor in that context also, save in exceptional circumstances. To proceed otherwise would represent a retrograde step.

100. I am not able to accept the bold submission of Mr Setright and Ms Guha that presence in this jurisdiction should no longer be basis for jurisdiction to make orders under Part IV of the Children Act 1989 in the absence of jurisdiction based on habitual residence under the 1996 Hague Convention. My reasons are as follows.

101. I have set out above the line of first instance authority that underpins the jurisdictional position with respect to public law proceedings at common law. As I have noted, each of those authorities is a decision at first instance that, whilst persuasive, is not binding on this court. However, the jurisdiction to grant public law orders in respect of children based on their presence in the jurisdiction articulated in those cases was not, in the context of Court of Appeal noting that the common law jurisdiction was modified by Brussels IIa, questioned by the Court of Appeal in *Re F (A Child)(Care Proceedings: Habitual Residence)* at [10], as set out above. In addition, in *Re N (Children: Adoption Jurisdiction)* the Supreme Court, whilst highlighting the need to consider in public law proceedings whether the court had jurisdiction under Brussels IIa in circumstances where public law proceedings fell within the scope of that Regulation, did not suggest that that legislative scheme removed presence as a further jurisdictional basis in such cases, or suggest that a presence based jurisdiction was inconsistent with Brussels IIa or the 1996 Hague Convention, which was by that time was also in force in this jurisdiction:

> "[2] The context in which these questions arise is important. Free movement of workers and their families within the European Union has led to many children living, permanently or temporarily, in countries of which they are not nationals. Inevitably, some of them will come to the attention of the child protection authorities, because of ill-treatment or neglect or the risk of it. In the past, the courts in this country might assume that they had jurisdiction simply because of the child's presence here. It is now clear, however, that public law proceedings fall within the scope of the Regulation (see *Proceedings brought by C* (Case C-435/06) [2008] Fam 27), so that in every case with a European dimension (more properly, a Regulation dimension) the

> courts of this country have to ask themselves whether they have jurisdiction. Even if they do have jurisdiction, Sir James Munby P has said that in every case they will need to consider whether the case should be transferred to another member state: see *In re E (A Child) (Care Proceedings: European Dimension) (Practice Note)* [2014] 1 WLR 2670, para 31; also *Merton London Borough Council v B (Central Authority of the Republic of Latvia intervening)* [2016] Fam 123, para 84(ii)."

102. With respect to the argument that the common law position should now reflect the approach taken by the 1996 Hague Convention, as Mr Setright and Ms Guha noted in their oral submissions, a particular object of the Convention is that of the protection of the child. A residual common law jurisdiction with respect to public law proceedings based on presence where the child is not habitually resident in a Contracting State for the purposes of Art 5 is not incompatible with that object and, indeed, is consistent with it. The position of H demonstrates the point.

103. Were the court to find in due course that H is not habitually resident in this jurisdiction then, absent a residual jurisdiction based on presence, the court would be precluded from making any substantive orders in respect of her welfare, notwithstanding that she has now been in the jurisdiction for over a year and has expressed a strong wish not to be returned to the Republic of Tunisia. That is *not* to say that the court *will* conclude that H is not habitually resident in this jurisdiction, or that the court *would* determine it appropriate to exercise a substantive jurisdiction based on presence if she is not habitually resident here. Those matters will fall to be determined on further argument in due course. The point is that it may, or may not, be in H's best interests to return to the care of the paternal grandmother in Tunisia at that point, but to accept Mr Setright and Ms Guha's submission would be to accept that the answer to that question will be driven at that point solely by considerations of jurisdiction, rather than considerations of welfare. In short, to align the common law position completely with the legislative position contained in the 1996 Hague Convention would leave the court with no ability to exercise a broadened basis for *substantive* jurisdiction even were the welfare of H to demand it. Whilst such an approach might more closely reflect the terms of the 1996 Hague Convention, it is not consistent with the need ensure the protection of children articulated in the preamble to that Convention.

104. Within that latter context, and as I have noted already, the Explanatory Report makes clear that the intention of the 1996 Hague Convention is not to exclude broadened bases of jurisdiction under national law where the Contracting State does not have jurisdiction under Art 5 of the Convention. In particular, and addressing Mr Setright and Ms Guha's submission regarding the import of Arts 11 and 12 of the Convention, paragraph 84 of the Explanatory Report is unequivocal in stating that whilst the 1996 Hague Convention expressly provides for measures to be taken based on presence only in cases of urgency or on a provisional basis, nothing in those articles is intended to exclude the broadened bases for jurisdiction that the Contracting States might attribute to their authorities in application of their national law in a case involving a child habitually resident in another Contracting State. Paragraph 84 of the Explanatory Report goes on to make clear that that position applies with even *greater* force in respect to children who do not have their habitual residence in a Contracting State.

105. In the foregoing circumstances, I am satisfied in this case that were the court to conclude that it did not have jurisdiction in respect of H under Art 5 of 1996 Hague Convention,

the court's jurisdiction arising out of the presence of H in the jurisdiction would subsist for the purposes of care proceedings pursuant to Part IV of the Children Act 1989, for the reasons I have given. It follows that the court would not be limited in such circumstances to taking measures under Arts 11 and 12 of the 1996 Hague Convention but *could* exercise its jurisdiction based on H's presence in the jurisdiction. Whether the court *would* proceed to exercise the jurisdiction based on presence is a separate question, to be determined in due course. I make clear that I have reached no conclusions on that question or the prior question of habitual residence.

If the question of habitual residence falls to be determined in this case, whether under the jurisdictional provisions of Chapter II of the 1996 Hague Convention or otherwise, what is the relevant date for that determination?

106. Finally, I turn to the question of the date on which habitual residence will fall to be assessed in respect of H under Art 5 of the 1996 Hague Convention. I am satisfied that that date is the date of the hearing. My reasons for so deciding are as follows.

107. Where a Convention is silent on a particular point, in this instance the date on which habitual residence falls to be determined for the purposes of Art 5 of the 1996 Convention, the Convention falls to be construed in accordance with the ordinary meaning to be given to its terms in context and having regard to the object and purpose of the Convention (see the Vienna Convention on the Law of Treaties 1936 Art 31). Within this context, two matters fall to be noted at the outset. First, the purpose of the connecting factor of habitual residence in Art 5 of the 1996 Hague Convention, which article determines which Contracting State has substantive jurisdiction to pursue the objects and purpose of the Convention, is to ensure that the jurisdiction with the closest factual connection to the child's family and social life, and the jurisdiction thereby best placed to take substantive decisions regarding the welfare of that child, is the jurisdiction that takes decisions concerning the child's welfare. Second, the Convention contains no principle of *perpetuatio fori*, by which a Contracting State seised of proceedings in respect of a child habitually resident in that Contracting State will retain jurisdiction for the duration of those proceedings, even if the child loses habitual residence there and becomes habitually resident in another Contracting State.

108. Within this context, the Explanatory Report makes clear that, in circumstances where the Convention forms a complete and closed system as between Contracting States when it has been determined that the child has his or her habitual residence on the territory of one of them, if habitual residence changes from one Contracting State to another Contracting State, the latter Contracting State will gain jurisdiction immediately on that event occurring for the purposes of Art 5(2) of the 1996 Convention. The consequence of this position is that a Contracting State cannot proceed on the basis that, once it is seised of proceedings on the date of issue (or such other relevant date), it will retain jurisdiction under Art 5(1) of the 1996 Convention until the conclusion of those proceedings. Further, and in these circumstances, in the absence of the principle of *perpetuatio fori*, it will be the factual situation during the course of proceedings, and whether that situation continues to amount to habitual residence as a matter of fact, that determines whether substantive jurisdiction subsists under Art 5(1). In the absence of the principle of *perpetuatio fori*, it is further axiomatic that habitual residence will fall to be assessed at the *current* hearing, and not by looking back to an earlier hearing in the proceedings. Indeed, the logical consequence of the foregoing position is that the question of habitual residence will fall to be confirmed at

each hearing, albeit that that exercise is unlikely to be an onerous one in the vast majority of cases. Within this context, where the proceedings reach a final hearing the question of whether the court has substantive jurisdiction pursuant to Art 5(1) of the 1996 Convention will still be a potentially live one. This is a fundamental change from the position that pertained under Art 8 of Brussels IIa prior to the departure of the United Kingdom from the European Union.

109. Within this context, and whilst the 1996 Convention is silent on the point, I am satisfied that reading Art 5(1) in its proper context, which includes the absence of the principle of *perpetuatio fori*, and having regard to the objects and purpose of the Convention, which seeks to ensure that it is always the jurisdiction with the closest factual connection to the child's family and social life that takes decisions concerning the child's welfare, the relevant date on which H's habitual residence falls to be determined in these proceedings for the purposes of Art 5(1) of the 1996 Convention will be the date of the hearing and not the date the court was first seised of the proceedings on 18 August 2021.

110. As this court noted in *Warrington CC v T*, this position does risk the question of habitual residence, and therefore jurisdiction under the 1996 Hague Convention, being determined by mere effluxion of time over the course of protracted proceedings, particularly where a litigant is seeking to gain advantage by causing delay in proceedings. In cases concerning children who arrive in this jurisdiction, that risk is particularly acute where the court determines upon the issue of proceedings that it has only jurisdiction to take urgent measures under Art 11 of the 1996 Hague Convention. Within this context, as this court observed in *Warrington CC v T*, it is *vital* that the question of whether, and on what basis, the court has jurisdiction is determined at the outset of the proceedings and that thereafter the proceedings are resolved in a timely manner based on that determination. It also further emphasises the need for robust case management generally in order to avoid a situation where substantive jurisdiction is ultimately determined by procedural default.

111. Finally, I am also conscious of the observations of Peel J in *H v R* regarding the potential for the relevant date for determining habitual residence under the 1996 Hague Convention to allow unscrupulous abductors to take advantage of delay, and his further observation that the fact that, as made clear in the Explanatory Report, national law takes over if a Contracting State loses jurisdiction under Art 5(1) may help to prevent that situation. However, in contradistinction to this case and the case of *Warrington CC v T*, in *H v R* the children had been taken from the jurisdiction of England and Wales to a non-Contracting State. This case, and the case of *Warrington CC v T*, concern the opposite situation to that which arose in *H v R*. In a case in which the subject child is already in England and Wales, the extent to which the fact that national law takes over following a loss by the Contracting State of jurisdiction under Art 5(1) may act to mitigate the risk of delay attendant on the relevant date under the 1996 Hague Convention, if at all, will depend on the facts of the case. In the circumstances, and where the point does not arise on the facts of this case, I propose to say nothing further in this regard.

CONCLUSION

112. In conclusion, I am satisfied that the 1996 Hague Convention is the scheme that governs the question of whether this court has jurisdiction to make orders under Part IV of the

Children Act 1989 in respect of H, notwithstanding the involvement in this case of the Republic of Tunisia. Further, and within that context, I am satisfied that if H is not habitually resident in England and Wales for the purposes of Art 5, the common law jurisdictional basis of presence will subsist in respect of H. Finally, I am satisfied that the question of whether H is habitually resident in this jurisdiction for the purposes of Art 5(1) of the 1996 Hague Convention is the date of the hearing.

113. I will now list the question of jurisdiction for determination in accordance with the answers to the preliminary issues set out above and give such directions as a necessary for such determination and any subsequent arguments that may arise in respect of *forum non conveniens*.

114. That is my judgment.