[2022] EWHC 3705 (Fam) Case No: SD21C00842

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: Friday, 21st January 2022

Before:

MR JUSTICE WILLIAMS

- -

Between:

A LOCAL AUTHORITY

Applicant

- and -

(1) DZ
(2) WZ
(3) A CHILD VIA THEIR CHILDREN'S GUARDIAN
(4) SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

(Jurisdiction: Public law and inherent jurisdiction: Family Law Act 1986: 1996 Hague Convention: Article 5, 6 and 11)

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MS P. HOWE Q.C. and Ms K Hopper (instructed by **A Local Authority**) for the **Applicant**
MS M. WHEELER Q.C. and **Mr J Banerji** (instructed by **Goodman Ray Solicitors**) for the **First and Second Respondents**
MS G. TAYLOR Q.C. and Ms Stather (instructed by Spearpoint Franks Solicitors) for the **Third Respondent**
MR EDWARDS for the **Fourth Respondent**

- -

Approved Judgment

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

....

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

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MR JUSTICE WILLIAMS :

1. I am concerned with a young man, LZ, who prefers to be known as AZ, who is 14 years and nine months of age.

2. The Applicant in these proceedings in these proceedings is A Local Authority who have applied for public law orders and orders under the inherent jurisdiction of the High Court relating to children in respect of AZ. They are represented today by Ms Howe Q.C. and by Ms Hopper.

3. The parents of AZ are DZ and WZ, who live in China, and are represented by Ms Wheeler Q.C. and by Mr Banerji.

4. AZ himself is represented by Gemma Taylor Q.C. and by Ms Stather, through his Children's guardian.

5. Also present today is Secretary of State for the Home Department, who were invited to intervene, I think, by me at some point late last year and they are represented by Mr Edwards.

6. The applications for the care order and for the orders pursuant to the inherent jurisdiction were made in the context of AZ having come to the UK in order to attend a boarding school, from which he was expelled very soon after his arrival and he then went to live with a host family, but due to issues to do with his behaviour, he was accommodated by the local authority. Subsequently applications were made for an interim care order and for a deprivation of liberty order because his behaviour was so dysregulated that he was exposing himself to harm and risking causing harm to others. The interim care order was made by His Honour Judge Bedford and the matter was then transferred to me.

7. Because AZ had only been in the jurisdiction a short time, having arrived in August 2021 in order to undergo quarantine before the commencement of the school term, in September, it was immediately identified that there was an issue as to the jurisdiction of the Court to make orders in respect of AZ as well as the rather more important question of what orders would best promote AZ's welfare, and so the matter returned to Court on a number of occasions in the autumn of last year and in December I gave directions, including listing it for a one day hearing today, 21st January 2022, in order to determine issues relating to jurisdiction and for the making of any consequential orders.

8. When the matter was before me in late autumn, there was uncertainty as to AZ's own position in relation to whether he wished to remain in this country or to return to China and there was associated uncertainty with the parents' position as to what should happen to AZ. At the first hearing, before me, AZ had expressed a desire to continue to reside in England and to pursue his education here. That developed such that, by the time the matter came before me shortly before Christmas, he was said to be expressing then a desire to return home.

9. The position has developed further since then, in that prior to the commencement of this hearing, all parties had come to the same conclusion in relation to what order should emerge from this hearing and that was built on a number of factors, but

significantly, at least as far as the local authority and the guardian were concerned, but I think also bearing upon the parents' decision in relation to this hearing, was the fact that over a number of weeks, AZ had been expressing a fairly consistent view that he recognised now that the best thing for him was to go back to China, the People's Republic of China. He had said that to the social work team around him, the care team around him and to the psychiatrist who had carried out an assessment of him and he had expressed the same to the children's guardian.

10. So by the time the matter commenced this morning, all were agreed that an order for **AZ's** return to China was the proper outcome of this hearing. The issue of most substance, really, were the practicalities of how such a return might be effected, given the concerns about AZ's possibly dysregulated behaviours and cooperation in the process. A subsidiary issue was the route to which jurisdiction would be achieved, there being a divergence of view as between the local authority and the guardian on the one hand, and the parents on the other hand. The local authority and the guardian both submitted that the pathway was via the 1996 Hague Child Protection Convention and, in particular, Article 11 of the 1996 Hague Convention, that providing the Court with jurisdiction to take measures in cases of urgency, one of those measures being the ability to make a return order; another being the ability to make interim care orders in relation to the public law applications.

11. The competing position advanced by Ms Wheeler QC on behalf of the parents was that, because the other country involved in this case, the People's Republic of China, is not a contracting state to the 1996 Hague Convention that that Convention did not apply and that the appropriate route to the making of return orders in particular, was via Section 3 of the Family Law Act 1986, which applies when the Hague Convention does not; which provides a jurisdiction to this Court either on the basis of habitual residence or on the basis of presence in England and Wales, and non-habitual residence anywhere else in the UK or a specified dependent territory.

12. Ultimately, it was clear from the opening exchanges that the parties were all agreed that the substantive power of the Court to make orders, in particular the return order, was not affected by whichever jurisdictional pathway one followed. So, all were agreed that not too much of this one day hearing should be absorbed in resolving the potentially interesting and complex arguments in relation to the jurisdictional pathway and that, more productively, the hearing should focus on the practical matters relating to how AZ's return to China could be achieved and that seems to me to be a pragmatic and sensible approach. However, it does not result in the Court being able to sidestep the issue of jurisdiction because, ultimately, any order that any Court makes must be founded on an appropriate jurisdiction. So whilst we have not delved deep into either the Convention or the statutes themselves, or the case law which relates to them, still less the Explanatory documents which would support the proper interpretation of the 1996 Hague Convention, together with all of the Good Practice Guides and other material which might bear upon it or the learning and writing on the topic, by established and well-recognised authors, such Mr Hodson OBE, and other writers of well-recognised legal texts.

13. Thus my conclusions in relation to the jurisdiction are based only on a cursory exploration of the arguments which can be made as I am not in a case where the order that might emerge from the consideration of jurisdiction was affected by whichever path one chose or indeed the availability of any jurisdiction at all, as that would have

required a much deeper dive into all of that material. As the ultimate order is not in contention, as I have said, I do not consider it necessary to undertake that very detailed exercise. That is not to say that there are not arguments which, in another case where the outcome on jurisdiction is critical to the form of order or the availability of any jurisdiction, that those arguments should not be explored in more depth. So, to the extent that I will reach conclusions in this judgment, it should be accepted by any reader of this judgment that they are without the advantage of a full exploration of all of the material that might surround them.

14. Having said that, certainly from my perspective, ultimately the conclusion is not one which I have struggled to reach, but that is without the advantage of expansion upon the interesting arguments which undoubtedly could be deployed in support of the parents' position.

15. I turn briefly to a little more detail about the background to how AZ finds himself the subject of these proceedings, and some of the evidence which bears upon the issues which have to be answered. He is now 14 years and eight months of age. He is, I understand, the only child of the parents and he was born, and as far as I know, has spent his whole life, up until August of 2021, living with his parents in his home Province in China. He attended school in the Peoples' Republic of China between 2013 and 2021 and, in the bundle of documents, there is an extract from his school reports which recorded his profile and indeed his results whilst at school, which showed that, during his time at school in the PRC, he achieved high grades in relation to various subjects and seemed to have been a successful pupil. That seems to be, to some extent, mirrored by what his parents say of him in the two witness statements which have been filed, and the contents of what has been elicited from them in discussions with social workers and, more particularly, with the expert in Chinese law, who was instructed to report on this case. That shows that whilst in China, AZ was a strong-willed and independent-minded young man; who valued education to the extent that he determined he wished to pursue his future education in England at a boarding school.

16. His parents facilitated that desire and so an application was made to a boarding school and he was accepted as a pupil in that school, commencing in the September term 2021, entering, into Year 10. The registration form disclosed no ongoing medical conditions and there was no indication of him having any special educational needs or disability. The application form was signed, it seems as long as go as 6th November 2020 and the documents in support, as I say, suggest that AZ would have been expected to be a valued addition to the school's pupil cohort.

17. He appears to have travelled alone from China to England; from what information has been gained, arriving in England with relatively little in the way of possessions. Indeed it is said, although I am not sure whether it is agreed, that he came without a computer or other personal belongings, in preparation for his schooling in England. He arrived in England, he went to the boarding school, where he went through the quarantine and he commenced his school year, as had been anticipated. However, regrettably his behaviour became increasingly difficult to manage and the school eventually took the decision that he should be expelled and that occurred on 20th September 2021, which suggests, given the shortness of time that he was able to cope with schooling at the boarding school, that something had occurred which caused him to behave in a way which was really unexpected by the school.

18. As I say, after that expulsion, which has been the source of a separate line of dispute, given that the school, I think probably in line with most boarding schools' policies, declined to refund the term's fees following his expulsion. But perhaps not surprisingly for AZ, and also for his parents, that has been a source of much concern, as one imagines that the fees would have constituted a very significant investment of their resources for the parents. For AZ to have been expelled so soon must have been an immense disappointment to him and to them.

19. As I said on 3rd October, the parents agreed that AZ should be accommodated, pursuant to Section 20 of the Children Act, by the local authority and subsequent to that, the various placements which were provided, struggled to manage A's behaviour. I think he is now on his sixth placement, he having started off in foster care and subsequently moving into residential placements and most recently, he has been in a bespoke residential placement put together by the local authority. The five previous placements had each broken down because of his volatile and often violent and inappropriate behaviour. During this period, he has spent time in police custody as a result of being arrested, I think, on at least two occasions. I think for criminal damage once, immediately following a hearing which took place before myself or another judge when a placement in Salford was proposed and authorised under a deprivation of liberty order. Following his release from police custody, another placement was found and, as I say, most recently a bespoke placement, although that has also been interspersed, I think, by periods of time when he has been admitted to hospital on at least one occasion when he refused to eat for four days; and on another occasion when he was again arrested and kept in police custody for a number of hours following a further incident causing what is said to be very extensive damage to the property.

20. I do not intend to descend into detail in relation to AZ's behaviour. I do not think it is necessary for the purposes of this judgment, but suffice to say that the entirety of the evidence from the social workers, the doctors and from the guardian demonstrate that, at times, AZ is a calm, humorous, intelligent and interested young man. On other occasions, though, he is transformed into an extremely aggressive, occasionally racially abusive, occasionally sexually threatening or otherwise capable of behaving inappropriately and violently in ways which constitute both an immediate physical threat to others and to himself, but also constitute a significant risk of emotional harm to others and to himself. The fact that he has been arrested on two occasions and that he has had the number of changes in his accommodation because the placements have been unable to cope with his behaviour in itself is an illustration of quite how damaging his behaviour can be to himself and potentially to others.

21. Given the nature of his behaviour, I gave permission for a psychiatric report to be prepared in relation to AZ and he was seen by Dr W, who assessed him under the supervision of Dr C, and the conclusion that Dr W reached was that AZ did not have any diagnosable mental health condition or other underlying health condition, such as ASD, so considered that there was no evidence for a diagnosis of ADHD. There was some suggestion of a conduct disorder, but that does not appear to have been considered to amount to any sort of personality disorder, which would be difficult to, I think, diagnose at his age in any event. He did not exhibit symptoms of post-traumatic stress disorder and no symptoms of psychosis, depression, or other low

mood. Nor was it considered that he had a learning disability and, of course, that would be inconsistent with the evidence of his proficiency in learning whilst in China.

22. Thus, the overall conclusion of Dr W was that his behaviour was to be seen in the context of a reaction to his complex and unfamiliar situation. Dr W said that reading the documents provided created an image of a disturbed, troubled and emotionally volatile young person, however when meeting AZ she said she did not come away with that impression. She said "*I wonder whether remaining in the same placement has helped with his emotional reactivity. From the history, it looks like AZ does settle when he stays in the same environment for a few days.*

23. She said that he had expressed his wish to go back to China and continue his education there and had agreed to take a PCR test and follow travel requirements. He told her that he had not wanted to go back previously because he wanted to settle the matter with his school fees first, but that he realised he could now do that back in China with his parents.

24. So the picture which emerges from the evidence of the parents and that of Dr W and the social work team is that he had not demonstrated this sort of behaviour whilst in China and that it in some way seems to have emerged as a result of the journey to England and the change in the environment. In a sense, that is perhaps not so surprising, given the very significant dislocation in terms of language, culture, absence of family, absence of any friends, that it should have had such an impact upon him and that perhaps what was AZ's dream was not grounded really in any true understanding of what the reality of a change of that magnitude would have upon him. What is entirely clear from all of that evidence from multiple sources, and now accepted by AZ and his parents is that his welfare requires as rapid a return to China as can be achieved, hence the agreement between all parties that he ought to be returned.

25. However, although that it is agreed and although it is not contested that the protective framework of an interim care order should endure until the return is secured, the Court still has to deal with the question of under what jurisdiction it makes any such orders. The starting point for private law orders and inherent jurisdiction orders is, of course, the Family Law Act 1986. Section 1 deals specifically with the jurisdiction to make certain private law and inherent jurisdiction orders. In Sections 2 and 3 it goes on to outline the circumstances in which the Court can make such orders. Section 1 of the Family Law Act 1986 does not deal with public law orders and so one needs to look for an alternative source of the basis of jurisdiction for those.

26. In relation to public law orders, prior to the revocation of the European Regulations, which bore upon family law jurisdiction, the courts both of the European Union and of this country had accepted that Brussels IIA including Article 8, provided the basis of jurisdiction for public law proceedings and that is confirmed in cases in the Court of Justice, such as *Re C* (Case 435/06) [2008] 1 FLR 490, ECJ. I think it is also referred to in *Child and Family Agency v JD (*Case 428/15) [2017] 2 WLR 949, [2017] Fam Law 48 and the public law jurisdiction has been confirmed in this country in *Re E (BIIR: Vienna Convention Case)* [2014] 2 FLR 151 and in *Lewisham v D* [2008] 2 FLR 1449.

27. So, of course the European Regulation 2203/2001, BIIA has been revoked following the implementation day of our exit from the European Union and the new regulatory framework in relation to jurisdiction then took over. The 1996 Hague Convention, which had existed in tandem with Brussels IIA now is the primary international instrument which bears upon jurisdiction. Prior to our exit from the European Union, it had had effect pursuant to the European Communities (Definition of Treaties) (1996 Hague Convention on Protection of Children etc) Order of 2010 , which declared the 1996 Convention to be an EU treaty within the meaning of the European Communities Act. However, as all of the EU treaties were revoked as a consequence of our departure, the Hague Convention had to be re-enacted in some shape or form, and the vehicle which was chosen for it to maintain its effect was the Private International Law (Implementation of Agreements) Act 2020 which inserted a new section into the Civil Jurisdiction and Judgments Act 1982. Section 1(2) of the Public International Law Act created a new section 3C of the Civil Jurisdiction and Judgments Act, which states in simple terms in subsection 1, "*The 1996 Hague Convention shall have the force of law in the United Kingdom*".

28. That is of general effect in relation to matters falling within the ambit of the 1996 Hague Convention which are set out in Article 3 of the 1996 Convention. The measures covered by Article 1 include guardianship, curatorship and analogous institutions, the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child, the placement of a child in foster care, family or institutional care, and the supervision by a public authority of the care of a child by any person having charge of them. Those measures are not identical to but very similar to those covered by Article 1(2) of Brussels IIA, which also covers guardianship, curatorship and similar institutions, designation and functions of any person or body having charge of the child's personal property, representing or assistance of the child and the placement of a child in a foster family or in institutional care. Both of them self-evidently also cover general matters of attribution, exercise, termination or restriction of parental responsibility. So the subject matter of both the 1996 Convention and Brussels IIA are very similar and so I have no doubt that the 1996 Hague Convention applies to public law proceedings, in the same way that Brussels IIA did.

29. As I say, the 1996 Hague Convention has it seems to me, freestanding effect on public law proceedings by it being given effect by section 3C CJJA but in relation to inherent jurisdiction orders, the situation is governed by the Family Law Act 1986. Section 1(1)(d)(i) makes the provisions of the Act applicable to orders made by a Court in England and Wales in the exercise of the inherent jurisdiction of the High Court with respect to children, so far as it gives care to any person or provides for contact with or education of a child. I note as an aside that the inherent jurisdiction in relation to orders for return of children does not fall within that definition. See the Supreme Court's decision in *Re A-v-A (Children: Habitual Residence) (Reunite intervening) [2013] UKSC 60* .

30. The jurisdictional provisions in Section 2 (3) provide that a Court in England and Wales shall not make a Section (1)(1)(d) order, i.e. an inherent jurisdiction order, unless it has jurisdiction under the Hague Convention or the Hague Convention does not apply, but the condition in Section 3 of the Act is satisfied or the child concerned

is present in England and Wales on the relevant date and the Court considers that the immediate exercise of its powers is necessary for his protection.

31. I have not set out Section 2(1) of the Act, given that private law orders are not engaged in this case.

32. The Section 3 conditions are either habitual residence or presence in England and Wales. The remaining parts of section 3 (1)(a) and (b) are not relevant for our purposes. Curiously the amendments to the FLA 1986 appear to make the section 3 conditions relate only to section 2(1)(b)(ii) rather than section 2(3) but this may be a 'continuity' error.

33. So having regard to those, what jurisdictional framework applies? Is it through the vehicle of the 1996 Hague Convention, either freestanding in relation to the public law or through the gateway of section 2(3)(a) FLA 1986 in relation to the inherent jurisdiction or is it through the common law, as submitted by Ms Wheeler through the gateway of section 2(3)(b)(i) and Section 3 or section 2(3)(b)(ii) of the Family Law Act on the basis that the 1996 Hague Convention does not apply?

34. The submission on behalf of the parents in relation to that is that no direct analogy can be drawn between 1996 Hague Convention and the Brussels IIA Regulation, so as to require the Court to treat the 1996 Hague Convention in the same way that Brussels IIA was treated in in the Supreme Court in *Re A*. Baroness Hale made clear in that case that the provisions of Brussels IIA were considered to apply, whether or not the other country involved was a member state of the European Union, or at least the jurisdictional provisions were to apply, and that followed on from a similar judgment on that point, albeit possibly obiter in *Re I* relating to Article 12.

35. It was clearly established, as a result of that decision and many subsequent decisions of the Court of Appeal and the Supreme Court that the provisions of Brussels IIA provided the primary source of jurisdiction in relation to all matters in relation to parental responsibility of children, irrespective of whether the other country concerned was a member state or not. Of course, it was well-recognised that, in relation to reciprocal provisions, such as those in relation to the reciprocal enforcement and recognition of orders, that that was different to the primary grounds of jurisdiction, such as Article 8 habitual residence. That was well-established. Ms Wheeler argues that Brussels IIA needs to be seen in the context that it was passed. namely as a component of the legal framework of the European Union, creating a common judicial area, where Regulations took direct effect, rather than being implemented through domestic statutory vehicles and which all ultimately went to support the integrity of the European Union, including the internal market, and that is undoubtedly a difference in terms of the context in which Brussels IIA was passed as compared to the 1996 Hague Convention.

36. Whilst the 1996 Hague Convention provides, as it were, the source material for much of Brussels IIA, it preceded it and was a product of the Hague Conference on Private International Law which is self-evidently a different body and with different purposes. Well, they may coincide or overlap but it does not have the same purpose as the European Union, and that undoubtedly is a difference between the two.

37. It is also right that the 1996 Hague Convention is different to Brussels IIA in the sense that it did not have direct effect, whereas Brussels IIA did. It has been implemented into domestic legislation, pursuant to the Private International Law Act. Ms Wheeler submits that the intention underlying the 1996 Hague Convention is to create obligations which are mutual as between the Contracting States to that Convention, that its intention is not to determine jurisdiction or indeed any other matter in relation to situations where the other state involved is a non-Contracting state. She draws support for this from the wording of certain provisions of the Convention which clearly refer to other contracting states and she also relies on the decision of the House of Lords in *Re J*, (A Child) (Custody Rights: Jurisdiction) [2005] UKHL 40, [2005] 1 WLR 14which dealt with the sister convention, the 1980 Child Abduction Convention, when Baroness Hale stated very clearly that 1980 Hague Abduction Convention principles could not be imported into abduction cases where the other country was a non-contracting state.

38. In maintaining the local authority and the guardian's position, Ms Howe QC and Ms Taylor QC both essentially relied upon the submission that the 1996 Hague Convention should be seen as the, as it were, successor jurisdictional vehicle and dealing with much the same matters, should be seen to be interpreted in the same way that the Brussels IIA regulation had been and, thus, it took its place as the first port of call for the Court considering jurisdiction. In particular, Ms Howe QC submitted that Article 11(3) of the 1996 Convention clearly contemplated the applicability of Article 11 of that convention, in situations where the child was habitually resident in a non-contracting state because it makes explicit reference to that situation in Article 11(3) itself, in which it states that 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.

39. So Ms Howe QC poses the question if 1996 is inapplicable where the other state is non-contracting, that would be entirely otiose. Ms Wheeler QC in response says that it does not undermine her primary assertion. One has to consider the range of countries with which the 1996 Hague Convention was dealing and I suppose, I am not sure whether Ms Wheeler QC was making this point, that the other references in the Convention to non-contracting states are relatively limited in their extent and it could be said that this is only applicable in relation to these urgent measures in any event. I think that perhaps illustrates the extent to which further argument on some of these points may be necessary in a case where the outcome is going to rely heavily on which interpretation one prefers.

40. It seems to me, for the purposes of this judgment, that the starting point really, and perhaps ultimately the end point can be found in Section 3C of the Civil Jurisdiction and Judgments Act, which simply says that the 1996 Hague Convention shall have the force of law in the United Kingdom. So that is the starting point.

41. If one then turns to the 1996 Hague Convention and recognising that the gold standard, as it were, and the starting point for determining whether this Court has jurisdiction, is habitual residence. If one looks at Article 5, accepting that the matters with which I am concerned today clearly fall within the Article 3, definition of measures covered by the Convention, is Article 5(1) namely '

'*the judicial or administrative authorities of the contracting state of the habitual residence of the child, have jurisdiction to make measures directed to the protection of the child's person or property*. That is it.

42. The United Kingdom is a Contracting State. The Hague Convention has effect and so it seems to me that the starting point is Article 5. That is whether is one is looking at it for public law purposes or inherent jurisdiction purposes under Section 2(3) of the Family Law Act. So a Court of England and Wales shall not make a Section (1)(1)(d) order unless it has jurisdiction under the 1996 Hague Convention.

43. That is the starting point, habitual residence. So is AZ habitually resident in England and Wales at the time of the commencement of the proceedings?

44. The approach to the evaluation of habitual residence has been transformed in recent years by a quintet of cases in the Supreme Court together with several cases in the Court of Justice of the European Union; the earlier CJEU cases having informed to a significant extent the principles adopted by the Supreme Court.

45. The core definition is that habitual residence is 'the place which reflects some degree of integration by the child in a social and family environment': A v A (children: habitual residence) (Reunite International Child Abduction Centre intervening) [2013] UKSC 60, [2014] 1 FLR 111.

46. Given the highly unusual factual matrix in this case I observe at this stage that the Supreme Court in Re B [2016] UKSC 4 emphasised that it is in a child's best interests to have a habitual residence so as to avoid falling into a jurisdictional limbo. Where a set of facts might reasonably lead to a finding of habitual residence or no habitual residence the court should find a habitual residence.

47. The principles which emerge from the decisions of the Supreme Court and the Court of Justice of the European Union are as follows:

    i) Habitual residence is a question of fact and not a legal concept like domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents;

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

    iii) The test adopted by the European court is 'the place which reflects some degree of integration by the child in a social and family environment' in the country concerned. The criterion of proximity identified in the Recital incorporates the child's best interests. This depends upon numerous factors, including the reasons for the family's stay in the country in question;

    iv) The test adopted by the European court is preferable to that earlier adopted by the English courts, being focused on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors;

    v) The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is

necessary to assess the integration of that person or persons in the social and family environment of the country concerned. That of an older child or adolescent is likely to be more distinct from that of the primary carer as they will have integrated in school or other aspects of their community;

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

vii) Parental intent did play a part in establishing or changing the habitual residence of a child: not parental intent in relation to habitual residence as a legal concept, but parental intent in relation to the reasons for a child's leaving one country and going to stay in another. The intentions or wishes of a parent with rights of custody would have to be considered. The intentions of the parents could not override the objective identification of where the child has in fact resided having regard to the importance of proximity. Subjective factors such as nationality or future intention cannot displace objective factors relating to proximity. They would have to be factored in, along with all the other relevant factors, in particular when deciding whether a move from one country to another had a sufficient degree of stability to amount to a change of habitual residence;

viii) The state of mind of the child concerned may also be relevant to assessing their degree of integration. The majority held it was only adolescents or those to be treated as adolescents whose state of mind was relevant. The minority (which included Baroness Hale) held that there was no logical reason to exclude the state of mind of younger children;

ix) The assessment of integration of the child involves consideration of objective factors as well as subjective factors. The court is seeking to ascertain the 'centre of the child's life'. It is also a comparative exercise involving consideration of the quality of the previous habitual residence and that of the new. The judge must take sufficiently into account the facts relevant to the old and new lives of the child and the family although need not necessarily do so in a side by side analysis of the sort carried out by Lord Wilson in Re B as long as it is apparent from the judgment as a whole that the exercise has been undertaken. Objective factors which support geographical proximity are likely to be more decisive than subjective factors such as national origins and future intentions but both are to be considered. Temporary absences from the country of their everyday lives, even if measured in months does not alter the country of habitual residence;

x) The previous rule that 'habitual residence' cannot be changed without the consent of all holders of parental responsibility is to be discarded. Whether a holder of parental responsibility has consented may affect the quality of integration but is not a bar to habitual residence changing;

xi) A young infant cannot gain habitual residence in a state which he has not visited when he was born and has been living with his primary carer in another MS for several months. A child cannot be habitually resident in a country in which he has never been present;

xii) A child will usually not be left without a habitual residence and if a set of facts could reasonably lead to a finding of habitual residence or no habitual residence the former should be preferred. As integration is gained in one country it is lost in another. Complete integration is not required but 'some'.

48. In Re B (as above) Lord Wilson set out three expectations:

[45] I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it.
[46] In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not subrules but expectations which the fact-finder may well find to be unfulfilled in the case before him:
(a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;
(b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and
(c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it.'

49. Ultimately it is a question of fact, focused on the objective and subjective markers which reflect some degree of integration by a child in a social and family environment.

50. Where there are two competing countries, of course, there must be a comparative evaluation of the degree of integration and the habitual residence. The concept of the habitual residence see-saw invites one to consider the extent to which the roots in one country may have been uplifted by a move to another country and the extent to which roots have been put down in that other country in order to determine where the balance lies in relation to habitual residence.

51. In this case, it is undoubtedly the case that AZ's state of mind would potentially be a relevant consideration in the evaluation of habitual residence, see the Supreme Court's decision in *Re LC*. The majority in that case identified that in relation to adolescents, their state of mind would be a relevant consideration and so clearly AZ's is and his state of mind in this case, certainly at the time of the inception of these proceedings, was very much that he wanted to remain here and be educated here, although that intention or desire of course is only one component in relation to his state of mind, the state of mind in relation to habitual residence will also incorporate many other factors.

52. The other side of it, and what is generally recognised to be the factors of more important, although not determinative, are the objective markers of integration, presence of family, a home, familiarity with culture, language, friends, all of that which makes up a social and family environment. In this case, AZ's family are in China. His friends, to the extent that we have any knowledge about them at all, would be in China, in his school or his environment there. He was only at the boarding school for two weeks plus his quarantine and there has been, as far as I know, no maintaining of any links with any boys or girls at the boarding school. His first language is, Mandarin. He was brought up in a province in China until he was 14 years and four months of age, and to the extent that he has other family and community or social ties, they will be dormant, but still in existence in China. He, regrettably as a result of the circumstances, has put down almost no roots at all in England as a result of moving from the boarding school to a host family to foster care to residential home to bespoke placement, although in recent weeks he has settled, to some extent. He is about as unsettled as one could imagine a young person could be in this country; and the extent to which he has integrated into his bespoke placement, given the reported difficulties with staff and interpreters and others, is a very light touch, it seems to me, integration into any sort of environment.

53. So I have no difficulty in reaching the conclusion that, on the facts, that the 14 years and four months of his life in China, with all of the integration that he had achieved there, has not been uprooted sufficiently by his decision to move himself to England in order to pursue his education. Given the demise of that programme and the situation he has found himself in, it is quite clear that the majority of his roots remain in China and that very few have been put down here, so that the habitual residence see-saw remains firmly tipped in favour of China. That is not to say that it has not lifted, to some degree, and that some very tentative roots have been put down in England, but the majority remains in China.

54. So he is not habitually resident here, so jurisdiction cannot exist under Article 5 of the 1996 Hague Convention.

55. Article 6 deals with children who are present in this jurisdiction, but the definition in Article 6 relates to refugee children and children who, due to disturbances occurring in their country or internationally displaced. In which case, the authorities of the contracting state on the territory of which the children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5. Article 6 also provides that the provisions of the preceding paragraph also apply to child whose habitual residence cannot be established. Well, as his habitual residence is established in China, that does not apply, but it seems to me that Article 6 is not applicable because he is not a refugee child nor has he, due to a disturbance occurring in China, internationally displaced. So, the jurisdiction does not arise under Article 6.

56. Article 7, the abduction jurisdiction, is inapplicable.

57. Articles 8 and 9 deal with transfer of jurisdictions.

58. Article 10 deals with prorogation, which does not apply in this case, so the next article of jurisdiction which potentially applies is Article 11, which reads,

> "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 measure of protection."

59. Article 11 has been considered by the Supreme Court in In re J (A Child) (Reunite International Child Abduction Centre and others intervening) [2015] 3 WLR 1827 where the Supreme Court, I think Baroness Hale identified that where jurisdiction lay with another country (in that case under Article 7 of the 1996 Hague Convention) Article 11 could be relied upon in order to seek the return of a child who had been abducted and that the definition within Article 11, urgency could apply to a child who had been, in that case, abducted but present for a relatively protracted period of time if the situation warranted it. The relevant part of the headnote summarises the effect of the judgment as follows;

> *"…article 11 supplied an additional jurisdiction in the courts of the country where the child was present; that, by requiring that a case be urgent and that the child or his property be present and in need of protective measures, article 11 demanded a holistic approach, consistent with its overall protective purpose that such protective measures as were necessary for the child should not be delayed while the jurisdiction of the country of habitual residence was invoked; that article 11 was not limited to cases of wrongful removal and was available to safeguard children who might for various reasons be habitually resident in one country but present in another; that article 11 provided a secondary jurisdiction which was not to be used either in respect of issues which were properly the remit of the home country or in opposition to it;, …"*

60. It seems to me that whilst this is not an abduction situation, AZ has been here for about five months now and given the welfare concerns over AZ, that there is little difficulty in saying that the situation is one of urgency. It was certainly urgent when it first came before the Court and it seems to me that the welfare concerns remain as urgent as ever that orders are made in relation to him. Given that he is present here, the jurisdiction exists to take measures of protection. That applies in relation to the public law. It also applies in relation to the inherent jurisdiction.

61. That being so, the jurisdiction exists under the 1996 Hague Convention and thus one does not get into the territory of needing to consider the common law jurisdiction which would exist under Section 2(3)(b)(i) and Section 3 (not available given my conclusions on habitual residence) or Section 2(3)(b)(ii) of the Family Law Act. Had the situation been different in relation to the factual matrix and had Article 11 not been available, it is perhaps conceivable that the Hague Convention might not have applied, such that one might have fallen into an alternative jurisdiction, but that is theoretical, given my conclusions on the facts. So, I am satisfied that the jurisdictional route which exists in order to make orders in relation to AZ is that which is provided by the Article 11 of the 1996 Hague Convention in relation to public law proceedings and in relation to the inherent jurisdiction. To the extent that it matters the public law jurisdiction arises through the effect of s.3C CJJA 1982 which makes the 1996 Hague Convention effective and the inherent jurisdiction powers through s.2(3)(a) FLA 1986.

62. The factual basis for the making of the interim care order remains essentially unchanged since the interim care order was first made, and so it seems to me to be no issue over whether there are reasonable grounds to believe that the situation envisaged by Section 31 of the Children Act 1989 is made out in the circumstances of this case. The jurisdiction under the inherent jurisdiction is a paramount welfare jurisdiction and so the question of a return order or a deprivation of liberty order falls to be determined by reference to the paramount welfare of AZ. Applying an attenuated evaluation of matters which bear upon his welfare, AZ's wishes and feelings are to return to China. The effect of a change in his situation will be to restore him to a familiar environment in which one would hope that the difficulties behaviourally that he has experienced will settle. The risk of harm to him of remaining in this country is that he will continue to exhibit, or experience rather, the stress which perhaps underpins the displays of dysregulated behaviour from which he is at such risk and the evidence suggests that his parents are capable of resuming his care and, indeed, are willing to resume his care on his return to China.

63. The effect of a return order, given the evidence as to its implementation, all point unerringly to the conclusion that his paramount welfare will be best be served by a return to China, and so I will make a return order in respect of him.

64. In terms of its implementation, the evidence from the Secretary of State has very helpfully illuminated the alternatives which are available. The evidence of Ms FW, the expert in Chinese law, has also contributed to the evaluation both of the practicalities of a return, but also the situation which will face AZ on return, and it seems likely that he will be able to re-access the education system and, assuming his parents will take him back under their roof, there is no reason to suppose that they will not, one does not need to worry about the state care issues which Ms FW set out in her report.

65. What does seem clear from her report and from the parents' evidence is that for the parents to travel to England to collect AZ would pose very considerable logistical problems. So it is clear that the most effective way for AZ to return to China will be with the assistance of the Home Office. Very helpfully, the support that the Home Office can provide through the Returns Logistics Team, the China desk, run by Ms G, will be available to support AZ's return. Whether or not it is an entirely voluntary return with tickets purchased by the parents and flights organised by the parents, or whether it is a return undertaken, essentially, by the Home Office on behalf of the parents, with flights paid for by them or not, the difference for AZ that the form chosen takes is in the future consequences which will apply for him if he maintains a desire to pursue an education in England. Perhaps after his experience since August, he may reconsider the benefits of that for him or at least in the way that he undertook the process. He may not wish to anyway, but I think for a young man to have pursued a dream in the way that he did, one ought to try to leave open the doors as far as possible in case he does seek to pursue it again.

66. So, the parents and AZ, and all involved, will or should seek to achieve a return by which the parents pay for the flights and organise it so that any consequent entry ban will be at the lowest end of the spectrum, which I think is 12 months, rather than finding themselves in the position where AZ is deported and gets with it a ten year ban on re-entering the country.

67. As I say, given that the Home Office will support it, whether it is entirely voluntary or not, it seems to me that the most beneficial vehicle for implementing the return order will be for the parents to, in conjunction with the Home Office team, to book flights for AZ themselves, so that that minimal consequence can be achieved. In the event that that is not achievable for whatever reason, there is absolutely no doubt, given my welfare evaluation, that the return should be achieved by whatever the next step up is that is required on the basis of AZ cooperating in the process. If for whatever reason, here is a change in his view, further applications will probably have to be made back to me in order to secure, for instance, the necessary Covid tests or other preparatory matters which would facilitate his return.

68. From the evidence, it suggests that a flight to Beijing would minimise the onward travel then, but I think that probably what is most important is that AZ returns to China as soon as that can practically be achieved. If that has to be via Amsterdam and onwards, I think the balance falls in favour of that route being adopted, rather than hanging on in the hope of a direct flight to Beijing emerging. On the other hand, if good fortune shines on AZ, then a flight direct to Beijing would be the ideal, but that may be out of our hands.

69. In terms of what happens between now and then, the deprivation of liberty order plainly will continue to be necessary and proportionate and in AZ's best interests to maintain his wellbeing, insofar as it can be.

70. The education visa will need to be cancelled forthwith. I think that would best be done by the parents, I think, from AZ's point of view and his parents' point of view. AZ's welfare will best be promoted by the family taking a proactive role and taking responsibility for this, but if that for practical reasons in terms of communication cannot be achieved, it will have to be done otherwise. So, I will require the parents to make the application to cancel his visa forthwith, so that can commence the ball rolling in terms of the timeframes for the Home Office to start working on implementing the logistics of his return. If the parents do not, for whatever reason, make that application to cancel the visa within seven days, subject to any submissions anybody wants to make, then the local authority may, in the exercise of their parental responsibility under the ICO, cancel that visa on his behalf. It is a matter which I consider to be within their remit of their exercise of parental responsibility on the facts of this case, and it is clearly necessary as a pre-condition to implementing the return order.

71. I think it would also very much help AZ to know that his parents are supportive of the position and so a brief formulation of the statement which has been provided by the parents should be prepared, so that that can be given to AZ, so that he sees what his parents' position is. If they prefer to write something separate, in perhaps less formal language, in their words, which mirrors the sentiments of that statement, I am prepared to give them the opportunity to do that, but something ought to be given to AZ within the next few days in order to illustrate to him that his parents' support for him, and the fact that they are not cross with him, but rather are sad that his plan has not worked out as hoped for.

72. Provided that the visa has been cancelled and that the letter has been provided, that should provide a good foundation for a discussion between the social work team, the guardian and the parents, as to the nature of the relationship that they have with AZ,

pending his return. So it would seem sensible for that discussion about how they can re-institute or re-constitute a fuller relationship between AZ and the parents should await those steps being achieved. Once they have been achieved, it seems to me that that should open a window which will potentially permit **AZ** and his parents to have indirect, but unsupervised, telephone calls in which they can discuss his return to China.

73. There is no application, before me for a defined contact order, under Section 34(4) of the Children Act 1989 which provides me with the power to define or direct the local authority to provide unsupervised contact. I am not prepared to make that order. It does not seem to me that the situation is sufficiently stable to require the local authority, on a defined basis, to provide unsupervised indirect contact. I can see, and I accept the force of Ms Wheeler's point, that it may be that the lack of direct relationship, unsupervised relationship is having some undermining effect on AZ's wellbeing at the moment and neither the parents or AZ are engaging with the arrangements that have been put in place because they, or certainly AZ seems to object to any element of supervision, on the basis that it is either spying or an undue interference with his personal autonomy. In a sense, I can understand the parents' position and AZ's position and why the parents want to have an unsupervised relationship with their son, but it may be, as I said earlier in submissions, that they do not appreciate quite how delicate his emotional stability is and therefore do not understand why the local authority are quite so concerned about any possible triggers or sparks which will result in AZ losing control and exhibiting the sort of very worrying behaviours that he has. So it seems to me that it requires very careful management on the ground, and that has to be left to the good sense of the carers around him and the social work team, in conjunction with the guardian, following a, I hope, productive discussion with the parents, following the provision of that letter and the cancelling of the visa.

74. I hope that that deals with all of the matters which require direction. I think in terms of disclosure to the Home Office, there is already a consent order which deals with the disclosure of the material and so, subject to anything anybody now wishes to say, those are my decisions.

75. That is my judgment.