Neutral Citation Number: [2019] EWCA Civ 283

Case No: B4/2018/2674

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HIGH COURT OF JUSTICE
FAMILY DIVISION
HHJ Hillier sitting as a Deputy High Court Judge
FD18P00545

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2019

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE FLAUX
and
LORD JUSTICE MOYLAN

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Re G-E (Children)
(Hague Convention 1980: Repudiatory Retention and Habitual Residence)

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- -

Mr M Jarman (instructed by **JI Solicitors**) for the Appellant
Mr C Hames QC & Ms C Baker (instructed by **Irwin Mitchell Solicitors**) for the **Respondent**

Hearing date: 12th February 2019

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Approved Judgment

See Order at bottom of this judgment

LORD JUSTICE MOYLAN:

Introduction:

1. On 18th October 2018 HHJ Hillier, sitting as a Deputy High Court Judge, dismissed the father's application for the summary return of two children aged 6 and 3 to Australia under the Hague Child Abduction Convention 1980 ("the 1980 Convention"). The judge found that by the date of the mother's wrongful retention the children were habitually resident in England and Wales. The father appeals from that decision.

2. Mr Jarman who represents the father, as he did below, submits that the judge's findings as to the date of the mother's wrongful retention and on the issue of habitual residence were both wrong. He accepts that the judge directed herself correctly as to the law and rightly acknowledged during the hearing that his appeal is confined to challenging the judge's findings on these issues.

3. I granted permission to appeal on 5th December 2018.

4. The retention which occurred in this case was a "repudiatory retention", this being the expression adopted by Lord Hughes JSC, in "the absence of a better expression", at [38], in *In re C and another (Children) (International Centre for Family Law, Policy and Practice Intervening)* [2018] UKSC 8, [2019] AC 1. It describes the situation in which a "child has been removed from the home state by agreement with the left-behind parent for a limited period" and the "travelling parent" then decides that they will not be returning to the home state "in accordance with the agreement", at [36].

5. In summary, the father's first three Grounds of Appeal contend that the judge was wrong to decide that the mother's repudiatory retention did not take place until 27th March 2018. The judge is said to have failed properly to analyse the evidence; if the judge had given sufficient weight to matters which were key "markers" to the mother's intention, she would have found that the mother had wrongfully retained the children by, at the latest, Christmas 2017/early January 2018. The fourth Ground of Appeal challenges the judge's finding that the children were habitually resident in England by late December/early January 2018. In addition, Mr Jarman submits that this date was, in any event, so close to the date of the mother's wrongful retention that it should not prevent the 1980 Convention from applying in this case.

6. The mother, through Mr Hames QC (who did not appear below) and Ms Baker submit that the judge considered all the matters which have been raised by the father in support of this appeal and that the findings the judge made were open to her on the evidence.

7. At the end of the hearing we informed the parties that the appeal would be dismissed. These are my reasons for agreeing with that decision.

Background

8. The brief background history is as follows. I should make clear that this is not a full history and, in some respects as a result, might not give a complete picture. This is, in

part, because I have specifically included the matters relied on by Mr Jarman as having been given insufficient weight by the judge when dealing with the mother's intention in respect of returning to Australia.

9. The father is Australian and has always lived in Australia. The mother is British. The parties met and started their relationship in 2010 when the mother was travelling and working as a doctor in Australia for an intended period of 12 months. The children were born in 2012 and 2014. The mother was primarily responsible for caring for the children because the father travelled a great deal in connection with his work.

10. The family moved homes frequently, 7 times, within Australia. The mother and the children also visited England to see her family here. They, the mother and the older child, came for a month over Christmas 2012, 6 weeks in the summer of 2013 and 6 weeks in late spring 2014. The mother and both children spent 6 months in England in 2015, 6 weeks in the summer of 2016 and one month at Christmas 2016.

11. In January 2017 the mother applied online for, and in April 2017 obtained, a school place for the elder child in England from September 2017. In April she obtained a quotation both for the storage of her possessions in Australia and for their being shipped to England. The mother accepted that she did not inform the father about these matters but said that this reflected the manner in which they conducted their lives and were not "clandestine" acts as suggested by Mr Jarman.

12. In or about June 2017 the parents agreed that the mother and the children would travel to England because the mother's father was terminally ill. They gave up the lease on the family's home in Australia in part because it was too small and they planned to move anyway. The mother "packed up the house" and put all the contents into storage. She also arranged with her employer for a "leave of absence". In her oral evidence the mother said that she maintained her professional registration, membership and insurance in Australia as well as her car insurance and gym membership. She left her car at a friend's house.

13. The mother and the children arrived in England on 21st July 2017 on tickets which provided for a return to Australia within 6 months. They lived in a holiday rental until early August 2017 when they moved into a longer term rental property near the children's school.

14. In August 2017 the mother purchased the elder child's school uniform. She sent the father a photograph of the child wearing the clothes.

15. The mother's father died on 2nd September 2017. The father understandably agreed that the mother could extend her stay with the children in England. Although, at one stage in the judgment, the judge refers to the parties agreeing that this could be extended to February 2018, it seems clear from counsel's submissions at this hearing that the agreed extension was open ended. This conforms with the judge's later conclusion that, if this was the father's expectation, he did not communicate this to the anyone.

16. The elder child started school at the beginning of September 2017. The mother sent the father a text telling him that the child was starting school and also sent the father a

photograph with the words, "Your little girl off to big school". The younger child started at a pre-school class on the same day.

17. On 24th November 2017 the mother sent the father a text saying, "I have no idea what to do" when he would not move to England and "my family here can't move to" Australia. She also referred to her "commitment to my job". The father replied that the mother needed "to sort out what" she was going to do.

18. On 20th December 2017 the mother sent the father a text saying that she was "just trying to work things out"; that "(o)f course you need to see us, the kids and we need to see you too"; and that she could not leave her mother and sister "just now".

19. On 21st December 2017 the mother first instructed her solicitors in England. It was accepted that as a result of this the mother became aware of the 1980 Convention.

20. On 27th December 2017 sent an email to her employer in Australia. She said she was "keen to return" to Australia "as soon as I can" but she had concerns for her family here and about what would happen in Australia in part because she "may not be able to leave freely".

21. On 16th January 2018 the mother sent another email to her employer in which she said that she now knew that she had to separate from the father; that, "I think I have to remain here for now until things are settled"; and that she had started the process required to enable her to work in England. She added that her "intention was to be back by now but I don't think I can for the sake of the kids".

22. The mother travelled to Australia without the children in March 2018. She stayed with the father for a week and then returned to England. By this date the mother had commenced a relationship with a man in England.

23. On 27th March 2018 the mother sent the father an email making clear that she did not intend to return to Australia.

The Proceedings

24. The father commenced his application under the 1980 Convention on 10th August 2018.

25. The order made on 22nd August 2018, when both parties were represented, contains the following recital, which is relied on by the father:

> "The respondent [mother] has made clear that her case is that: (a) when she left Australia in mid-late June (sic) 2017 with the children she had no intention to return to Australia, and no intention to remain in England and (b) in the alternative, the latest date of retention is by 27 March 2018."

At that stage the mother was intending to oppose the application on a wide range of grounds including settlement under Article 12.

26. The order made on 30th August 2018 makes clear that the mother no longer relied on settlement and it records her case as being that the children were wrongfully retained in England on or about 27th March 2018.

27. The final hearing took place on 15th/16th October 2018 during which the judge heard oral evidence from both parents. She gave judgment on 18th October 2018.

The Judgment

28. The judgment contains what Mr Jarman accepts was a correct summary of the issues which the judge had to determine and the legal principles which the judge had to apply.

29. When dealing with the legal principles, the judge referred to a number of authorities including the Supreme Court's decision on repudiatory retention, *In re C*, and decisions dealing with habitual residence including: *In re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 76; *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 606; *Re B (A Minor) (Habitual Residence)* [2016] EWHC 2174 (Fam); and *Proceedings brought by HR (with the participation of KO and another)* [2018] 3 WLR 1139.

30. The judge summarised the parties' respective cases and their oral evidence. The father's case was that the mother had been making "clandestine plans to move to England" and, when she came here in July 2017, intended to do so permanently. Alternatively, it was his case that the mother had decided not to return to Australia at the latest by the end of December/January 2018.

31. As set out in the judgment, in support of his case the father relied in particular on the following matters: the mother's January 2017 application for and subsequent acceptance of a school place for the elder child in England from September 2017; the mother's enquiries about shipping and storage in April 2017; the purchase of flights with a 6 month return limit; the purchase of school uniform and the elder child starting school; the mother's texts and emails in December 2017 and January 2018 as referred to above; the mother consulting her solicitors on 21st December 2017; and the recital to the order of 22nd August 2018 (see paragraph 25 above).

32. The mother's case was that the date of the wrongful retention was 27th March 2018 and that by that date, if not earlier, the children were habitually resident in England. It was asserted that the children had "put down roots" very quickly because of the stability of their lives here.

33. The judge made clear her "great sympathy for the predicament" in which the parents found themselves. She took into account the impact of the father having given evidence by video link but concluded that, "overall", the mother was the more credible and straightforward witness.

34. The first issue the judge addressed was the date of the wrongful retention. She analysed the evidence and expressly considered all the matters relied on by the father as demonstrating that the mother had decided not to return to Australia by December 2017 at the latest.

35. The judge rejected the submission that the mother had acted clandestinely. She acknowledged that, in other families, this might well be the right conclusion but it was not in this case because of the way in which the parents had acted previously in relation to child care arrangements. It fitted with the pattern of the father leaving decisions to the mother. The judge also rejected the submission that the application for a school place demonstrated that the mother intended to move to England. She accepted the mother's evidence that she was "keeping all options open" because there was "every possibility that they would be in England at some point and they would need to attend school".

36. The judge methodically considered the other matters - "not only individually but also together" – and concluded that they were "not the acts of" someone who was planning to leave and not return or someone who had decided not to return. For example, the mother had been open about the elder child starting school because she had sent the father photographs and the judge accepted the mother's evidence that she had only purchased limited items of school uniform because she "didn't know how long they would be in the UK". The judge analysed the texts and emails relied on by the father but, again, decided on the evidence as a whole that the mother had not "by then formed a subjective intention to stay in the UK". She accepted the mother's evidence that the mother "remained in a state of confusion about what to do".

37. The judge, therefore, rejected the father's case that the mother "had formed a clear intention to retain the children in England" by the end of December 2017. She repeated her conclusion that the mother had not "made her mind up" but had "both options clearly in her mind". The mother's "thoughts were internal unmanifested considerations".

38. The judge considered the other correspondence relied on by the father and the fact that the mother obtained legal advice in December 2017. She found that, when the mother went to Australia in March 2018, "one of the most significant reasons she went was because she had not made her mind up about the future". It was not until she came back to England that she "formed a subjective intention not to return" to Australia. This was "formed between the 11th and 27th" March" on which latter date it became manifest by the mother telling the father she was not returning.

39. The judge next addressed the issue of habitual residence. She referred to Lord Kerr JSC's misgivings, as expressed in *Re C*, at [63], about the consequences of requiring "some overt act or event by which the intention becomes manifest" before a wrongful retention can be established. The judge acknowledged that it "would be of concern if a parent could deliberately thwart" the 1980 Convention by establishing habitual residence through "a process of stealth". But, as referred to above, the judge expressly addressed this issue as raised by the father and decided that the mother had not carried out a pre-determined secret plan nor had she "attempted to achieve habitual residence by stealth".

40. The judge considered Lord Wilson JSC's analogy from *Re B*, at [45], of the "see-saw" and asked the question, "When did the Australian roots come up and the English roots go down?". The judge decided that the children's roots in Australia were "rather shallow" for a variety of reasons including the father's long absences from the family

home and their repeated moves. As a result she found that the "central family members for the children when they came to England in 2017 were each other and their mother".

41. Further, because of the time the children had previously spent in England, they had "real ties" which grew "closer and faster as a result". She decided that by late December 2017/early January 2018 the children had become "firmly integrated and had put down firm roots" in England. Their "Australian roots had come up and the see-saw had tipped. They were stable in their home, social life and schooling which was a contrast for them". They had become habitually resident "by a natural process of integration rather than a plan".

Submissions

42. I am grateful to the parties for their respective submissions which were advanced in a focused but comprehensive manner.

43. As referred to above, Mr Jarman acknowledges that the judge properly directed herself as to the issues which she had to determine and the order in which they had to be determined. He also acknowledges that the judge "impeccably directed herself" by reference to the authorities relevant to the issues of repudiatory retention and habitual residence.

44. However, he submits, the judge failed to attach any or any sufficient weight to a number of objective factors which, if properly analysed, would have led her to conclude that the mother had decided not to return to Australia either when she came here with the children in July 2017 or, at the latest, by December 2017/January 2018. In essence he submits that, as Lord Kerr and Lord Wilson JJSC had said when dissenting in *Re C*, the judge's conclusion was flawed because she had likewise failed to recognise how the factors relied upon by the father impacted on the question of whether the mother had decided not to return to Australia.

45. Mr Jarman identified the key factors, which he submits should have led the judge to this conclusion, as being those he relied on below (as set out in paragraph 31 above). The judge had considered these factors but, he submits, she considered them only in isolation and did not consider the "totality" of the evidence. The judge had "failed to scrutinise the reality of the mother's situation". He took the court through them to demonstrate why, in his submission, the judge's conclusion, as to when the mother's decision not to return to Australia occurred, was unsustainable. Why, for example, he submits, did the mother instruct solicitors in December 2017? In his submission, there is only one conceivable answer, namely that it was because the mother had already decided not to return with the children to Australia. He also submits that the judge gave too much weight to "aspects of welfare" which were not relevant to the issue of wrongful retention.

46. If the judge had determined that the wrongful retention had occurred as submitted by the father, Mr Jarman submits this would inevitably have led her to conclude that the children were not habitually resident in England by that date partly because the dates, in effect, coincided. He also submits that the judge was wrong to find that the children's roots in Australia were "rather shallow". They were substantive and substantial with the father remaining there. In addition, having regard to the ages of the children and

the other limited connecting factors with England (they had, for example, only been at school for one term), the judge should have found that they remained habitually resident in Australia at the date of the wrongful retention.

47. Mr Hames' submissions can be summarised very briefly. He acknowledges that, objectively, some of the matters relied on by the father, if viewed separately from the oral evidence, might appear to support the conclusion that the mother did not intend to return to Australia much earlier than March 2018. However, he submits, the judge "methodically and meticulously" analysed all the matters relied on by the father and carefully considered *all* the evidence, both oral and written, when making her factual determinations. They were, he submits, findings she was entitled to make on the evidence and were based on her assessment of that evidence including, importantly, of the parties as witnesses. The judge has also given, what he describes as, very clear reasons in a "conspicuously full" judgment.

48. Mr Hames addressed each of the matters relied on by the father and submits that they do not individually or collectively demonstrate that the judge's findings were wrong. In respect of the recital to the order of 23rd August 2018 he submits that this was not some sort of evidential concession and, at most, it was being said on behalf of the mother that when she came to England in July 2017 "she wasn't sure what she was going to do next" (as recorded in the transcript of the August hearing).

Authorities

49. In *Re R*, a 1980 Convention case, Lord Reed JSC, at [18], noted,

> "the limited function of an appellate court in relation to a lower court's finding as to habitual residence. Where the lower court has applied the correct legal principles to the relevant facts, the evaluation is not generally open to challenge unless the conclusion which it reached was not one which was reasonably open to it."

In that case the trial judge's determination on the issue of habitual residence had been reversed on appeal by the Inner House of the Court of Session. That court had considered that the judge had erred in law "in treating a shared parental intention to move permanently to Scotland as an essential element in any alteration of the children's habitual residence from France to Scotland", at [9]. The appeal from that decision was dismissed by the Supreme Court.

50. In *Re C* the Supreme Court, as referred to above, determined that repudiatory retention is possible as a matter of law, at [50]. The focus of the debate was the need under the terms of the 1980 Convention for there to be a "breach of rights of custody" for a retention to be "considered wrongful" as provided by Article 3, at [42]. Lord Hughes JSC's reasoning was as follows:

> "43. When the left-behind parent agrees to the child travelling abroad, he is exercising, not abandoning, his rights of custody. Those rights of custody include the right to be party to any arrangement as to which country the child is to live in. It is not accurate to say that he gives up a right to veto the child's

> movements abroad; he exercises that right by permitting such movement on terms. He has agreed to the travel only on terms that the stay is to be temporary and the child will be returned as agreed. So long as the travelling parent honours the temporary nature of the stay abroad, he is not infringing the left-behind parent's rights of custody. But once he repudiates the agreement, and keeps the child without the intention to return, and denying the temporary nature of the stay, his retention is no longer on the terms agreed. It amounts to a claim to unilateral decision where the child shall live. It repudiates the rights of custody of the left-behind parent, and becomes wrongful.
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> 44. The plain purpose of the Abduction Convention is to prevent the travelling parent from pre-empting the left-behind parent. The travelling parent who repudiates the temporary nature of the stay and sets about making it indefinite, often putting down the child's roots in the destination State with a view to making it impossible to move him home, is engaging in precisely such an act of pre-emption.
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> 45. It is possible that there might also be other cases of pre-emptive denial of the rights of custody of the left-behind parent, outside simple refusal to recognise the duty to return on the due date. It is not, however, necessary in the present case to attempt to foresee such eventualities, or to consider whether fundamental failures to observe conditions as to the care or upbringing of the child might amount to such pre-emptive denial. It is enough to say that if there is a pre-emptive denial it would be inconsistent with the aim of the Abduction Convention to provide a swift, prompt and summary remedy designed to restore the status quo ante to insist that the left-behind parent wait until the aeroplane lands on the due date, without the child disembarking, before any complaint can be made about such infringement."

51. What then was required to establish repudiatory retention? Lord Hughes JSC answered this question, non-exhaustively, in [51]:

> "51. As with any matter of proof or evidence, it would be unwise to attempt any exhaustive definition. The question is whether the travelling parent has manifested a denial, or repudiation, of the rights of the left-behind parent. Some markers can, however, be put in place.
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> (i) It is difficult if not impossible to imagine a repudiatory retention which does not involve a subjective intention on the part of the travelling parent not to return the child (or not to honour some other fundamental part of the arrangement). The spectre advanced of a parent being found to have committed a repudiatory retention innocently, for example by making an application for temporary permission to reside in the destination State, is illusory.

> (ii) A purely internal unmanifested thought on the part of the travelling parent ought properly to be regarded as at most a plan to commit a repudiatory retention and not itself to constitute such. If it is purely internal, it will probably not come to light in any event, but even supposing that subsequently it were to do so, there must be an objectively identifiable act or acts of repudiation before the retention can be said to be wrongful. That is so in the case of ordinary retention, and must be so also in the case of repudiatory retention.
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> (iii) That does not mean that the repudiation must be communicated to the left-behind parent. To require that would be to put too great a premium on concealment and deception. Plainly, some acts may amount to a repudiatory retention, even if concealed from the left-behind parent. A simple example might be arranging for permanent official permission to reside in the destination State and giving an undertaking that the intention was to remain permanently.
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> (iv) There must accordingly be some objectively identifiable act or statement, or combination of such, which manifests the denial, or repudiation, of the rights of custody of the left-behind parent. A declaration of intent to a third party might suffice, but a privately formed decision would not, without more, do so.
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> (v) There is no occasion to re-visit the decision of the House of Lords in *In re H* [1991] 2 AC 476 (para 28 above) that wrongful retention must be an identifiable event and cannot be regarded as a continuing process because of the need to count forward the 12-month period stipulated in article 12. That does not mean that the exact date has to be identifiable. It may be possible to say no more than that wrongful retention had clearly occurred not later than (say) the end of a particular month. If there is such an identifiable point, it is not possible to adopt the submission made to the Court of Appeal, that the left-behind parent may elect to treat as the date of wrongful retention either the date of manifestation of repudiation or the due date for return. It may of course be permissible for the left-behind parent to plead his case in the alternative, but that is a different thing. When once the actual date of wrongful retention is ascertained, the article 12 period begins to run."

52. Although Lords Kerr and Wilson JJSC dissented in the outcome, they agreed that the concept existed and that it required the "travelling parent" to have formed the intention not to return the child in accordance with the agreement with the other parent, at [63] and [83]. This "subjective intention", as described more broadly by Lord Hughes JSC at [51(i)], is an essential factual element which has to be determined by the trial judge.

53. The Supreme Court also decided (Lord Kerr JSC alone had misgivings) that there must be something more than a "privately formed decision". There "must be an objectively identifiable act or acts of repudiation before the retention can be said to be wrongful", at [51(ii)].

54. The Supreme Court was agreed that the trial judge had failed properly to consider the relevance, to the issue of the mother's intentions, of what was said in a letter written by the mother's solicitors in November 2015 in support of an application for British citizenship for the children. They diverged on whether this required the case to be remitted.

55. The majority, by Lord Hughes JSC's judgment, decided that it did not undermine the judge's substantive findings:

> "55. The judge went on to examine Mother's state of mind. He found that she vacillated in what she meant to do. He had seen her examined and cross-examined, and it is clear that he believed her when she said that as at both November 2015 and February 2016, she had not yet made up her mind …
> what does prevent there from being a repudiatory retention in April is that Mother's internal thinking could not by itself amount to such. If she had had such an intention in November, the application to the immigration authorities [for British citizenship of the children] would have been capable of amounting to an objective manifestation of her repudiation, but the judge believed her when she said that she did not. It was open to him to believe her or not to believe her about this. He saw her and this court has only a transcript. It does not provide nearly sufficient basis for overturning his decision. His error about the potential significance of what was said to the immigration authorities in November is not inconsistent with his yet believing the witness whom he saw when she said that she had not then (or until April) made up her mind to stay."

56. Lord Kerr and Lord Wilson JJSC dissented because, in their view, a rehearing was required so that the issue of the mother's intentions as at November 2015 could be properly addressed.

57. The authorities to which the judge was referred on the issue of habitual residence make clear that it requires a broad factual analysis. It is a broad consideration of the connections which a child has with both relevant states.

58. As referred to above, the judge adopted the analogy of a "see-saw" from Lord Wilson JSC's judgment in *Re B*:

> "46. One of the well-judged submissions of Mr Tyler QC on behalf of the respondent is that, were it minded to remove any gloss from the domestic concept of habitual residence (such as, I interpolate, Lord Brandon's third preliminary point in the *J* case [1990] 2 AC 562), the court should strive not to introduce others. A gloss is a purported sub-rule which distorts application of the rule. The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules 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."

59. The "global analysis" required, as well as the comparative nature of the exercise referred to by Lord Wilson JSC, were highlighted by the CJEU in *Proceedings brought by HR*, at [54] and [45]. I quote from this decision at some length to put in context my later reference to the parents' respective intentions and the nature of the residence as being among the relevant factors.

> "41. According to case law, the child's place of habitual residence must be established on the basis of all the circumstances specific to each individual case. In addition to the physical presence of the child in the territory of a member state, other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that it reflects some degree of integration of the child into a social and family environment: see (*Proceedings brought by* A) [2010] Fam 42 , paras 37 and 38; *Mercredi v Chaffe* [2012] Fam 22, paras 44 and 47–49 and *OL v PQ* (Case C-111/17 PPU), paras 42 and 43.
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> 42. It is apparent from that case law that the child's place of habitual residence for the purpose of Regulation No 2201/2003 is the place which, in practice, is the centre of that child's life. Pursuant to article 8(1) of that Regulation, it is for the court seised to determine where that centre was located at the time the application concerning parental responsibility over the child was submitted.
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> 43. In that context, it is necessary, in general, to take into consideration factors such as the duration, regularity, conditions and reasons for the child's stay in the territory of the different member states concerned, the place and conditions of the child's attendance at school, and the family and social relationships of the child in those member states: see *A*'s case [2010] Fam 42 , para 39.
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> …
>
> (The court then addresses the situation of a child who is not of school age when the circumstances of the person with whom the child lives will be "particularly important".)
> …

> 46. Lastly, the intention of the parents to settle with the child in a given member state, where that intention is manifested by tangible steps, may also be taken into account in order to determine the child's place of habitual residence: see *A*'s case [2010] Fam 42 , para 40; *C v M* [2015] Fam 116 , para 52 and *OL v PQ* , para 46.
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> …
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> 54. However, as has been recalled in para 41 above, determining the child's place of habitual residence for the purpose of article 8(1) of Regulation No 2201/2003 requires a global analysis of the particular circumstances of each individual case. Therefore, the guidance provided in the context of one case may be transposed to another case only with caution."

60. That the intentions of the parents is a relevant factor was referred to by Lord Reed JSC in *Re R*. He first made clear that an intention to reside "permanently or indefinitely", at [16], is not required, before saying that "the purposes and intentions of the parents" are "among the relevant factors". Intentions are clearly relevant, for example, to whether the child's "presence is … temporary": see *HR* at [41].

61. This connects also with the nature of the residence. Although it is clear that there is no requirement for a child to have been resident in a country for "a particular period of time", Lord Reed JSC in *Re R* at [16], the nature or, to use the word from *Re R* and other cases, the "stability" of the residence will impact on whether habitual residence is established. For example, in *Re R* it was found to have been established in Scotland within about four months while in *Re C* Lord Hughes JSC observed that the trial judge's remark, that it was arguable that the children were habitually resident in November 2015, "may well be going too far, for at that stage they had been in the United Kingdom only since May, a period of about six months", at [57].

Determination

62. The judge, as is accepted, was right to decide, first, when the children had been wrongfully retained in England before then determining where they were habitually resident at that date.

63. When I gave permission to appeal I did so because I considered it arguable (a) that, as in *Re C*, the judge in this case had insufficiently evaluated the effect of the objective evidence when determining the issue of the mother's intentions; and (b) that the judge had failed to undertake the broad analysis required when determining habitual residence and had given insufficient weight to the matters relied on by the mother, when arguing that she had not formed the intention not to return to Australia, and which pointed to the children's presence here as being temporary; and had been wrong to assess the children's roots in Australia as "rather shallow".

64. Having heard the parties' submissions I am satisfied that the judge's findings in respect of the mother's intentions and of habitual residence were open to her on the evidence and were based on a sufficient analysis of the evidence. I can explain my reasons for these conclusions briefly.

65. As to the mother's intentions, it is clear that the judge's finding as to when the mother decided that she was not returning to Australia was based significantly on her assessment of the mother's oral evidence. She found the mother a credible witness and accepted her evidence that she had not formed this intention until March 2018. Contrary to Mr Jarman's submissions, the judge expressly considered the matters on which the father relied both individually and collectively, including the mother's correspondence in early 2018 which, contrary to Mr Jarman's submission, the judge did not ignore as she referred to it in paragraph 95 of her judgment.

66. Indeed, I would agree with Mr Hames' submission that the judge's analysis was both methodical and meticulous. The judge was plainly aware of the need to conduct a critical appraisal of the mother's evidence having regard to the matters relied on by the father. The judge specifically referred to the need to consider why the mother was doing what she was doing and whether they revealed her true intentions which she was seeking, in part, to hide by acting clandestinely.

67. The judge expressly rejected the submission that the mother had been acting clandestinely or with any intention to deceive. In this respect, I do not think that Mr Jarman's criticism of the judge's references to, what might be called, welfare issues is fair. The judge addressed these matters for the purpose of considering credibility and when addressing Mr Jarman's submission that the mother had acted clandestinely.

68. At its core, Mr Jarman's submission is that the judge gave insufficient weight to aspects of the evidence when determining the issue of the mother's intention. I reject this submission because, as referred to above, in my view the judge gave the weight she was entitled to give to the various evidential elements when determining when the mother decided she was not returning the children to Australia. She conducted an appropriately critical appraisal and decided that the mother's actions and emails did not demonstrate an intention contrary to that given by the mother in her oral evidence. This was clearly a finding which was open to the judge and one which, I am satisfied, was based on a sound evaluation of the effect of the objective evidence when determining the issue of the mother's intentions. I would add, finally on this issue, that the recital relied on by Mr Jarman was one of the matters specifically considered by the judge and weighed by her with the other evidence.

69. On the issue of habitual residence, I see the force in Mr Jarman's challenge to the judge's conclusion that the children's roots in Australia were "rather shallow". I also accept that it could be argued that the judge gave insufficient weight to the fact that the children's stay in England was initially intended by both parents to be for a very short period and was then extended for what was expected, again by both parents, to be a temporary period.

70. However, having carefully considered the submissions made by both parties, I have come to the clear conclusion that the judge's determination was one which was reasonably open to her. She has undertaken a sufficiently broad assessment and explained why, in the context in particular of the children's existing "real ties" with England, she concluded that their stability and integration "grew closer and faster as a result" and that the "centre" of their lives, per *HR* at [42], had become England by late December 2017/Janaury 2018. I am satisfied, again, that the judge gave the weight she

was entitled to give to the various evidential elements when determining the issue of habitual residence including the nature of the children's residence in England and the quality of their connections with Australia.

71. I would also just note that, having regard to my rejection of the father's challenge to the judge's finding as to the date of the repudiatory retention, Mr Jarman would have had to persuade this court not only that the judge's determination on habitual residence was wrong but also that the children were not habitually resident by March 2018.

72. The above comprise my reasons for the appeal being dismissed.

LORD JUSTICE FLAUX:
73. I agree.

LORD JUSTICE LONGMORE:
74. I also agree.

IT IS ORDERED

1. The appeal against the order of 18 October 2018 is dismissed.
2. The appellant shall pay the costs of the appeal to be the subject to a detailed assessment if not agreed.

Dated: 1 March 2019