Neutral Citation Number: [2022] EWHC 3405 (Fam)

Case No: DE22C50190

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2022

Before :

MRS JUSTICE LIEVEN

- -

Between :

DERBYSHIRE COUNTY COUNCIL

Applicant

and

MOTHER

First Respondent

and

FATHER

Second Respondent

and

A and B
(children, through their Children's Guardian)

Third and Fourth Respondents

- -
- -

Mr Richard Hadley (instructed by **Derbyshire County Council**) for the **Applicant**
Ms Hannah Markham KC and Ms Claire Meredith (instructed by **JMW Solicitors**) for the **First Respondent**
Mr Patrick Bowe (instructed by **Eddowes Waldron Solicitors**) for the **Second Respondent**
Ms Kerry Boyes (instructed by **Kieran Clarke Green Solicitors**) for the **Third and Fourth Respondents**

Hearing dates: **18 November 2022**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 December 2022 by circulation to the parties or their representatives by e-mail.

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MRS JUSTICE LIEVEN

This judgment was handed down in private on 19 December 2022. It consists of 42 paragraphs. The judge gives leave for it to be reported in this anonymised form as Pseudonyms have been used for all of the relevant names of people, places and companies.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by his or her true name or actual location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Mrs Justice Lieven DBE :

1. These are care proceedings under section 31 Children Act 1989 ("CA") concerning two children, A aged 8 and B aged 3 ½. The two issues covered by this judgment are the question of whether the children were, at all relevant times, habitually resident in England and Wales, and an issue as to interim contact with the parents.

2. The Local Authority ("LA") was represented by Mr Hadley, the Mother was represented by Ms Markham KC and Ms Meredith, the Father was represented by Mr Bowe and the children were represented, through the Child's Guardian, by Ms Boyes.

3. On 9 July 2022 B was taken to hospital by her parents. She had sustained a penetrating stab wound to her back caused by a kitchen knife. She required urgent surgery, without which the injury may have been fatal, although happily she is now making a good recovery.

4. Both parents were arrested and interviewed. Neither parent has given a comprehensive account of B's injury. They both accept they were in the kitchen when the injury occurred. They both refer to the injury as an "accident", but neither explains how it occurred.

5. The children were initially placed in the care of maternal grandparents. Both parents were released on bail with conditions that they did not have contact with children under the age of 16 save with the permission of the LA.

6. At the first hearing on 22 September 2022 Interim Care Orders ("ICO") were made in respect of both children. The parents disputed the court's jurisdiction on the basis that they said the children were habitually resident in Spain. The parents were ordered to produce statements and the matter was listed before HHJ Williscroft on 18 October 2022. She determined that the children were habitually resident in Spain, and directions were made for a case summary to be drawn up to be transmitted to the Spanish Courts. The Judge continued the ICO on the basis of Article 11 of the 1996 Hague Convention on the Protection of Children ("the Hague Convention"). The Mother sought permission to appeal the ICO. The Judge refused permission to appeal. On 11 November Moylan LJ also refused permission to appeal.

7. On 26 October 2022 HHJ Williscroft indicated to the parties that she wished the issue of habitual residence to be reconsidered at a further hearing because her attention had not been drawn to the decision of MacDonald J in *London Borough of Hackney v P* [2022] EWHC 1981 (Fam). MacDonald J found that the relevant date for determining habitual residence was the date of the hearing, whereas HHJ Williscroft had proceeded on the basis that the relevant date for determining habitual residence was the date the Court was seised of the matter.

8. The matter was then listed before me, as the Family Division Liaison Judge for the Midlands, to consider afresh the issue of habitual residence.

9. The Court exercises jurisdiction under the Hague Convention by way of either: habitual residence (Article 5); best interests (Articles 8 and 9); or emergency powers (Article 11). The relevant articles are as follows:

*"**Article 5***

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction."

*"**Article 8***

(1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

- *request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers necessary, or*

- *suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.*

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

(a) a State of which the child is a national,

(b) a State in which property of the child is located,

(c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,

(d) a State with which the child has a substantial connection.

(3) The authorities concerned may proceed to an exchange of views.

(4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests."

> *"**Article 9***
>
> *(1) If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either*
>
> - *request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that state, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or*
>
> - *invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.*
>
> *(2) The authorities concerned may proceed to an exchange of views.*
>
> *(3) The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request."*

> *"**Article 11***
>
> *(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.*
>
> *(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.*
>
> *(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question."*

10. The first issue is therefore under Article 5 and the question of where the children are habitually resident at the relevant date.

11. However, the date on which to determine habitual residence has become a matter of some legal controversy. In *London Borough of Hackney v P* [2022] EWHC 1981 (Fam), MacDonald J held at [106] that the relevant date on which habitual residence will fall to be assessed under Article 5 of the Hague Convention is the date of the hearing. In *H v R* [2022] EWHC 1981 Peel J had found that the relevant date was the date the court was seised, albeit that was in a case where the second country was a non-Hague

signatory state (Libya). For the reasons that I set out below, I have reached the conclusion that the relevant date is the date the court is seised, even though Spain is a signatory to the Hague Convention. The issue turns on the interpretation of Article 5 of the Hague Convention.

12. In *Hackney* MacDonald J sets out at [59] to [66] the relevant provisions and caselaw on the point. He then sets out his conclusions at [106] to [111]. I do not need to repeat all these passages, but I have had close regard to them.

13. The essential argument is that under Brussels IIa Article 8, express provision was made that the relevant date for determining jurisdiction was *"at the time the court is seised".* In contrast, Article 5(1) does not specify the date on which the question is to be determined. The issue is how that date is to be determined in the absence of express words in the Hague Convention. MacDonald J in reaching his conclusion places very great weight on the Explanatory Report to the Hague Convention, which I will refer to below.

14. The approach to the interpretation of international treaties is set out in Article 31 of the Vienna Convention on the Law of Treaties 1996. This states:

> *"**Article 31 General rule of interpretation***
>
> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
>
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> *(a) any agreement relating to the treaty which was made between all parties in connection with the conclusion of the treaty;*
>
> *(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
>
> *3. There shall be taken into account, together with the context:*
>
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
>
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
>
> *(c) any relevant rules of international law applicable in the relations between the parties.*
>
> *4. A special meaning shall be given to a term if it is established that the parties so intended."*

15. MacDonald J refers at [62] of ***Hackney*** to paragraphs [42] and [84] of the Explanatory Report to the Hague Convention, which state:

> *“"42. Where the change of habitual residence of the child from one State to another occurs at a time when the authorities of the first habitual residence are seised of a request for a measure of protection, the question arises as to whether these authorities retain their competence to take this measure (perpetuatio fori) or whether the change of habitual residence deprives them ipso facto of this jurisdiction and obliges them to decline its exercise. The Commission rejected by a strong majority a proposal by the Australian, Irish, British and United States delegations favourable to the perpetuatio fori. Certain delegations explained their negative vote by their hostility to the very principle of perpetuatio fori in this field and wanted jurisdiction to change automatically in case of a change of habitual residence, while other delegations thought that it would be more simple for the Convention not to say anything on this subject thereby abandoning to the procedural law the decision on perpetuatio fori. The first opinion appeared to be the more exact in the case of a change of habitual residence from one Contracting State to another Contracting State. Indeed it is not acceptable that in such a situation, which is located entirely within the interior of the scope of application of the Convention, the determination of jurisdiction be left to the law of each of the Contracting States. Moreover this solution is one which currently prevails for the interpretation of the Convention of 5 October 1961. On the other hand, in the case of a change of habitual residence from a Contracting State to a non-Contracting State, Article 5 ceases to be applicable from the time of the change of residence and nothing stands in the way of retention of jurisdiction, under the national law of procedure, by the authority of the Contracting State of the first habitual residence which has been seised of the matter, although the other Contracting States are not bound by the Convention to recognise the measures which may be taken by this authority."*
>
> *And:*
>
> *"84. The rules of jurisdiction contained in Chapter II, which have been analysed above, form a complete and closed system which applies as an integral whole in Contracting States when the child has his or her habitual residence on the territory of one of them. In particular, a Contracting State is not authorised to exercise jurisdiction over one of these children if such jurisdiction is not provided for in the Convention. The same solution prevails in the situations described in Article 6, where the child has his or her residence in a Contracting State. In the other situations the mere presence of the child gives rise to the application of Articles 11 and 12, but these articles do not exclude the broader bases for jurisdiction that the Contracting States might attribute to their authorities in application of their national law; only, in this case, the other Contracting States are not at all bound to recognise these broadened bases for jurisdiction which fall outside of the scope of the Convention. The same thing is true, for even stronger reasons, for the children who do not have their habitual*

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

16. With the greatest of respect, I find these passages rather opaque. What seems to be drawn from them is that the Commission did not agree that the principle of perpetuatio fori applies to this Convention. That was the view of Peel J in ***H v R*** at [37]. However, the Explanatory Report does not make clear how habitual residence in Article 5 is to be determined. Importantly in my view, the Report is not “an agreement” between the parties regarding the interpretation or application of the treaty within the terms of Article 31 of the Vienna Convention.

17. At [107] to [111] MacDonald J set out his conclusions, placing significant reliance on the Explanatory Report:

> *“107. Where a Convention is silent on a particular point, in this instance the date on which habitual residence falls to be determined for the purposes of Art 5 of the 1996 Convention, the Convention falls to be construed in accordance with the ordinary meaning to be given to its terms in context and having regard to the object and purpose of the Convention (see the Vienna Convention on the Law of Treaties 1936 Art 31). Within this context, two matters fall to be noted at the outset. First, the purpose of the connecting factor of habitual residence in Art 5 of the 1996 Hague Convention, which article determines which Contracting State has substantive jurisdiction to pursue the objects and purpose of the Convention, is to ensure that the jurisdiction with the closest factual connection to the child's family and social life, and the jurisdiction thereby best placed to take substantive decisions regarding the welfare of that child, is the jurisdiction that takes decisions concerning the child's welfare. Second, the Convention contains no principle of perpetuatio fori, by which a Contracting State seised of proceedings in respect of a child habitually resident in that Contracting State will retain jurisdiction for the duration of those proceedings, even if the child loses habitual residence there and becomes habitually resident in another Contracting State.*
>
> *108. Within this context, the Explanatory Report makes clear that, in circumstances where the Convention forms a complete and closed system as between Contracting States when it has been determined that the child has his or her habitual residence on the territory of one of them, if habitual residence changes from one Contracting State to another Contracting State, the latter Contracting State will gain jurisdiction immediately on*

that event occurring for the purposes of Art 5(2) of the 1996 Convention. The consequence of this position is that a Contracting State cannot proceed on the basis that, once it is seised of proceedings on the date of issue (or such other relevant date), it will retain jurisdiction under Art 5(1) of the 1996 Convention until the conclusion of those proceedings. Further, and in these circumstances, in the absence of the principle of perpetuatio fori, it will be the factual situation during the course of proceedings, and whether that situation continues to amount to habitual residence as a matter of fact, that determines whether substantive jurisdiction subsists under Art 5(1). In the absence of the principle of perpetuatio fori, it is further axiomatic that habitual residence will fall to be assessed at the current hearing, and not by looking back to an earlier hearing in the proceedings. Indeed, the logical consequence of the foregoing position is that the question of habitual residence will fall to be confirmed at each hearing, albeit that that exercise is unlikely to be an onerous one in the vast majority of cases. Within this context, where the proceedings reach a final hearing the question of whether the court has substantive jurisdiction pursuant to Art 5(1) of the 1996 Convention will still be a potentially live one. This is a fundamental change from the position that pertained under Art 8 of Brussels IIa prior to the departure of the United Kingdom from the European Union.

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

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

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

18. The question of when to decide whether the Court has jurisdiction on the basis of the child being habitually resident in England is not straightforward. However, I approach the matter by applying Article 31 of the Vienna Convention. Article 31(1) states that a treaty shall be interpreted in accordance with the ordinary meaning of the terms within it, and in the light of its object and purposes.

19. The words of Article 5 do not assist because they say nothing about at what stage habitual residence should be determined. The question of whether jurisdiction is determined at the outset of proceedings, or is a floating issue throughout the proceedings, is simply not dealt with.

20. I turn therefore to the "object and purposes" of the Hague Convention. The objects are set out in Article 1, and Article 1(a) refers to measures for the protection of the person or property of the child. The overarching purpose of the Hague Convention must be the protection of the child.

21. If habitual residence and therefore jurisdiction has to be revisited at every hearing, then that creates very significant practical difficulties and may be seriously detrimental to the interests of the child. It creates a strong incentive in abduction cases, and potentially in other cases, for one party to delay proceedings in order to move the child's place of habitual residence, and therefore the jurisdiction of the Court, to the new country.

22. MacDonald J considered this issue in [110] of ***Hackney***, stating that it emphasised the need for robust case management to avoid substantive jurisdiction being determined by procedural default. However, robust case management in many cases will not solve the issue. In the present case, the delays are a product of the need for expert medical evidence, not any default of the parties or lack of robust case management.

23. The factual position is that although, for the reasons I have explained below, I have no doubt the children were habitually resident in Spain when these proceedings commenced, there is a real possibility that by the time of a final hearing their habitual residence will have shifted to England. They will have become settled in English schools and with friends and networks here. The likelihood of habitual residence

shifting this way is increased by the caselaw now emphasising the child's integration as the critical factor over the intentions of the parents. If the test depended primarily on the parents' intentions, then habitual residence would be slow to change. But if the court focuses on the child's integration in the second country, then particularly with children such as these, with extensive familial ties in England, habitual residence may shift relatively quickly. It is inevitable that with the passage of time, a child's factual integration into the country s/he is living in will increase. Therefore, the possibility of habitual residence as a matter of fact moving between the date the Court is seised and the date of a final hearing will itself increase.

24. Further, delay is endemic in the system. An interpretation of the Hague Convention that leaves the Court's jurisdiction at the mercy of such delay, whether being deliberately encouraged by a party or not, is an interpretation which does not advance the protection of the child. The jurisdiction of the Court becomes inherently uncertain, and therefore the way the child's future is to be decided itself becomes potentially unclear. An example of this is a case that has proceeded on the basis of habitual residence being in the first country, but then when it comes to the final hearing a finding that habitual residence has shifted, meaning that welfare decisions are now to be made in the second country. It is also potentially wasteful of judicial and administrative resources because the procedures for transfer and liaison under the Hague Convention will be rendered pointless because by the final hearing the child has become habitually resident in England. Therefore, allowing habitual residence to shift in this way creates uncertainty with the process that cannot be beneficial to the welfare of the child.

25. I accept that the thrust of the Explanatory Report appears to be that habitual residence and thus jurisdiction is not to be fixed when the Court is seised. I agree with Peel J in *H v R* at [40] that that is what it appears to say. However, the Explanatory Report is not listed in Article 31(2) as part of the "context" of a Convention and is not itself an agreement or practice within Article 31(3). It is possible it might be argued to be "a special meaning …. That the parties so intended", but the intention of the parties is simply unclear. The most I take from the Explanatory Report is that there was no consensus between the parties and therefore the only formal statement of intention is the absence of words within Article 5 (or the rest of the Hague Convention).

26. In my view, the purpose of the Hague Convention is best met by habitual residence, and therefore jurisdiction, being determined when the Court is seised, for the reasons I have given. In the light of the fact that the Hague Convention is silent on the issue, it is open to the Court to adopt that approach.

27. I turn to the facts of this case. The tests for habitual residence were comprehensively summarised by Hayden J in *Re B (A Child) (Custody Rights Habitual Residence)* [2016] 4 WLR 156. This summary was endorsed by the Court of Appeal in *Re M (Children) Habitual Residence 1980 Hague Child Abduction Convention)* [2020] 4 WLR 137, save for point (viii) which is omitted, below:

> *"i. The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A, adopting the European test).*
>
> *ii. The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry*

must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, Re KL).

iii. In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': A v A (paragraph 80(ii)); Re B (paragraph 42) applying Mercredi v Chaffe at paragraph 46).

iv. It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (Re R);

v. A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (Re LC). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows, the child's integration which is under consideration.

vi. Parental intention is relevant to the assessment, but not determinative (Re KL, Re R and Re B);

vii. It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (Re B); (emphasis added);

viii. […]

ix. It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (Re R and earlier in Re KL and Mercredi);

x. The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (Re R) (emphasis added);

x. The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (A v A; Re B). In the latter case Lord Wilson referred (para 45) those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move;

xi. Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was

> *important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (Re R).*
>
> *xii. The structure of Brussels IIa, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, "if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former" (Re B supra)."*

28. In *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4, at [45] Lord Wilson introduced the concept of the see-saw, and said at [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), 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."*

29. Applying those tests to the fact of this case, I agree with HHJ Williscroft, that as at 22 September 2022 the children were habitually resident in Spain. The evidence in this case is set out in witness statements by the Mother and the Father. The Mother's family had had a house in Spain for many years. During the pandemic, the parents had decided to move to Spain, albeit the Father's work remained in the UK. There was considerable planning for the move, including a lengthy process to obtain visas to allow the Mother and children (including an older sister who is still in Spain) to remain in Spain beyond the period of a three month tourist visa. The post-Brexit position in Spain is that for

people seeking long-term residence, they may be granted a five year visa and can then apply for permanent residence. The Mother and children have been given five year visas.

30. The children moved to Spain in August 2021, giving up their school and nursery places in the UK. A started school in Spain, and B started at nursery. Both remained in those placements until Summer 2022. The Mother is integrated into the ex-patriate community in Spain.

31. The family were preparing to sell the house in England, although they had not yet done so. They came back to England in July 2022 for a holiday. The Father continued to work in England, but frequently visited the family in Spain.

32. I have no doubt that on this evidence, and applying the relevant caselaw, that the children were habitually resident in Spain on 22 September 2022 when the Court was first seised of the matter. The children were integrated into the community in Spain by having attended school/nursery for a school year and having doubtless made the friends and connections that went with that. The evidence that the parents intended this to be a permanent, or at least long-term move, and had made all the practical arrangements that went with that intention, is clear from the visa applications. This was an ex-pat family so the nature of the roots and integration in Spain are rather different than would be the case with a Spanish family. However, within the context of that lifestyle, the children were integrated in Spain.

33. However, all parties now agree following the decision of Moylan LJ on 11th November 2022 that the Court has the power to make ICOs in this case pursuant to Article 11. There is no doubt that the circumstances which gave rise to the ICOs were urgent and the children were in need of protection. B had suffered a very serious injury in circumstances which were largely unexplained and could give rise to significant risks.

34. The next question is therefore whether the English Court is "better placed" under Article 9 than the Spanish Court to assess the child's best interests and, if so, then a request may be made under Article 9 that the English Court be authorised to exercise jurisdiction. The approach to very similar provisions in Brussels IIa were considered by the Supreme Court in *Re N* [2016] UKSC 15 and by Munby J in *AB v JLB (Brussels II Revised: Article 15) UI* [2009] 1 FLR 517:

> *"13. First it [the court] must determine whether the child has, within the meaning of Article 15(3), 'a particular connection' with the relevant other member state … Given the various matters set out in Article 15(3) as bearing on this question, this is, in essence, a simple question of fact. For example, is the other member of state the former habitual residence of the child … or the … child's nationality …*
>
> *Secondly, it must determine whether the court of that other member state 'would be better placed to hear the case, or a specific part thereof'. This involves an exercise in evaluation, to be undertaken in the light of all the circumstances of the particular case.*

> *Thirdly, it must determine if a transfer to the other court 'is in the best interests of the child.' This again involves an evaluation undertaken in the light of all the circumstances of the particular child."*

In *Re N*, Lady Hale set out detailed consideration of the issues of "better placed" and what are the best interests of the child. At [43] she said:

> *"43. It is the case, as argued on behalf of the mother, that the 'better placed' and 'best interests' questions are inter-related. Some of the same factors may be relevant to both. But it is clear that they are separate questions and must be addressed separately. The second one does not inexorably follow from the first.*
>
> *The question remains, what is encompassed in the 'best interests' requirement? The distinction drawn in In re I remains valid. The court is deciding whether to request a transfer of the case. The question is whether the transfer is in the child's best interests. The focus of the inquiry is different, but it is wrong to call it 'attenuated'. The factors relevant to deciding to question will vary according to the circumstances. It is impossible to be definitive. But there is no reason at all to exclude the impact upon the child's welfare, in the short or the longer term of the transfer itself. What will be its immediate consequences? What impact will it have on the choices available to the court deciding upon the eventual outcome? This is not the same as deciding what outcome will be in the child's best interests. It is deciding whether it is in the child's best interests for the court currently seized of the case to retain it or whether it is in the child's best interests for the case to be transferred to the requested court."*

Then she goes on to refer to the principles of comity and mutual respect between jurisdictions.

35. Again, the parties agree that the English Court is in a better position to determine the facts of the present case, in particular what happened to B on the evening of 9 July 2022. I agree that is clearly the case. The incident took place in England, all the witnesses, both of fact and the medical witnesses, are present in the UK and all speak English rather than Spanish. Therefore, it is appropriate that a request under Article 9 be made and in the interim this case is case managed towards a fact finding hearing in the Derby Family Court.

36. The remaining issue that I considered at the hearing was that of interim contact between the parents and the children. The children are currently placed with a maternal uncle who has been subject to a positive viability assessment.

37. They have direct contact with their parents five times per week, three times in a contact centre and twice at home with the uncle, but always with professional supervision by two supervisors. There is also indirect contact through FaceTime which is unsupervised but "supported" by the uncle. The only issue before me is whether that level of supervision is proportionate and necessary.

38. The parents both accept that contact needs to be supervised but submit that such supervision should be by the uncle or grandparents, all of whom have been positively

assessed. The parents asked that the contact should be at the uncles' home save for one session per week at the contact centre. It was agreed that the Court has the power to make orders about contact pursuant to s.34(2) CA.

39. It was not entirely clear to me what the justification for ongoing professional supervision is. There was some suggestion that the LA needed to monitor contact for the purposes of assessing the parents. However, I accept the parents' position that the LA have copious evidence, in part from many months of supervised sessions, as to the relationship between the children and the parents. I note that there are no concerns about the quality of contact or the appropriateness of the parents' interactions with the children.

40. There was also a suggestion of a need for professional supervision in order to safeguard the children in the light of the injury to B on 9 July. There is no doubt that that was a very serious incident which requires to be fully investigated in a fact finding hearing. However, in determining contact it is necessary and important to focus on the specific risk being guarded against, and the proportionality of interferences in the parents' and children's Article 8 rights under the European Convention on Human Rights. There is no evidence of any other incidents of risk or harm to the children, or of any "red flags" in relation to the parents.

41. Importantly, both the uncle and the grandparents, have been positively assessed by the LA. It can therefore be assumed that they are safe and responsible people to protect the children. I can see that in some cases there might be a concern that family members, even if positively assessed, would not be able to ensure the children were protected from their parents at contact because of familial pressure. However, there is no evidence in this case of that type or level of concern.

42. In my view it is disproportionate to require professional supervision, other than once per week, to monitor the parents' relationship with the children. In my view the LA and the Guardian have not focused sufficiently on the specific nature of risks in this case, and whether they justify professional supervision.