OUTER HOUSE, COURT OF SESSION

2020 CSOH 80

P121/20

OPINION OF LADY WISE

In the Petition of

JP

Petitioner

for

Orders under the Child Abduction and Custody Act 1985

against

AAR

First Respondent

and

ENM

Second Respondent

Petitioner: Clark; Brodies LLP
First Respondent: Cartwright; Drummond Miller LLP
Second Respondent: Coutts; Millard Law

28 August 2020

[1] The petitioner, JP, is the mother of a child born in Italy in October 2012, who is the subject of these proceedings. She will be referred to as Bella throughout, a fictitious name to preserve her anonymity. AAR, the first respondent, is Bella's father. He was never married to the petitioner but it is not disputed that as a matter of Italian law he and the petitioner

have shared parental responsibilities and rights in relation to their daughter, including the right to determine where she should reside. The second respondent, ENM, is the first respondent's partner. She and the first respondent have two young children and although the couple are both Italian they have lived in Edinburgh since about 2015. They have two young children who were born in Scotland. The petitioner is a citizen of the Ivory Coast but was born in Switzerland and has lived in Italy for many years. On 18 January 2018 Bella travelled with her father to Scotland, her mother having agreed that she should live with him and his partner here in circumstances that will be referred to in more detail below. The petitioner alleges that she expected Bella back in Italy to start school on 10 September 2018.

[2] It is not disputed that Bella came to Scotland with the petitioner's full agreement. The issue is whether her retention in Scotland is wrongful. Both respondents claim that the Hague Convention is not engaged in this case because they assert that Bella had been habitually resident in Scotland for some time prior to 10 September 2018. It is accepted by the petitioner that the retention cannot be wrongful unless Bella was habitually resident in Italy on that date as none of the parties contend that she had no habitual residence at all. JP's position is that Bella did not lose her habitual residence in Italy because the circumstances in which she lived in Scotland between 18 January and 10 September 2018 were characterised by neglect and change such that her residence did not have the settled quality required for the acquisition of habitual residence. There was considerable involvement during that period by the local authority, which has entered these proceedings as an interested party but was not involved in the hearing that is the subject of this opinion. A number of possible defences to an order for return being made would be in issue if the convention is engaged and so the determination of habitual residence was dealt with at a hearing restricted to the issue of wrongful retention.

Undisputed facts

[3] While there was considerable reference in the affidavits and related material about Bella's departure from Italy and whether or not there was a firm date for her return when she left, some of the essential facts were not in dispute. She had lived with her mother and her maternal grandmother for almost all of the first 5 years and 3 months of her life. She attended nursery school five days per week and the circumstances of her care and upbringing were, at least on the face of it, unremarkable. Bella had relatively limited contact with her father during those formative years. Her mother's financial circumstances were quite straightened. In paragraphs 5 and 6 of her supplementary affidavit (number 105 of process) the petitioner states that she did not tell anyone, including Bella, that she had decided that the child should live in Scotland at least until she found a permanent job after a sewing course she was about to undertake. She was aware that some people around her would think it was a bad idea. The petitioner's mother, TV, confirms in her affidavit that, despite Bella having lived mostly with her since birth, her daughter JP had not informed her of the plan until after the child left for Scotland with her father. TV was angry and states that she did not know why her daughter would make such an arrangement.

[4] On 3 April 2018 Bella was subject to a Joint Investigative Interview (JII) by social work and police authorities in Scotland following allegations made by the child about something sexual that she described as having happened to her while in Italy. In that interview the child described herself as being in Scotland "on holiday". Bella was not registered in school until April 2018, commencing in primary 1 of a local primary school towards the end of that month. On 26 June 2018 Bella was received into the care of the local authority at the request of the first respondent. The respondents had separated earlier that

month and the first respondent and the child had presented as homeless. Bella was accommodated in a foster placement. She started a new primary school on 15 August 2018. She maintained contact with the first respondent initially on one or two occasions per week but sometimes only once per month. The local authority considered the future for the child and discussed the possibility of kinship care, including in Italy. Bella was returned to the care of the respondents who had reconciled, in May 2019. The present petition was raised on 11 February 2020.

Submissions for the petitioner

[5] Ms Clark submitted that Bella was not habitually resident in Scotland on 10 September 2018. She was in foster care and had relatively limited contact with the first respondent and no contact at all at the time with the second respondent. She was attending a new school and her understanding of the English language was limited although progressing. Her circumstances were novel, evolving and unfamiliar. She was dependent on the local authority for care and in turn that authority had delegated the primary care of her to the foster carers. Her placement was intended to be a temporary one and had the first respondent withdrawn his consent to that placement the local authority would most likely have sought a Child Protection Order. Between 26 June and 10 September 2018 Bella's circumstances remained in a state of uncertainty and flux. She had not achieved sufficient integration into her social and family environment to acquire habitual residence in Scotland.

[6] Ms Clark referred to various entries in the detailed social work records which had been lodged in process. She pointed out that, prior to 26 June, Bella's attendance at school had been very sporadic and on 10 September she had been attending her new primary school for only 3 weeks and 2 days. In the earliest period, January to April 2018, she appears

to have been at home where only Italian was spoken. The social work records record concerns by teaching staff that Bella's absence from school was having a detrimental impact on her. She was coping with huge change. She had no process of introduction to her foster carers and had been thrown into a new situation, albeit that Bella embraced that and is reported as not feeling sad. On 17 August 2018 there was a change of social worker and the child is described in the records as clingy and unsettled. On 31 August 2018 at her second meeting with that new social worker Bella is described as "shy but happy to come along". No further meetings with the social worker took place before 10 September.

[7] In essence there were two periods of a lack of familiarity for the child, first between January and June 2018 and then again between late June and early September 2018. While the placement in care did not negate the possibility of Bella acquiring habitual residence in Scotland Ms Clark submitted that the degree of stability and integration was what mattered, whether a child was cared for by her parents or by some other person or body. Bella was not integrated in Scotland on 26 June 2018 because during the first of the two periods she had been in an Italian speaking home, had no friends and had been kept from school. That was not conducive to the acquisition of a new habitual residence. During the second period between the end of June and 10 September Bella shared her foster placement with other looked after children and her circumstances remained in a state of flux. Ms Clark relied particularly on the local authority's consideration of the possibility of kinship care in Italy as indicative of Bella not being a child settled in Scotland. There was no real anticipation of what her immediate future would hold. There were references in the social work records to persistent threat by the respondents to return the child to Italy, telling social workers on many occasions that they would do so. While the proposed return would have been to the

paternal grandmother and not to the petitioner that did not detract from the child's lack of settlement in Scotland.

[8] Bella is an Italian child with native Italian speakers on both sides of her family. However, her skin colour is apparently much darker than those of her half-siblings, the children of the first and second respondents. There was some support for a suggestion that she may have been rejected by the respondents due to her skin colour. This has been recorded in the local authority's assessment of need and risk dated 7 August 2018. The child had experienced considerable difficulties in the care of the respondents and had stopped eating, ingested toilet paper and was seen to be rocking back and forth and staring at the wall for an hour when visited by a social worker. She was considered to be a child at risk of harm, the skin on her elbows was broken and her hair was matted and tied up for a long time. She was not able to settle quickly in foster care because of the trauma she had experienced in the six months with the respondents. That period was glossed over in the respondents' materials and submissions. During the period 18 January to 10 September 2018 the persons on whom Bella was dependent were isolated and vulnerable and Italian and the only change that occurred was her removal to temporary care for the last two and a half months of that period. Ms Clark accepted that if there had been no consideration during that period of the possibility of kinship care in Italy her argument would be less strong but she contended that Bella's roots in Italy had not come up completely by September and so she had not completely lost her Italian habitual residence.

[9] Further reliance was placed on a number of entries from the social work records indicating, for example, that by 24 August 2018 there was still no trusted adult in Bella's life. On 9 August that year the petitioner herself had made contact with social services about the issue of Bella going back to Italy to attend school having become aware at the end of June

that her daughter was in the care of the local authority. On 27 June 2018 a social worker had told the petitioner that it was the first respondent who could choose where Bella lived. That was the day after Bella was accommodated and created difficulties for the petitioner in knowing what to do. On 26 July 2018 following telephone calls between the social work department and the petitioner a social worker had told the petitioner that Bella was settled and told the petitioner to seek legal advice. There had also been contact from the petitioner's mother and her maternal aunt with the social work department. Overall the temporary nature of the child's circumstances in September 2018 and the brevity of those circumstances should result in a finding that Bella was not habitually resident in Scotland on that date.

Submissions for the first respondent

[10] Ms Cartwright disputed that the petitioner had put a firm return date on Bella's stay in Scotland. She pointed out that the petitioner stated in paragraph 13 of her affidavit that the parties signed a travel document at the airport on 18 January 2018. The first respondent's position was that he had met the petitioner at a train station to hand over Bella and it was on the 17 January. In any event, the document lodged by the petitioner in support of that contention was notably not signed by the first respondent. There had been no reference by the petitioner to a specified return date until very late in the day.
Ms Cartwright accepted that whether or not there was a specific agreement to return was not determinative of the question of habitual residence on the specified date but she was clear that the first respondent regarded the arrangement as open-ended.

[11] It was accepted on behalf of the first respondent that there may be cases where a child whose parents were fairly isolated in the new country and who was then taken into

care could not acquire habitual residence, but it was not in dispute that a fact dependent inquiry was required and here the facts were supportive of a change. It was noteworthy that the first respondent had moved to Scotland as early as July 2015. He and his partner had two children both born in Scotland and so Bella's father had been habitually resident in Scotland for quite some time before the arrangement made in January 2018. It was also noteworthy that from the outset of Bella living here there had been some contact with social services and that was recorded in the available records. The respondents were living in poverty with very young children and it was highly relevant that they had sought the support of social services themselves. That illustrated a level of integration into the community. They were not hiding, they were not on the run or living outside society but were seeking support to enable them to manage their lives. In any event, Bella's life had not been particularly settled in Italy prior to her departure. Reference was made to court documents lodged in process and which indicated the mother's reasons for dismissing a previous action there. Ms Cartwright submitted that an unsettled life in terms of welfare did not affect the ability to acquire habitual residence in a jurisdiction. While it was acknowledged that Bella had not attended school until April 2018 and that her attendance was sporadic, she had at least been enrolled in school consistent with a requirement of Scottish education law that children attend school from an earlier age than in Italy. The petitioner could hardly criticise the respondents for a lack of attendance at school in Scotland in early 2018 if it had been her intention that the child would start school in Italy in September 2018.

[12] It was noteworthy that this 5 year old child was not told by the petitioner why she was being sent to Scotland. Nothing could turn on the child thinking in April 2018 that she was on holiday because her mother had not told her otherwise. There was sufficient

evidence to conclude that prior to 26 June 2018 Bella had acquired habitual residence in Scotland. Her reception into care was in terms of section 25 of the Children (Scotland) Act 1995 and was a voluntary procedure. It was a choice made by the family as being the best option at that time. Between the end of June and 10 September there was even greater integration in Scotland. Ms Cartwright also relied on various entries from the social work records. For example, on 5 July 2018 Bella was recorded as settling very well and speaking English with good understanding. As this was only 9 days after she was accommodated in foster care it was clear that she was not purely an Italian speaker at that time. The note also stated that her dry elbows were being moisturised and that appointments were being made with the dentist and the optician. She was seeing her father twice per week on an unsupervised basis. On 26 July a letter had been sent to the petitioner advising her that the child was doing well. Against that background and the fact that the petitioner had been involved in court proceedings in Italy on 22 June 2018 and had been advised on 27 June, five days later, that she should seek legal advice, it was noteworthy that there was no mention from the petitioner at that time of Bella being expected to return to Italy on 10 September. By 16 August 2018 Bella was attending the second of her two primary schools in Scotland and her mother was aware of what was going on. There was ample information to infer that the petitioner was aware before that date that her daughter was settled, speaking English and going to school in this jurisdiction such that her previous residence in Italy had been uprooted and settlement in Scotland had taken place. By September the child had friends and hobbies in this country as recorded in the first respondent's affidavit. All of this had taken place with the knowledge of the petitioner's family. It was the case that there were mentions in the records of one or other of the respondents considering a return to Italy but these related to the social worker's discussions with the second respondent and what she

thought the first respondent was thinking. While it was not disputed that the relationship of the respondents had been tempestuous, as a matter of fact they had both remained resident in Scotland throughout.

[13] Taking the period January to September 2018 as a whole, Bella had gradually acquired her habitual residence here and, although the need for external support from social services had increased, it was because the child was already integrated in this jurisdiction that her settlement with foster carers had been so easy. There was no evidence to support that Bella had remained habitually resident in Italy. The social work department's decision to consider kinship care there did not point to a retention of habitual residence. The social work department had taken jurisdiction to look at decision making for Bella's future and had assumed that they had the power to do that whether they had characterised that in terms of habitual residence or not. No party challenged the local authority's right to enter into discussions about Bella's future care.

[14] It was not in dispute that by 26 September 2018 the petitioner was living in Venice. Bella had no connection with Venice, no friendships or other social ties and she would not be familiar with her mother's life there. The petitioner claimed that she had enrolled the child to start school in Italy in September 2018 but provides no details as to where in Italy that would be or what school she had been enrolled in and no documentation had been produced. Ms Cartwright contended that dislodging habitual residence depended on many factors which of course vary with age and circumstances. The only real connecting factor Bella had with Italy by September 2018 was her mother as opposed to a home to which she could easily return. There was simply no information at all about the petitioner's circumstances in September 2018 and it was for her to establish that. On 10 September 2018 Bella was not yet 6 years of age and an assessment of her habitual residence had to be

carried out with that in mind. While she was living in foster care there was an intention that her life in Scotland would be permanent. She was well integrated here and had no continuing base in Empoli where she had lived from birth until January 2018. The mother's actions in having court proceedings in Italy for custody and maintenance dismissed in 2018 on the basis that the child was living in Scotland leant significant support to the first respondent's contention. The first respondent's second plea-in-law should be sustained and the petition dismissed.

Submissions for the second respondent

[15] Ms Coutts on behalf of the second respondent adopted her written submissions which set out the detail of why she too contended that Bella had been habitually resident in Scotland for some time prior to September 2018. It was noteworthy that during the relevant period the petitioner had engaged a lawyer in Italy who had been dealing with the social work department in Edinburgh. That was a different lawyer to the one instructed in relation to child abduction matters in July 2019 some 10 months after the petitioner's alleged date of wrongful retention. The second respondent was in broad agreement with the first respondent's submission in relation to the history of events. The child had made an allegation of abuse during the time she was in Italy to the second respondent and it was the second respondent who had sought help with that from the social work department. ENM had found dealing with that matter and the care of her own younger children very difficult and the social work records should be taken as a reasonably accurate contemporary record of what the parties said at the time.

[16] It was clear that Bella was a vulnerable child. Her mother had difficulties with parenting in the early years and had moved to live with her own mother for support.

Subsequently she had moved to the first respondent's mother looking for support and that had been shortly prior to the decision that Bella should go to Scotland to reside with her father. It was noteworthy that the petitioner was moving to Venice with her new boyfriend at the time. She made arrangements for the child to be cared for by the respondents. It was also the second respondent's position that the agreement had been that Bella would relocate to stay in Scotland indefinitely. On that basis, the move had been a permanent one and Bella's habitual residence had changed when she left Italy. Shortly after her arrival the local authority were told that the custody arrangements had changed and that Bella's mother had transferred custody to her father (Inventory for the Interested Party item 13 page 2). There was also a note in the social work records from 11 April 2018 that the respondents had stated a concern about what they would do if Bella's mum changed her mind about Bella living with them. They were unsure how best to support Bella.

[17] There was some suggestion in the records of harassment by the petitioner and her family of the respondents who had been advised that they were under no legal obligation to speak with that family. Importantly, there were a number of communications between the second respondent and the health visitor and social work department during the second half of May 2018 where the second respondent indicated she could not cope with Bella's behaviour and needed support. There was then some discussion about the sort of supports that could be provided and there was a note of 6 June 2018 that the respondents no longer wanted Bella and thought she should go to Italy. Thereafter, the social work department discussed temporary foster care for Bella and on 18 June 2018 there was a note in the records that the petitioner had been asking for telephone contact with her daughter but that the last time there was contact there was a noted increase in sexualised behaviour by the child. There were some reports of the petitioner threatening the respondents with action if Bella

was not returned to Italy, although the date of 10 September does not appear to have been mentioned. On 26 September 2018 the petitioner's mother had sought Bella's return to live with her but there was no suggestion that the petitioner, who was working in Venice, would have been able to take on the care of Bella herself.

[18] On the basis of these and all of the other facts now known to the court, it could not be said that Bella retained habitual residence in Italy. Not only was the purportedly agreed date for return not mentioned by the petitioner to the social work authorities over a relatively long period, but no action was taken by the petitioner to seek Bella's return until towards the end of 2019 with the current proceedings being raised only in February 2020. It seemed that the date of 10 September 2018 was an invented one. The purpose of Bella coming to Scotland was to be with her father and his partner who were already settled in Scotland and had half-siblings for her here. There was a clear joint purpose and intention on the part of the parties that Bella would settle in Scotland with that family. The alternative would have been moving to Venice with her mother and her mother's new boyfriend. The degree of integration required to alter habitual residence from Italy to Scotland was in the circumstances much less than it would have been if the parental choice had not been joint or if the first respondent and his partner had been less established in Scotland. In the circumstances now known to the court Bella acquired habitual residence in Scotland as early as January 2018 and it had not changed by September. On any view and even assuming there was an agreement between the parties that she would be returned, Bella was always going to live in Scotland for an appreciable period of time for a child of her age. There were no plans for her mother to visit her or for Bella to visit her mother in Italy. The fact that she has not had an easy time in Scotland and has had difficult circumstances here did not alter the position. It was not necessary for Bella's circumstances to have been ideal or even better

than the circumstances that prevailed in Italy. It was enough that there was no plan other than a settled intention that Bella live in Scotland for an appreciable period. If anything, the fact that Bella was accommodated by the local authority on her father's suggestion did not weaken her habitual residence here; in fact it strengthened it. There were serious allegations about what had happened to Bella in Italy by that stage and any discussions about kinship care related to the possibility of the first respondent's mother being a possible carer. Had the first respondent acted on an idea that his mother care for Bella in Italy, the local authority would have intervened and enforced the child's retention in this jurisdiction.

[19] No weight should be attached to the child's announcement at the JII that she was on holiday in Scotland. She had been 5 years old and had not been told by her mother why she was going to Scotland. Interestingly in the JII transcript there was a stage at which Bella stopped the translator translating and said (referring to the translator) "she has got to learn". This was indicative of a high level of understanding of the English language on the part of the child in April 2018. The second respondent was fully conversant in English and Ms Coutts disputed the petitioner's contention that prior to June 2018 Bella had lived in a purely Italian speaking household. She had been well dressed and cared for and was not a neglected child. The dry skin on her elbows did not mean that she was not physically cared for and could happen to any child. There were records of Bella having fun at home and one report of her facing the wall during a visit does not amount to being malnourished or unhappy. In all the circumstances, even if the agreed relocation in January 2018 was not sufficient to change habitual residence immediately, Bella had integrated into life in Scotland before September 2018.

Petitioner's response

[20] Ms Clark submitted that the court should place no real emphasis on the documents from the hearing on 22 June 2018 in the Florence Court. There had been two translations of the document and nothing could be taken from the use of the words "expatriation" and "domicile" where they were used in the different translations and so nothing could turn on what might have been said to the court at that time. So far as the first respondent's intention was concerned there was a reference in the social work case records around September 2018 that he told a social worker he was unsure whether he was going to stay in Scotland. Further, the petitioner did not accept that Bella was a vulnerable child when she was in Italy and the petitioner has continued with her attempts to maintain contact with her child whom she has not seen since January 2018. While there had been some indirect contact, this has been obstructed by the respondents and the last occasion was in January 2020.

The applicable law

[21] The Hague Convention on the Civil Aspects of International Child Abduction is incorporated into domestic law in this jurisdiction by the Child Abduction and Custody Act 1985. Article 3 provides as follows:

> "The removal or the retention of a child is to be considered wrongful where -
>
> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

Article 12 provides that where a child has been wrongfully removed or retained in terms of Article 3 and less than one year has elapsed from the date of the wrongful removal or

retention the authority concerned shall order the return of the child forthwith. There are certain limited defences to a return where wrongful removal or retention is established but none is relevant at this stage. The sole issue for determination is whether the child of the petitioner and first respondent was habitually resident in Italy immediately before her alleged retention in Scotland. There was no dispute between the parties on how the law in relation to habitual residence in the context of international child abduction has evolved in recent years.

[22] In *A* v *A and Another (Children): Habitual Residence (Reunite International Child Abduction Centre and Others Intervening)* [2013] AC 1 the UK Supreme Court examined the traditional view of habitual residence as that had been interpreted in England and Wales against the European Court of Justice guidance and following the implementation of Council Regulation (EC) No 2201/2203 ("Brussels II *bis*"). At paragraph 48 of the judgment Baroness Hale of Richmond, citing the case of *Proceedings brought by A* [2010] Fam 42 decided by the Court of Justice of the European Union and other relevant authorities, drew all of the threads of the previous case law, including European case law, together and made eight relevant points (at paragraph 54). These included that habitual residence is a question of fact and not a legal concept such as domicile (and so there is no legal rule akin to that whereby a child automatically takes the domicile of his parents); that the test adopted by the European court for habitual residence was "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned; and that it is unlikely that such a test produces different results from that previously adopted in the English courts. Baroness Hale specifically expressed the view that the test adopted by the European court was preferable to that earlier adopted by the English courts insofar as they had focused on the purposes and intentions of the parents rather than the situation of

the child. Accordingly any test that preferred the purposes and intentions of the parents should be abandoned in deciding the habitual residence of a child. Further, the social and family environment of an infant or young child is shared with those (whether parents or others) on whom he is dependent. In any case in which habitual residence is at issue it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned. The essentially factual and individual nature of the enquiry should not be glossed with legal concepts which would produce a different result from that which the factual enquiry would produce. Finally the court noted that it was possible that a child may have no country of habitual residence at a particular point in time. The reference to that possibility came from the Advocate General's opinion in the case of proceedings brought by *A*, cited above, at paragraph 45. The possibility of a child having no habitual residence at all during a transitional period was said to be "conceivable in exceptional cases".

[23] In the subsequent case of *In re B (a child)* [2016] AC 606 Lord Wilson in the UK Supreme Court expressed the following view on the way in which the loss of one habitual residence and the acquisition of another operates:

> "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 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."

A recent example of a Scottish case heard by the UK Supreme Court on this issue can be found in *In re R (Children)* [2016] AC 76. There Lord Reed emphasised that it was the stability of the residence that was important, not whether it is of a permanent character. There is 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 (paragraph 16).

Discussion

[24] The first relevant issue to address is that of the circumstances in which Bella came to Scotland. While the parties' intentions are by no means determinative, it is clear from the undisputed facts that they agreed that Bella would be resident in Scotland for an appreciable period of time. The respondents contend that she was sent to live in this jurisdiction without limit of time, in contrast with the petitioner's position that she was to return to Italy to start school on 10 September 2018. Either way, Bella was to live here for at least eight months by the date of the alleged wrongful retention, quite a long time in the life of a five year old child. There are two notable features about the circumstances in which this child came to live in Scotland. First, the petitioner told no one, including Bella herself and her

own mother (TV) with whom the child had lived and to whom she was attached, about the arrangements. If there was a firm date on which Bella would return to Italy, I would have thought it likely that the petitioner would have explained that to her own mother in order to mitigate TV's disapproval. The document produced by the petitioner which, she states, represents an agreement between her and the first respondent that the child would be returned by 10 September 2018 is not signed or otherwise acknowledged by the first respondent and I attach no weight to it. I note that the specific date of 10 September was not raised initially by the petitioner in her complaints to the Social Work Department about what had happened to Bella in Scotland. Had there been a firm agreement to return the child by that particular date, it seems to me to be likely that the petitioner would have raised that at an early stage. Nonetheless, while doubting that there was a firm date fixed between the parties for the child to return to Italy at the time of departure, I will determine the question of Bella's 's habitual residence as at the September date in light of the case now pled. This accords with the guidance given in the authorities, summarised in the case of *In Re R (Children) 2016 1 AC 76.* There Lord Reed (at paragraph 21) reiterated that parental intentions in relation to residence in the country concerned constitute a relevant factor, but not the only relevant factor. Importantly, an intention to live in a country for a limited period is not inconsistent with becoming habitually resident there. Accordingly, in light of the significant period of residence here by September 2018, the unusual circumstances in which the petitioner agreed that her daughter could come and live in Scotland are in this particular case little more than the starting point for examination of the facts.

[25] I will approach the matter by considering two separate periods of time as counsel did in their submissions. First, there is the period between 18 January 2018 and 26 June 2018 the latter date being the date of the voluntary reception of the child into care. Secondly, the

period between late June and 10 September 2018 requires to be considered. Dealing with the first period, counsel for the petitioner highlighted the joint investigative interview (JII) by police and social work authorities following allegations made by Bella about something sexual that she stated had happened to her while in Italy. It is not in dispute that she described herself as being "on holiday" in Scotland at the time of that interview. As her mother had told her nothing of the circumstances in which she was coming to Scotland other than she would return to Italy "soon", it is not surprising that Bella characterised her residence here as a holiday at that time. It does support a contention that at least from the child's own perspective she may not have regarded herself as habitually resident in this jurisdiction, in so far as a 5½ year old child would understand that concept. Although she had been living in Scotland for about two and a half months at that stage she had not yet been attending school and her life in Scotland will have centred around her father, his partner and her two half siblings. She will no doubt still have presented as a little Italian girl, albeit that, as counsel for the respondents pointed out, her understanding of the English language appeared to be sufficient to contradict the translator at one point during the JII. I reject the contention of the respondents that Bella became habitually resident in Scotland almost immediately after arriving here in January 2018 and I reach that conclusion regardless of whether the arrangement between the petitioner and the first respondent was open-ended or not. On the basis of the authorities referred to, it does take a little time for even a relatively young child to put down the necessary roots that represent the necessary degree of integration in the new state or jurisdiction. The uncertainty in the child's mind about the circumstances in which she was resident in Scotland, coupled with the change of care givers and lack of attendance at school or nursery school tend to militate against a rapid integration of the type that might take place almost immediately. I do not wish to criticise

the respondents for Bella's initial lack of attendance at school. Had she remained in Italy, my understanding is that, while she had been attending nursery or pre-school since 2015, she would not have started formal schooling until September 2018; indeed that is the reason why the petitioner states she ought to have been back in Italy by then. The first respondent appears to accept that there was a delay in enrolling her for primary schooling here, but the relevant fact is that when she spoke with the authorities on 5 April 2018, she was not attending a local school and so had not acquired that type of social integration. That changed relatively quickly thereafter and later in April she was enrolled in the first primary school she attended here. From that point on her education was in the English language only and she was beginning to integrate more into the different aspects of the county in which she was residing.

[26] There is little doubt that the respondents faced a number of challenges in coping with their care of Bella at the same time as her two half siblings against a background of financial challenges and the couple's volatile relationship. They had accessed social services from the beginning of Bella's time in Scotland. By 2018 the respondents had been living in this country for some years and I accept Ms Cartwright's submission that it exhibited a level of knowledge of and integration in the system that they sought to access such support themselves. The circumstances in which Bella came to this country are in direct contrast to situations where a parent hides from the authorities because of the circumstances in which the child was removed from his or her habitual residence. The respondents had been living openly in Scotland for some years and had, with the petitioner's agreement, taken Bella into their home to live. No criticism should be levelled at them for seeking necessary support from social services when required. Having regard to the social work records and other available material, I conclude that, while Bella's home life was difficult in some respects and

while she was exhibiting behaviour said to be linked to the disclosures she had made about life in Italy, her existence in this country was taking on more of a permanent character by June 2018. There was no expectation by anyone in Scotland that she would be leaving this jurisdiction. Her family life became unsettled because her primary care givers separated and that created a crisis in terms of the first respondent's accommodation and ability to provide day to day care for his daughter. There was no suggestion from anyone involved in this jurisdiction that a solution might be to return Bella to her mother. In this context the dismissal of the proceedings in Italy is a significant factor. The petitioner had raised proceedings in the court in Florence seeking sole custody of Bella. Those proceedings were dismissed on 22 June 2018 on the basis that Bella had been living in Scotland with her father for some months. Regardless of any difficulties with the translation of the court documents, the petitioner was legally represented and her consent to their dismissal reflected the fact that she had given care of her daughter to the first respondent in Scotland. She did not then act on the suggestion to seek legal advice when she heard of her daughter's reception into care a few days later. These facts add to the sense that Bella's residence in Scotland had, by June 2018, taken on a fairly permanent character.

[27] Ms Clark for the petitioner did not suggest that the reception of Bella into care at the end of June 2018 negated the acquisition by her of a habitual residence in this country. What she contended was that, when considered carefully, the circumstances in which this child had been in Scotland throughout the period in question were so temporary and unsatisfactory as to be insufficiently settled to change her habitual residence from Italy to Scotland. The opposing contention was that a lack of settlement in a welfare sense had no effect upon the child's ability to acquire habitual residence in this jurisdiction. I was advised that there was no English or other comparative authority known to counsel on this point.

The issue of principle is of course well settled in accordance with the authorities to which I have already referred. A factual inquiry of the child's particular circumstances will be determinative of whether her habitual residence changed. What is important, however, is that it is the degree of integration in the new *state* that is the key consideration, not the strength of the child's bond or relationship with the parent who has allegedly wrongfully retained her in the jurisdiction in question. That is clear from paragraphs 45 and 46 of *in Re B (a child)* [2016] AC 606 cited at paragraph 23 of this opinion. By June 2018 Bella had progressed from being an infant or very young child whose ability to settle in a country will be inextricably linked with her caregivers' ability or inability so to settle to a schoolgirl with her own peer group. Her residence in Scotland was by then taking on a more permanent quality.

[28] At the hearing in this case all counsel addressed me on various passages from the social work records that might cast light on the extent of the child's settlement during the second significant period from late June onwards. As indicated, the circumstances in which Bella was received into care voluntarily included the first respondent's homelessness when he and the second respondent separated. It is noteworthy that the petitioner was advised that Bella was in care but there was no active suggestion on her part in response that she would remove her from the care of the local authority. In fairness to the petitioner, it does seem that the Social Work Department may have advised her, incorrectly, that the decision about where Bella should live was by that time solely with the first respondent and it may be that her lack of insistence that Bella be returned emanated from that. She did make a suggestion in August 2018 that Bella might go back to Italy to attend school. On the basis of the available Social Work Department records, it seems that Bella settled well into her foster placement and that her life became calm and secure. She retained contact with her father

during the time she was in care. In August 2018 she started a new primary school and continued to be completely immersed in the English language both at home and at school. I accept the submission made on behalf of the second respondent in written submissions that the concept of being settled in the context of habitual residence does not mean living in ideal circumstances or in better circumstances than prevailed in the previous country of habitual residence. By the summer of 2018 Bella was well settled in Scotland and living in circumstances experienced by a number of children in this country, namely of being in the temporary care of the local authority but maintaining contact with the parent who would normally have day-to-day care and control of them.

[29] In the petitioner's submissions, much was made of the discussions at Social Work Department level of the possibility of kinship care for Bella in Italy during this period. Self-evidently these would not have been discussions in which the child was involved, nor which impacted on her day-to-day life at all. They were simply discussions that one would expect to take place given Bella's country of origin. The fact that she was and is an Italian child should not be conflated with the determination of the fact of her habitual residence on a given date. From a child centred perspective, it seems to me that Bella's roots in Italy had been dislodged quite some time before 10 September 2018. She had not seen those who had been her primary care givers in Italy, her mother and maternal grandmother, for seven months by mid-August 2018. She has an aunt, MU, who lives in Switzerland and to whom the child had been close, but she had not seen Bella since September 2017. The only immediate family member with whom this little girl had contact in the summer of 2018 was her father, the first respondent. She was settled in a temporary foster placement and attending a local school. While the social work records noted on 24 August 2018 that there was still no trusted adult in Bella's life, that is a reflection of the disadvantages that this child

was facing in her young life and not a comment about whether or not she had integrated into life in Scotland. Indeed, had there been any indication in the social work records that Bella was still so attached to her previous care givers in Italy that she had not settled well in Scotland, that would have been a factor that might have militated away from integration in this jurisdiction. There is no such record. The progress Bella made with her English language is narrated by the first respondent in his affidavit (at paragraph 15), where he records also that once attending her new primary school in August 2018 Bella was undertaking many activities including football, dancing and swimming and had made friends at the various clubs she attended. For his part the first respondent disputes that he told the social workers at any time that he might return to Italy. The second respondent certainly seems to have done so and may have indicated to the social workers that the first respondent was also contemplating such a move. Again, however, there is no suggestion that Bella was ever alerted to any possible intention on the part of the respondents to leave Scotland and no active steps appear to have been taken to that end.

[30] The paperwork available to me in this case is voluminous, primarily because the social work records detailing Bella's circumstances over now a fairly long period of time have been produced. Some of those records would be more relevant to a possible defence of a grave risk to the child were she returned to Italy and I am not addressing that in this opinion. It is noteworthy, however, that insofar as there are serious allegations of abuse of Bella, these relate to the time that she was in Italy. There is no suggestion at all that she suffered abuse at the hands of the respondents. In his affidavit, the first respondent sets out some of the very challenging behaviour that Bella presented shortly after making the statements about what she said had happened to her in Italy at the hands of a male friend of her mother. I consider those allegations relevant only insofar as they support a contention

that Bella's life in Italy was not, from the child's perspective, one of completely uneventful stability such that habitual residence there might have been particularly hard to dislodge. Regardless of the truth or otherwise of the allegations made, the child has raised concerns about something she states happened to her in Italy that has caused the Social Work Department in this jurisdiction to make clear that they would take steps to try to avoid her return to her previous care situation there.

[31] From all of the above. I conclude that by about the middle of 2018 and certainly by August 2018 Bella had lost her habitual residence in Italy and acquired a new habitual residence in Scotland. Her time here had not been entirely happy and she had undergone a change of day to day residence albeit with regular ongoing contact with her father. By 10 September 2018 her life was more settled in a welfare sense as indicated above and she had few if any links to her previous life in Italy. Accordingly, I accept the contention of the first and second respondents that the Hague Convention is not engaged in this particular case because the child in question was not habitually resident in Italy on the material date of 10 September 2018.

[32] The proceedings in this case were not raised until February 2020, by which time Bella had been returned to the respondents, who had reconciled. She has been living permanently with them since May 2019. Relations between the petitioner and the respondents have come to an end and apparently Bella has had no contact with her mother of any kind, the previous contact having been by telephone or electronic means only, since January of this year. My decision on the lack of engagement of the Hague Convention in this case has no bearing on the question of what is best for this child's care and upbringing going forward. I can only hope that all of those involved will now focus on that important matter.

Conclusion

[33] For the reasons given above I will sustain the second pleas-in-law for each of the respondents and dismiss the petition.