Neutral Citation Number: [2019] EWHC 219 (Fam)

Case No: FD18P00660

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2019

Before :

MRS JUSTICE LIEVEN

- -

Between :

L	**Applicant**
- and -	
M	**Respondent**

- -
- -

Henry Setright QC and Michael Gration (instructed by **Dawson Cornwell**) for the **Applicant Father**
Edward Devereux QC (instructed by **Vardags**) for the **Respondent Mother**

Hearing dates: 28 – 31 January 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE LIEVEN

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

Mrs Justice Lieven :

1. This is an application by the Applicant father ("the Father") made on 4 October 2018 for the return of the parties' two children, William and Frederick, twins aged 18 months, to the jurisdiction of England and Wales. The application is made pursuant to the inherent jurisdiction of the High Court. The twins were made wards of court by Mrs Justice Gwynneth Knowles on 15 October 2018.

2. The Father was represented before me by Mr Setright QC and Mr Gration, and the Mother by Mr Devereux QC. I am very grateful to them for their assistance.

3. The case concerns two children born in England of Chinese parents. The children left England in December 2017 with their parents. The parents then separated, with the Mother remaining in China whilst the Father returned to England. The Father wishes me to find that this court has jurisdiction and then order the children to return to England, or alternatively make orders about the children in China.

The Issues

4. The issues in broad outline are therefore whether this Court has jurisdiction; if it does have jurisdiction whether it should choose to exercise it, and if so what orders it should make. The sub-issues that I have to determine are as follows:
    a. Does article 10 Brussels II Revised apply? If yes:
    b. At what date should I apply article 10?
        i. were the children unlawfully abducted from England in December 2017? or
        ii. were the children unlawfully retained in China between January -March 2018, and if so at what date?
    c. At whichever date I decide is appropriate, were the children habitually resident in England or China on that date?
    d. If article 10 does not apply, were the children habitually resident in England or China in October 2018?
    e. If I find that the children were habitually resident in England at the relevant date, then should I choose to exercise the English jurisdiction?
    f. If I do choose to exercise the jurisdiction what order should I make?

5. In respect of issue (a) Mr Devereux QC argues that article 10 does not apply and that English caselaw that finds it does apply is wrong, and that I should make a reference to the CJEU on this issue. I declined to make a reference at the start of the hearing, and I will therefore deal substantively with the request for a reference below.

The factual position

6. The Father was born in China on [on a date in] 1987 in Shanxi Province. He is now aged 31. He came to the UK in 2006 as a student and has lived in the UK ever since, with some periods of return to China. His parents continue to live in China, in Shanxi Province, where he was born. He has worked in the financial services sector in London for a number of years, and is currently employed as a financial analyst in the commodities sector with an investment company. He is a citizen of the People's Republic of China, which I will refer to as "China". He has indefinite leave to remain in the UK, granted in August 2015.

7. The Mother was born in China on [on a date in] 1984 and is now 34 years old. She came to the UK in 2003 as a student. The Mother also worked in the financial sector in London initially for Barclays and then for HSBC. She was also granted indefinite leave to remain in August 2015.

8. The parties met in 2009 at the London School of Economics, in London and entered into a relationship shortly thereafter. They got married in Shanxi, China, on 9 February 2011. Following the marriage the Father returned to the UK on 13 February 2011 and the Mother followed on 27 February of the same year. The Father returned to his then employer, Bank of America Merrill Lynch, where he remained until 2012. The Mother commenced work with HSBC in April 2011. They lived in a two bedroom flat owned by the Father in Canary Wharf. In 2014 they purchased a second flat at Buckingham Gate, Belgravia, which is a one bedroom flat.

9. The parties both wished to have children, but discovered that they could not conceive naturally. The Mother therefore undertook IVF treatment in 2016. This took place in Wuxi, China. The Father says that the fact that the IVF was undertaken in China was at the Mother's family's insistence. This only matters because it is the Mother's case that when the parties went to China in 2016 this was initially intended as a permanent move back to China. The Father says that the time spent in China that year was solely for the Mother's IVF treatment and was only intended to be temporary. There is some evidence of the parties discussing buying property in Shanghai, where they were mainly living whilst in China. There is also an exchange of texts about kindergartens and preschools in Shanghai. In my view the evidence supports at least a finding that they were discussing the possibility of staying in China, but they never reached any firm view or agreement.

10. It is not necessary for me to decide precisely what their mutual intentions were in 2016. It may well be that the Mother was hoping that they would settle in China, whereas the Father was intent on returning to the UK. The most that I can say with certainty is that there was no clear mutually concluded decision.

11. In any event in March 2017 the Mother returned to London, at that stage 5 months pregnant. The Mother says that the Father was very keen that the children be born in the UK, as that would entitle them to UK citizenship, and thus strengthen the parents' case for secure immigration status in the UK. The Mother's evidence was that the Father's employment was unstable and that there was always at least the possibility that they would go to live in China.

12. The twins were born in London on [on a date in] 2017. The family lived together in the Canary Wharf flat. They initially employed a nanny for 3 months and the Mother's parents visited between July and September 2017 to help with the babies. From October to December part time nannies were employed and the paternal grandmother came to visit to help with the twins.

13. There is considerable dispute on the evidence between the parties as to the nature of their relationship during this period, and the degree to which the Father was involved with care of the children. In terms of the relationship, it is clear on the evidence that as with many first-time parents, particularly of twins, there were considerable tensions and difficulties around the demands being placed on both parents. There is no doubt that the Mother was

the primary carer as she was at home with the children (her work with HSBC having ended) on a full-time basis.

14. One of the central issues in the dispute over the children's habitual residence is the nature of the parties' intentions at and around the time of their birth, as to where the children should be brought up. The factual evidence is that the children were registered at a number of London private primary schools, including Eaton House School, Belgravia which has a nursery section, where they were given a place. They were also placed on the interview list for schools that considered children from the age of 3. They were registered with a GP in Canary Wharf and had all the relevant immunisations there. They were involved in social activities in London to the degree possible given their very young age.

15. The Mother's case is that she and the Father discussed going to China after the twins' first immunisations, and she says they agreed that she would stay for a period in Sanya, in Southern China, with the twins at a house belonging to her parents. She does not suggest that there was any agreement about how long this arrangement would last for. There is an email dated 27 November in which there is discussion about where in China the Mother will go. The Father's case is that they were only discussing a holiday in China over the New Year.

16. In November flights were booked for the family to fly to Shanghai on 14 December. The Father's flight had a return date on 2 January 2018, and Frederick was booked on his ticket. The Mother's return date was in March and William was on her ticket.

17. The family travelled to China in mid-December 2017, and there is a considerable conflict in the evidence over the circumstances of this trip. According to the Father both parents had decided to take a holiday in China around the Christmas period, in part to see the paternal grandfather who had not yet met the twins. The Father says that the intention was that they would all travel out to China together on 14 December 2017, and that he would return with Frederick on 2 January 2018, whilst the Mother and William would stay with his family until March 2018.

18. However, on 9 December the maternal grandmother became very unwell with kidney stones and was admitted to hospital and had an emergency operation on the 10th. She was discharged from hospital on the 12th. On the same day two helpers arrived from China, apparently sent by the Mother's family, to help with packing and travelling with the twins. The Father says that at this point he asked the Mother why she was packing so much for the trip, and the Mother told him that she wanted a divorce and was going to leave England with the children. The Father says that he did not want to leave London but felt he had no alternative as he did not want the children to leave without him.

19. The Mother's version of events leading up to the departure from London on 14 December is very different. She says that although there had not been detailed discussions about the future, it was agreed that she would go to China and spend some time there with the twins. She said the fact that Frederick was booked on the Father's ticket was only for convenience and there was no intention for him to return with the Father in January. There is an amicable text exchange dated 10 December where she refers to the paternal grandmother's health position, and says she will delay the plan to go back to China and stay in the UK for longer if the Father needs her to, otherwise her parents' friends

(sometimes described as "helpers") will come to the UK to accompany her and the boys on the flight.

20. On the Mother's case the position then became much more fractious on 12 December when the parties had a major argument. The Mother's evidence is that the Father was violent to her, holding her down and pulling her hair. The Father strongly denies this, and his mother also said in evidence that the Father was not violent to the mother. It is however clear that there was a very serious argument and from that point onwards relations deteriorated badly. The Mother's evidence was that at this point she had said she wanted a divorce, but she was not really sure what she was thinking. The main thrust of her evidence was that she just wanted to go home to China to be with her parents for a period.

21. I prefer the Mother's evidence on what was intended in December 2017. If the plan had seriously been for the Father to return to London with Frederick I would have expected some contemporaneous evidence of this. The Father had not been the twin's primary carer up to December, and indeed the Mother was still breast feeding until they went to China in December. The twins had never been separated from each other, or their Mother. The Father said that he had intended simply to find a nanny on a website when he returned. He said that he had spoken to his employers about working flexibly, and there had been a discussion with his boss about sharing childcare with his children, who apparently lived in Bromley. However, I have seen no contemporaneous evidence about discussions with his employers about childcare and flexible working for the period of return, or any evidence of planning for what would inevitably have been a very difficult return. I find it very difficult to believe that it would be that easy to arrange such flexible working, at very short notice, particularly in the financial investment sector. I also find the Father's ideas about childcare and how he would have looked after Frederick alone, both inchoate and unrealistic. It seems to me to be far more likely that the Mother's version of the plan was the true one, namely that she would stay in China for a certain period with both children.

22. I note at this stage that the Father's evidence on this point does trouble me. I do not think that he was being frank in his evidence, and that leads me to doubt his credibility on some other parts of his evidence. It also leads me to think that he has very little understanding of the childcare needs of these young children.

23. What appears to have changed on 12 December is that the Mother said that she wanted a divorce, and was not intending to return to the UK, at least in the short term.

24. The parties arrived in China at Shanghai airport. They were met at the airport by the paternal grandfather, both maternal grandparents and various helpers who came with them. The Father asked the Mother to accompany him to his family home in Taiyuan (in Northern China), but she left with her family and the children for Sanya (in Southern China on Hainan Island). She did not give the Father an address at that stage. On 17 December the Father transferred £45,000 from the joint account to his sole account. He says he did this to protect his financial position, given that the Mother had indicated that she wanted a divorce.

25. The Father returned to England on 2 January 2018, but without either child.

26. On 11 February 2018 the Father travelled to China for Chinese New Year and went to Sanya to see the Mother. It is not disputed that the Mother repeated her request for a divorce and said she did not intend at that stage to return to the UK. The Father says that it was from this time onwards that the Mother's parents, and at one point the Mother, said that if the Father would transfer certain property to the Mother then the divorce would not proceed. The Mother's evidence was that effectively she and her parents were using the requests for money as a way of testing the Father's commitment to the marriage. The Father visited Sanya again in later February before returning to England.

27. In March 2018 the Father consulted solicitors in London, but no legal action was taken in England at that time. The Father had indirect contact with the children up to 25 March, but then had no further contact with them until November. He says this was because the Mother cut off electronic communication. In April the paternal grandparents travelled to Sanya to meet the maternal family. The plan had been for the Father to join them on this trip. He did not do so. He says this was because he had been involved in a road traffic accident in London and was worried about leaving the country. I found this part of his evidence difficult to believe. The accident was apparently minor, and there were no injuries. Even though he says an off-duty police officer was involved, I have seen no evidence of a police investigation and nothing to support a concern that he should not leave England.

28. The Father says that he did not contact the children through this time because the Mother had cut off electronic communications. However, the Father did have the family's address in Sanya, and I have seen no requests via solicitors for direct or indirect contact with the children, nor any requests up to September 2018 for the children to be returned to England.

29. It is not possible for me to judge with certainty what was in each parties' mind at this time. However, I do accept the Mother's evidence that she was highly confused and conflicted in terms of what she intended to do, the degree to which she wanted at various points to reconcile with the Father and her future plans. As I will return to below, this is one of the reasons why I do not think trying to decide the issue of habitual residence on the basis of the parties' intentions is very helpful in this case. Both parents' feelings and plans may very well have changed within very short periods, and indeed may not have been consistent at any particular time. Through 2018, and indeed perhaps up to the present day, the Father has been unwilling to accept the marriage was over and has, at least in his own mind, at various points sought reconciliation.

30. On 26 March 2018 the Mother wrote to the Father formally indicating that she wished to seek a divorce and had hired lawyers in China. There were various emails (via WeChat) at this stage, and the Father sought to talk to the Mother. In April he again asked the Mother to return to London. In May he again saw English solicitors.

31. In June 2018 the Mother filed for divorce in China, which the Father resisted. He said in the court documents that as at February 2018 the parties had been reconciling. The Chinese court rejected the divorce application in October and the Mother is currently appealing that decision. At the present time therefore the Chinese courts have not made any orders, or indeed engaged in any consideration of the position of the children, or what living or contact arrangements should be in place.

32. The Mother had been seeking a job with HSBC in Hong Kong for some time. She had previously worked for HSBC in London, and she said that since 2017 she had been considering the possibility of getting a job in Hong Kong. It was clear from her evidence that she was keen to get back to work, and saw her working as an important and positive step both for herself and the children. In terms of what happened to the twins if she got the job, again I accept that she did not have clear and fixed plans in early 2018. She said that at one point she had thought that she would take the children with her to Hong Kong. Ultimately, she got the job in July 2018. At that point the Mother moved to Hong Kong and has been living there during the week since then. She described the job in Hong Kong as her "dream job". Initially the twins were in Dalian with the maternal grandparents and two nannies. In October the twins travelled from Dalian to Sanya with the maternal grandparents and nannies. They have been living in Sanya since then. I understand the Mother returns to Sanya approximately every second weekend, and during holidays. The rest of the time the twins are looked after by the grandparents and the nannies. Both grandparents are professors, and to the degree they still work this can be done flexibly and remotely, and therefore they do not need to be in Dalian but can reside in Sanya with the children.

33. There has been no assessment of the children's welfare in China, as there are no proceedings in respect of them at the current time. However, from the evidence I have seen there is no ground to believe that they are anything other than well looked after and loved in China, by a combination of the maternal grandparents, nannies and the Mother when she is there. That is not to say that they do not miss the Father, and that it would plainly be strongly in their emotional and psychological interests to have a closer relationship with him. At the present time they have a 10 minute skype/facetime contact each day with the Father.

The law

34. The Father's application is for an order in wardship under the High Court's inherent jurisdiction. The Supreme Court in *A v A (Children: Habitual Residence)* [2014] AC 1 found such an application falls outside s.1 of the Family Law Act 1986, but within the terms of Brussels II Revised (BIIR).

Brussels II Revised

35. Council Regulation 2201/2003 (BIIR) provides as follows:

Article 8

"1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12."

Article 10

*"**Jurisdiction in cases of child abduction***

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

> *(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or*
>
> *(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:*
>
> *(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;*
> *(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);*
> *(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);*
> *(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or*
> *retention."*

36. Therefore, under article 8 the question is whether the children were habitually resident in England in October 2018 when the application to court was made, whereas if article 10 applies the relevant date could be significantly earlier.

Article 10 and the Reference

37. There is an issue in the present case as to whether article 10 applies in circumstances where the children have been moved to a non EU member state and it is alleged that they have been unlawfully retained there. Mr Devereux QC argues that the jurisdictional scope of article 10 is not *acte clair* and I should make a reference to the CJEU on the issue. He argues that the Court of Appeal in In re *H (Children) (Reunite International Child Abduction Centre intervening)* [2014] EWCA Civ 1101, [2015] 1 WLR 863 was wrong to find that article 10 applied in a non EU abduction case and that subsequent authority in the CJEU and commentators have suggested that Re H is wrongly decided. I will consider this issue below. However, given that I am bound by *Re H*, I would have to be of the clear view that it had either been decided per incuriam or that it was wholly inconsistent with subsequent CJEU authority before I would consider it appropriate to make a reference. In my view, it is for the Court of Appeal, or Supreme Court whether in this case or some other, to decide whether to make a reference in this type of situation, whatever the merits of Mr Devereux's substantive arguments.

38. In *Re H* the father had returned to the UK from Bangladesh, leaving the mother and children in Bangladesh. Some 4½ years later the father made an application in England

under the inherent jurisdiction for an order for the children's return. Black LJ (as she then was) giving the only judgment, found that jurisdiction was retained in England under article 10. Given that Mr Devereux QC has asked me to make a reference to the CJEU on this issue, and has argued that ***Re H*** was wrongly decided, it is necessary for me to set out the Court of Appeal's reasoning in a little detail.

39. Black LJ referred at [39] to ***In Re I (A Child)*** [2010] 1 AC 319 where the child was habitually resident in Pakistan but the Court held that article 12 of BIIR applied. She then referred to ***A v A*** [2014] 1 AC 1 where the Supreme Court held that the jurisdiction provisions of BIIR applied, even where the alternative jurisdiction is a non-member state. She quoted [30] of ***A v A***:

> "*Does the Regulation apply where there is a rival jurisdiction in a non-member state?*"
>
> "*The Regulation deals with jurisdiction, recognition and enforcement in matrimonial and parental responsibility matters. Chapter III, dealing with recognition and enforcement, expressly deals with the recognition in one member state of judgments given in another member state: see article 21.1 . But there is nothing in the various attributions of jurisdiction in Chapter II to limit these to cases in which the rival jurisdiction is another member state. Article 3 merely asserts that in matters relating to divorce, legal separation or marriage annulment 'jurisdiction shall lie with the courts of the member state' in relation to which the various bases of jurisdiction listed there apply. Article 8 similarly asserts that the courts of a member state 'shall have jurisdiction in matters of parental responsibility'… Furthermore, article 12(4) deals with a case where the parties have accepted the jurisdiction of a member state but the child is habitually resident in a non-member state, thus clearly asserting jurisdiction as against the third country in question. Hence in In re I (A Child) (Contact Application: Jurisdiction) [2010] 1 AC 139, this court held that article 12 did apply in a case where the child was habitually resident in Pakistan. There is no reason to distinguish article 12 from the other bases of jurisdiction in the Regulation."*

40. And [93] in the minority judgment of Lord Hughes in the same case:

> *"There can be no doubt about the jurisdiction of the English court in relation to the elder siblings. This is not because of any rule of law which prevents one of two parents from unilaterally altering the habitual residence of a child. It is because as the 1980 Hague Convention requires, in the case of abduction, whether removal or, as here, retention, the acid test is habitual residence immediately before the event. They were resident in England. They went to Pakistan only for a three-week holiday. There they have been wrongfully retained. For the same reason, article 10 of Brussels II Revised maintains the jurisdiction of the English court."*

41. At [45] of *Re H*, Black LJ recorded that it was agreed by the parties in that case that article 10 applied where the country concerned was not a member state. Mr Devereux relies on this to suggest that the matter simply went by concession and that *Re H* was decided per incuriam. He therefore argues that it would be appropriate for me to make a reference.

42. However, it is clear from reading *Re H* that the Court of Appeal considered the jurisdictional issue very carefully. At [48] to [50] Black LJ referred to various of the Recitals to BIIR and the policy considerations and said at [51]:

> *"It is not plain therefore that policy considerations do, in fact, clearly dictate that article 10 should be interpreted so as to bring an end to the retained jurisdiction even when it is in a non-member state that the children are now living and not a member state."*

43. She then concluded at [53]:

> *"In those circumstances, working, as the judge did, on the basis that the father's case as to wrongful retention is accepted, jurisdiction is retained in the courts of England and Wales by virtue of article 10 and has not been lost, because the children have not yet acquired a habitual residence in another member state. To decide that there is jurisdiction is not, of course, the same as deciding that jurisdiction will be exercised. That is separate question, to which I will return."*

44. Mr Devereux referred me to the subsequent CJEU decision in *UD v XB* (C-393/18 PPU) where at para 33 the Court appears to suggest that article 10 is limited to intra EU cases. However, the issue did not arise on the facts of that case, and there is no consideration of the terms or purposes of article 10.

45. In the light of the passages in *Re H* set out above, it seems to me impossible to argue that Black LJ did not consider the purposes of article 10 or that the decision is per incuriam. It may be that there is some doubt over the jurisdictional scope of article 10, but in the light of the binding authority on me, I do not consider it appropriate to make a reference. I therefore find that article 10 applies, and I have to consider whether the children were habitually resident in England at the relevant date under article 10.

46. The next legal issue is where the children were habitually resident at the three potentially relevant dates: December 2017 when they left England and Mr Setright argues they were abducted; March 2018 when it is alleged they were unlawfully retained in China; and October 2018 when proceedings commenced in England.

47. The first date is that of the alleged "abduction", and the issue is one of fact for me on the evidence. In other words, whether I find there was an abduction on 14 December 2017 by the Mother. I will deal with this under findings below.

48. The more complicated legal issue is to consider when any unlawful retention arose. Lord Brandon in *Re H:Re S (Abduction: Custody Rights)* [1991] 2 AC 476 at 499 said

"*retention occurs where a child, which has previously been for a limited period outside the State of its habitual residence, is not returned to that State on the expiry of such limited period…"*. The concept has become known as "repudiatory retention". The concept has been considered in detail by the Supreme Court in *Re C (Children)* [2018] 2 WLR 683. Lord Hughes said;

> "*43. When the left-behind parent agrees to the child travelling abroad, he is exercising, not abandoning, his rights of custody. Those rights of custody include the right to be party to any arrangement as to which country the child is to live in. It is not accurate to say that he gives up a right to veto the child's movements abroad; he exercises that right by permitting such movement on terms. He has agreed to the travel only on terms that the stay is to be temporary and the child will be returned as agreed. So long as the travelling parent honours the temporary nature of the stay abroad, he is not infringing the left-behind parent's rights of custody. But once he repudiates the agreement, and keeps the child without the intention to return, and denying the temporary nature of the stay, his retention is no longer on the terms agreed. It amounts to a claim to unilateral decision where the child shall live. It repudiates the rights of custody of the left-behind parent, and becomes wrongful."*
>
> *….*
>
> *"51. As with any matter of proof or evidence, it would be unwise to attempt any exhaustive definition. The question is whether the travelling parent has manifested a denial, or repudiation, of the rights of the left-behind parent. Some markers can, however, be put in place.*
>
> *(i) It is difficult if not impossible to imagine a repudiatory retention which does not involve a subjective intention on the part of the travelling parent not to return the child (or not to honour some other fundamental part of the arrangement). The spectre advanced of a parent being found to have committed a repudiatory retention innocently, for example by making an application for temporary permission to reside in the destination state, is illusory.*
>
> *(ii) A purely internal unmanifested thought on the part of the travelling parent ought properly to be regarded as at most a plan to commit a repudiatory retention and not itself to constitute such. If it is purely internal, it will probably not come to light in any event, but even supposing that subsequently it were to do so, there must be an objectively identifiable act or acts of repudiation before the retention can be said to be wrongful. That is so in the case of ordinary retention, and must be so also in the case of repudiatory retention.*

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

49. It does seem to me that there is some danger of trying to impose a highly legalised analysis in the context of people who were not contemplating legal agreements and who were going through a highly traumatic time of family breakdown. Certainly in the present case no agreements as to what would happen once the children had gone to China were written down. Indeed there was no clear, or really articulated agreement at all between the parents as to where the children would live in the medium term. The situation was fluctuating, and both sides' wishes, intentions and emotions were changing. What I take principally from the passage above, is that the Judge should look for some objectively identifiable act of repudiation of the previously agreed position. I will seek to apply that approach below.

50. The next issue is whatever the relevant date, the correct legal analysis of habitual residence. The correct approach to issues of habitual residence has been extensively considered by the Supreme Court and CJEU in recent years. The relevant authorities and the principles that emerge from them have been very helpfully summarised by Hayden J in *In re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam): [2016] 4 WLR 156:

"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 (para 80(ii)); Re B (para 42) applying Mercredi v Chaffe at para 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) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (Re B – see in particular the guidance at para 46);

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);

xi) 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;

xii) 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).

xiii) 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);

"18. If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child. The approach must always be child driven. I emphasise this because all too frequently and this case is no exception, the statements filed focus predominantly on the adult parties. It is all too common for the Court to have to drill deep for information about the child's life and routine. This should have been mined to the surface in the preparation of the case and regarded as the primary objective of the statements. I am bound to say that if the lawyers follow this approach more assiduously, I consider that the very discipline of the preparation is most likely to clarify where the child is

> *habitually resident. I must also say that this exercise, if properly engaged with, should lead to a reduction in these enquiries in the courtroom. Habitual residence is essentially a factual issue, it ought therefore, in the overwhelming majority of cases, to be readily capable of identification by the parties."*

51. The formulation quoted above was approved by a majority of the UK Supreme Court in *Re C* [2018] 2 WLR 683 at [56].

52. Importantly for the purposes of this case, it is now entirely clear that there is no rule that one parent cannot unilaterally change a child's habitual residence. The correct legal position is fully explained by Black LJ in ***Re H*** at [19] to [37] and confirmed by Lord Reed in ***Re R*** [2016] AC 76 at [17].

53. The next legal issue is whether if this Court does have jurisdiction, I should exercise that jurisdiction, or whether I should instead stay these proceedings.

54. The principles to be applied are those set out in ***Spiliada Maritime Corporation v Consulex*** 1997 AC 460. The application of those principles in the context of a dispute about children, was considered by Wilson J (as he then was) in ***M v M*** , where he said at [9]:

> *"[9] Thus I arrive at a mildly curious situation in which, in respect of the application for a stay, the welfare of the girls is important but not paramount but in which, in respect of the application for an order for return, their welfare is paramount. I am grateful to both counsel for not seeking to present this dichotomy as raising any significant conundrum. Neither of them disputes that these applications stand or fall together. Unless Mr Scott persuades me that it is in the interests of the girls to be returned in the short term to South Africa so that their future can there be decided, the father will not secure an essential part of the relief which he seeks, namely the order for their return. I propose to look at the case first in terms of the girls' welfare and then, if I am satisfied that, judged by that paramount principle, it is indeed in their interests to return, I will, before directing a stay, cross-check that, in reaching that determination, I have in effect concluded, or alternatively that I should proceed to conclude, that the criteria requisite for a stay are satisfied. Of the authorities cited by counsel, the most helpful seems to me to be the decision of the Court of Appeal in Re K (Abduction: Consent: Forum Conveniens) [1995] 2 FLR 211. It is clear from the judgment of Waite LJ at 217F and 219C that, in determining that proceedings referable to the child in Texas should continue, that similar proceedings in England should be stayed and that accordingly the child should be returned to Texas, the Court of Appeal primarily, or perhaps even solely, analysed the issues in terms of the result which would best promote his welfare."*

55. If I do get to this stage of the analysis then I have to decide whether to order summary return. In deciding that issue the welfare interests of the children are paramount, ***Re J (A child)*** [2006] 1 AC 80. The approach to be applied is set out by Baroness Hale at [22-38] and involves looking at the interests of the child.

The application of the facts to the law

56. The first issue is jurisdiction and that turns on the children's habitual residence at the relevant date. I will start by considering the question of what is the relevant date for the determination of habitual residence. There are three dates or periods that might be relevant: 14 December 2017 when the children left England; some date between January-March 2018 when the Mother decided to retain them in China; or October 2018 when these proceedings commenced. As I have explained above, I consider that I am bound by *Re H*, and therefore article 10 of BIIR applies.

57. Mr Setright suggests that the first possible date is 14 December 2017, when the family travelled to China. He argues that at this date the Mother had a fixed intention not to return and therefore there was an unlawful abduction at that date and thus article 10 applied at that date.

58. I should start by making clear that it is obviously the case that the children were habitually resident in England up to 14 December. They had spent their entire, albeit short, lives here and both their parents were here. They were integrated in England, to the degree one would expect given their very young age, by reason of medical care and some socialisation. Mr Devereux accepts this was the case.

59. However, in my view this is not a relevant date under article 10. The Father had undoubtedly agreed that the children would spend some time in China. It is his case that the agreement was that Frederick would return with him on 2 January, but I do not accept his case on this point. As I have said above absolutely no arrangements were made for childcare in early January and it seems to me inconceivable that the Mother would have agreed to one child returning alone without her or the other twin. The common understanding, in my view, was that both children would remain in China with the Mother for a period, although the parameters of that period were not clear, and the parents probably had different expectations about when it would end.

60. To the degree that Mr Setright is arguing that the Mother had a clear intention not to return to England, and therefore there was an unlawful abduction on 14 December I do not think the evidence supports this conclusion. The Mother's intentions on that day as she left England were unclear, probably including to herself. She and the Father had just had a very bad argument, she was upset and as she said she just wanted to go home to be with her parents. It would be wholly unreal to try to ascribe to her a fixed intention at that date to retain the children in China indefinitely.

61. The second possible date under article 10 is the point at which the Mother did decide not to return to England and that the twins would live for the foreseeable future in China. It is not possible to pin this down to one precise date. However, by the end of March 2018 the Mother was unequivocally saying to the Father that she and the children were not coming back to England in accordance with any previous understanding that they would do so in March. How to define the date for a "repudiatory retention" was considered in detail by the Supreme Court in *Re C (Children)* [2018] 2 WLR 683 as referred to above. At [51] Lord Hughes says that wrongful retention must be an objectively identifiable act and that purely internal unmanifested thoughts are best seen as at most a plan. Applying that approach here, in my view the objectively identifiable act comes at the end of March 2018 when the Mother writes to the Father formally indicating that she wants a divorce and that she has instructed lawyers. The instruction of lawyers seems to me to be the kind of objective act the Supreme Court was looking for. To the degree that there had been a

mutual understanding that the Mother and children would return to London at some point, I think the Mother was making clear at the end of March that this was no longer her intention, and she was keeping the children in China. I will therefore take the end of March as the date at which I should determine the children's habitual residence, and therefore for deciding whether this Court has jurisdiction.

62. In deciding whether the children were habitually resident in China or England at the end of March I will use the check list of factors as set out by Hayden J. in *Re B* with reference to the various roman numerals. It is not necessary to go through each and every one of his sub-paragraphs given that there is some overlap between them.

63. Firstly, the habitual residence of the child corresponds to the place it has some degree of integration in a social and family environment and the whole consideration must be child-focused (i and ii). In March 2018 the children were living in China with their Mother, who had been their primary carer throughout their lives, their maternal grandparents and nannies. The evidence suggests that they were well integrated in this environment. It is correct that they were not living with their Father, and they were not in England where they had spent their first six months. However, ethnically and culturally these are Chinese children, and as I understand the specific consideration around integration, it is to cover a situation where a child is physically in a country but not integrated within it. However, in this case these are very young children, so integration into a country or community is necessarily limited. To the degree they could be, these children were integrated into their Chinese social and family environment by March 2018. I note that it is not necessary for the children to be "fully" integrated into the new country.

64. I also note that although in March 2018 the children were only 9 months old and therefore pre-lingual, they were being spoken to most if not all the time in Chinese, which must be another indicator of integration into a society.

65. Mr Setright strongly argued that integration could only be limited because the Mother was hoping to take up a job in Hong Kong; the Father was in England; and there was a necessarily high degree of "instability" in the position. I do not think this is a fair reflection of the true situation. The Mother was by late March clear that the children were staying in China, or perhaps moving over the border to Hong Kong. She was also clear that they were going to reside with the extended maternal family rather than returning to England. There may have been some uncertainty as to whether they might move to Hong Kong at some point, but as at March 2018 their integration was in China. I view the whole issue of the job in Hong Kong as something of a red herring. Although Hong Kong is obviously a different jurisdiction to China, it is very much closer to China and Sanya in particular, than England, both geographically but also in terms of the environment the children were living in.

66. I note that it is the stability of the child's residence that is important, not its permanence (*Re B* xii). Therefore even if there was a possibility that the children might move to Hong Kong at some point, that does not change the conclusion that they were habitually resident in China at the relevant date.

67. Second, *Re B* (v) says that the child will usually have the same habitual residence as the parent who cares for him/her. The Mother was the primary carer, and had been throughout the children's lives. She was plainly habitually resident in China, as shown

both by her actions and the evidence of her intentions. Although she had spent many years in England, by March 2018 she did not have a job in England; she had separated from the Father in England; and she was living with her parents in China.

68. Thirdly, Mr Setright emphasises the shortness of time that the children had been in China (some three months from 14 December to late March) and referred to Lord Wilson's "see-saw" in *Re B (A child) Habitual Residence Inherent Jurisdiction* [2016] 2 WLR 557. However Hayden J in *Re B* (xi) explains that integration can develop quite quickly and this is quintessentially a question of fact. The children's "roots" in England were, particularly given their age, slight. Their family and cultural ties in China on the other hand were extensive. Therefore in my view this was a case where habitual residence could and was changed quite rapidly.

69. Fourthly, I need to consider in determining habitual residence their best interest in the context of proximity (*Re B* (iii) and *Mercredi v Chaffe* 2012 Fam 22 at [46]. As I understand how this factor works at this stage of this analysis, it is whether a finding of habitual residence corresponds with the child's best interests in terms of proximity. The children quite clearly here had a practical connection in China, but also and importantly they were being fully cared for in a loving environment. That is not to underestimate the importance of them being separated from the Father, but there is certainly no conflict here between their best interests and their being found to be habitually resident in China.

70. Fifthly it is now possible for one parent to change a child's habitual residence without the consent of the other parent, *Re B* (iv) and *Re R*. In my view, the Mother's unequivocal position by the end of March had led to the children's habitual residence changing. The law is now clear that this is possible, and the facts of this case support that this is what had happened here.

71. The relevance of intention is potentially a complicated one. There may be cases where the parental intention is absolutely clear, and there is objective evidence, such as an application for a visa in the new country showing a clear intention. Here, the Mother's intention may have been somewhat uncertain in early 2018, and may well have fluctuated. This is hardly surprising given that her marriage had broken down, and she was dealing with a new and emotionally very difficult situation. In my view by late March her evidence suggests that she was clear she was not returning to England, but this is not a case where I think intention alone is likely to be the critical factor.

72. Finally, I fully take into account the fact that the Father was living in England and that the children retained a home in England. Their room and possessions were still in the flat in Canary Wharf. They remained registered at the GP surgery, and as I have recorded above they had been given a pre-school place at Eaton Place School. However, taking the evidence in the round and focusing on the position of the children, as opposed to the position of the Father, I do not think that the remaining links to England outweigh the strong evidence in favour of the children being habitually resident in China. Their links to England were their nationality and the fact that their Father was living here. There may be cases where nationality is important, but given the young ages and the background of these children it seems to me to have little impact on their habitual residence. There is no suggestion that their immigration status in China was precarious. The fact that their

Father was in England, and they had still had a home here is relevant, but does not outweigh all the factors which point to habitual residence having been acquired in China.

73. For these reasons I have reached the conclusion that the children were habitually resident in China not England by the end of March 2018, the date on which they were unlawfully retained under article 10, and therefore I find that this Court has no jurisdiction.

74. If article 10 did not apply, then the relevant date would be October 2018 when the application was made. In the light of what I have said above, self-evidently at that date the children were habitually resident in China.

75. Given that I have found that the Court has no jurisdiction, I do not need to go on to consider whether I would have exercised jurisdiction, and what would have been in the best interests of the children. However, for completeness I should record that I do not think it would have been in the best interests of the twins to bring them back to England, given that they appear to be well settled and well looked after in China. I appreciate that the Mother is away from them during the weeks, and some weekends. However, they are living in an extended family, and this form of childcare is not unusual in China. It plainly would be in their interests to re-establish a close relationship with their Father. I understand he is having some, albeit limited, indirect contact with them. The Mother was very clear that she thought it was in the twins' interests to see their Father, and that she hoped he would visit them regularly in China. It is to be hoped that such contact can take place as soon as possible.
76. I have taken into account the expert evidence as to the legal position in China, and in particular that there are no proceedings at the present time by which the interests of the children are considered. However, given that I have found this Court has no jurisdiction, that evidence does not impact on the findings I have made.