Neutral Citation [2023] EWHC 2728 (Fam)
FD22P00668

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

1 November 2023

Before

JOHN MCKENDRICK KC
(Sitting as a Deputy High Court Judge)

Between

A MOTHER

The Applicant

AND

(1) A FATHER

(2) A GIRL

(3) A BOY (By his CAFCASS Guardian**)**

Respondents

Ms Hilary Lenox instructed by Philcox Gray & Co for the applicant on 16 October 2023 (and subsequently acting in person)
Ms Anita Guha instructed by Osbornes Law for the first respondent
Ms Katy Chokowry instructed by Goodman Ray LLP for the second and third respondents

Hearing Date: 16 October 2023

APPROVED JUDGMENT

This judgment was handed down remotely at 12:00 on 1.11.23 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

The Deputy Judge:

Introduction

1. By way of an application, dated 3 October 2022, made pursuant to the Child Abduction and Custody Act 1985 (incorporating, by Schedule 1, the 1980 Hague Convention on the Civil Aspects of International Child Abduction, hereafter the "1980 Hague Convention") the applicant sought the summary return of the second and third respondents to the Republic of France. The second respondent is a girl, aged almost 14 (I shall refer to her as X). The third respondent is a boy, aged 11 (I shall refer to him as Y). I shall refer to X and Y collectively as "the children". The first respondent is the (separated) husband of the applicant and father to the second and third respondents.

2. Following a two day hearing on 31 July and 1 August 2023, I dismissed the applicant's application for a return order for reasons explained in a judgment dated 8 August 2023 (see [2023] EWHC 2059 (Fam)). When counsel sought to draft an order there was a disagreement between the mother, on one side, and the children and the father, on the other, in respect of the following declarations:

> **"AND UPON THE COURT MAKING A DECLARATION IN THE FOLLOWING TERMS:**
>
> The court is satisfied upon the basis of the evidence that:
>
> 1. Upon this order for non-return having been made by the court (in the event they have not already done so in the 12 months they have been

living in this jurisdiction), the children will acquire a habitual residence in the jurisdiction of England and Wales; and

2. the courts of England and Wales have primary jurisdiction in matters of parental responsibility over the children pursuant to Article 5 of the 1996 Hague Child Protection Convention; and
3. any applications in respect of matters involving the exercise of parental responsibility in respect of the subject children are to be issued and determined in the jurisdiction of England and Wales."

2. I had not been asked to address this relief prior to handing down judgment. I had not resolved the issue of habitual residence in my judgment (see paragraph 108). I was asked to rule on this matter on the papers by way of an email sent by the parties, dated 16 August 2023.

3. Given the importance of the declarations and the dispute between the parties it was not consistent with justice to summarily determine this matter in reliance only on an email from the parties. I did not have submissions on the law or focused evidence on the issue of habitual residence for both X and Y. Nor had the date for the factual assessment of habitual residence been identified or agreed. I informed the parties I was prepared to determine the issue, if an application were to be issued, seeking the necessary declaration. The application was issued on 22 August 2023 by the children's solicitor. The application notice explained that the declarations set out above had sought to be added to the Hague Convention non-return order but were opposed by the applicant.

4. For the purposes of this habitual residence/jurisdiction declarations application, the children are the applicants, however, consistent with my earlier judgment I shall continue to refer to the mother as the applicant, the father as the respondent, and X and Y as the children (or X/Y).

5. The matter was listed to be heard before Judd J on 7 September 2023. The applicant sought an adjournment of this hearing for a variety of reasons, not least that she had only 3 days' notice of the hearing and did not have legal aid in place and time to instruct counsel. Judd J adjourned the hearing, with the agreement of the parties, and directed the parties file and serve witness statements limited to the issue of the children's habitual residence, not exceeding five pages in length and skeleton arguments.

6. At the hearing on 16 October 2023, I heard helpful submissions from counsel. I reserved my decision.

7. On 19 October 2023 the Court of Appeal handed down judgment in *Re London Borough of Hackney v P (Jurisdiction: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 1213 ("Hackney") where Moylan LJ (with the agreement of King and Newey LJJ) sets out material learning on the issue *inter alia* of the relevant date for the purposes of determination of a child's habitual residence in public law proceedings. After consideration of the judgment, I considered whether to seek further submissions from counsel on the relevance of this decision to the application before me, but determined considering the matter myself would be more proportionate and would resolve the issues as swiftly as possible.

8. I find that X and Y were both habitually resident, at the date of the application for the declaration (22 August 2023) and at the date of the hearing (16 October 2023), in England and Wales. I will make a declaration to that effect. I also declare that the courts of England and Wales have jurisdiction to determine all issues in respect of X's and Y's welfare, including disputes as to the exercise of parental responsibility, which includes 'custody and access rights' in respect of them. A declaration to that effect will also be made. I endeavour to set out my reasons for these decisions below.

Background

9. The background to this application is set out in the judgment to determine the underlying Hague Convention application which is found at [2023] EWHC 2059 (Fam). It need not be repeated.

The Written Evidence On Habitual Residence

The Applicant (Mother)

10. The applicant filed and served a short witness statement confined to the issue of habitual residence dated 28 September 2023. She explained in her statement that she found the decision not to return the children upsetting, particularly in the context that her father had recently died. She noted she had communicated with the respondent about the children visiting France in late August for their older sister's wedding. She understands that it might have been the case that X refused to come to France without an order as to her

habitual residence being England Wales in place. She was very disappointed that the children did not come and neither they nor the respondent would 'move' on this issue.

11. She denied the suggestion that without the declaration in place she might try to retain the children in France. She states she does not wish to put the children through more litigation. She thinks the respondent is seeking to alienate her from her children. She states:

> "I am concerned that a declaration that the children are now habitually resident in England and Wales, despite [the respondent]'s abduction in August 2022, will only have the effect of further driving a wedge between me and my children, and removing me from their lives."

12. She states that she understands that a declaration of habitual residence would mean future welfare issues would be litigated in England and feels this would put her at a disadvantage and that she is scared to return to England because of the respondent's previous abusive behaviour. She would like the children to have French nationality.

13. She says that she wishes to appeal the non-return order and on 22 September 2023 issued an application for permission to extend time to appeal the order made, out of time. She asks that the determination of the application for habitual residence be adjourned until after the appeal has been determined. She also states that if the appeal is not successful "the children can be held to be habitually resident in England and Wales" but that she believes it is not 'necessary' for there to be a declaration to that effect.

The first Respondent (Father)

14. In his witness statement dated 29 September 2023 the respondent explains why he supports a declaration in respect of habitual residence:

> "It is extremely important that there is a declaration stating that the children are habitually resident in this jurisdiction as it is hoped that the children will be able to visit their mother in France where she is currently living. I do not think that [the applicant] has accepted the outcome of the Hague proceedings and I fear that she might start proceedings in another jurisdiction, or retain them in France if they travel there."

15. He explains the children's older sister was married in Switzerland in late August 2023. X was supposed to be the flower girl and Y a page boy. The applicant attended the wedding. The children did not attend the wedding because the respondent believed he could not safely take them as the applicant does not accept they are habitually resident in England and Wales.

16. The respondent notes the children have lived in England since August 2022 and have not left the jurisdiction since.

17. He tells me that X has attended her school since January 2023. She is settled and is coping well academically. She attends a range of after school clubs (German language, theatre and boxing). She has a lot of friends. Six are named in his statement. She has been

referred to CAHMS and therapy may soon be arranged but she can speak with a duty clinician meanwhile.

18. Y has attended his school since March 2023. He is in year 6. He was the 'star pupil' of his class last week. He enjoys PE and ran in the school sports day last term. He attends a maths club. He goes to a boxing club. He plays football for his school and at a private club. He is about to start police cadets. He too has many friends, nine are named. He engages with them as a 'gamer,' amongst other ways. He celebrated his recent eleventh birthday with seven of his friends at a party.

19. Both children have 'intermittently' attend the children's church group at a church near their home. Both are registered with a local General Practitioner. Lastly, the respondent explains the children's network of maternal and paternal extended family in England who the children see, including their older sister.

Goodman Ray Position Statement

20. The children's solicitor has provided a position statement dated 4 October 2023 (in additional to their counsel's skeleton argument). Whilst not evidence and therefore not signed by a statement of truth, the statement conveys useful information about the children. No party objected to its admissibility at the hearing.

21. It notes that the children missed out on the experience of the summer wedding and that was 'wholly avoidable'. It notes the children still have not seen their mother since August

2022 and that it is very important contact resumes and that their mother can prioritise them and visit them soon.

22. It states the children are habitually resident in England Wales and the contrary position is unarguable. It states:

> "While this issue was not argued at the hearing, in part the reason for that is that it follows that an order for non-return means that welfare issues are then the subject of determination by the English court."

The Position of the Parties

23. The applicant was represented by Ms Hilary Lennox, counsel. The first respondent was represented by Ms Anita Guha, counsel. The second respondent was represented by her solicitor and counsel, Ms Katy Chokowry. The third respondent was represented through his Cafcass Guardian by the same solicitor and counsel as the second respondent.

24. The applicant previously opposed declarations that the children are habitually resident in England and Wales. She sought an adjournment of the hearing before me because she was un-well. She asked that it be listed for a one hour hearing on the first available date after four weeks. Just prior to the hearing, her solicitor had stated in written correspondence that 'she does not oppose and does not consent' to the declaration that the children are habitually resident in England and Wales. Her counsel informed me at the outset of the hearing that her client's position had changed and that contrary to what her solicitor had told the court, she now sought an adjournment and if it were granted this

would be for the purpose of opposing the declarations sought. Otherwise no submissions were made on the question of habitual residence and the declarations. Following the hearing, the applicant mother wrote to the court directly. She informed me that her position had not been clearly set out and that she was in clear opposition to the declaration sought by the children being made. She set out her disappointment that she was unable to join the hearing (see below).

25. The respondent's position was to support the children's application for the declaration. He strongly opposed the application for an adjournment. Ms Guha set out excerpts from leading authorities and a helpful summary of the law in respect of habitual residence. She placed emphasis on the need for a declaration given the applicant consulted French lawyers in late August 2023 and given the risk the applicant would seek to engage the jurisdiction of the French courts, if the children travel there. She supported Ms Chokowry's submissions on behalf of the children.

26. The children, through their Guardian and solicitor respectively, sought the declarations and also opposed the adjournment. Ms Chokowry submitted that:

> "By virtue of the dismissal of the application for summary return to France, the court has determined that the jurisdiction in which disputes about the children should be decided is England and Wales. Recognition that the children will remain in this jurisdiction is usually underpinned by an acceptance in respect of their habitual residence."

27. She submitted that a declaration was necessary on the facts of this case because:

a. the applicant disputes the children's habitual residence;

b. the applicant is seeking to appeal the non-return order and therefore does not accept the children should remain in this jurisdiction;

c. the applicant's evidence is that welfare proceedings should take place in France not England;

d. the children are anxious to return to France if there's a prospect they will be detained there and a declaration will have an effect on the French courts;

e. the English courts' substantive jurisdiction, absent emergency, is based on habitual residence (see Article 5 and 7 of the 1996 Hague Convention).

28. Ms Chowroky submitted that:

> "The Hague Convention 1996 is since 'Brexit' the "*first port of call*" when establishing the court's jurisdiction pursuant to the Family Law Act 1986: see Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention) [2023] EWCA Civ 659 at paras 58-59 and Re S (Children: Parentage and Jurisdiction) [2023] EWCA Civ 897."

29. As to the (often fraught) question of when habitual residence should be assessed, it being accepted it can change during proceedings, Ms Chokowry submitted that:

> "It is therefore submitted that the relevant date for determination of the issue of habitual residence is the date that the application for [the] declaration was made on behalf of the children as the issue raised by that application is whether, the

court having dismissed the application under the Hague Convention 1980, the children can now be considered habitually resident in this jurisdiction."

30. I raised the question of the court's jurisdiction to make the declarations sought, given no other relief was sought. Ms Chokowry, with the support of Ms Guha, submitted that: (i) reliance could be placed on the decision of Moor J in *K v L (Child Abduction: Declaration)* [2012] EWHC 1234 (Fam); (ii) secondly I could rely on section 19 of the Senior Courts Act 1981; and (iii) that whilst the Family Procedure Rules do not have an equivalent of Civil Procedure Rule 40.20 (which permits declaratory relief when no other remedy is sought) I was referred to the decision of King LJ in *Re P H-L (Children) (Mobile Phone Extraction)* [2023] EWCA Civ 206 at paragraph 54 where reference was made to the fact the courts could rely on the common law, as encapsulated by the CPR, in circumstances where there is a gap in the FPR.

Adjournment

31. Ms Lennox submitted the applicant required an adjournment because she had not yet digested my judgment from August 2023. That her client had been unwell in August 2023. She had sought advice on an appeal. Ms Lennox told there was no medical evidence to explain her non-attendance. I am not clear why it was not possible for the applicant to attend the hearing remotely from France on 16 October 2023. On the morning I adjourned the hearing for around an hour to permit her remote attendance. For reasons which were not clear she was unable to join the link and attend. I understand a communication had been sent to the court which did not find its way to me and Ms Chowroky informed me there was medical evidence that the applicant was not well enough to travel.

32. This ancillary matter of declarations relates to declarations which follow from a decision I made on 8 August 2023. The hearing to determine the matter on 7 September was understandably adjourned. The determination of this matter is now pressing. Delay is contrary to the welfare interests of the children, a matter I must consider in the context of the overriding objective found in the Family Procedure Rules. Ultimately, however, it is not unjust to proceed to determine this matter at the hearing. The applicant has instructed solicitors and counsel. She had filed a witness statement setting out her evidence and position. The factual matters are not particularly in dispute. The decision whether to make the declarations or not requires legal adjudication of jurisdiction and habitual residence. Ideally, of course, the applicant would have joined the hearing remotely on 16 October, but as I had to hear an urgent matter at 14:00 on the same day, there was no further time to adjourn the matter to resolve whatever technological or other problems had arisen. It was therefore necessary, and not unjust, to refuse a further adjournment of this matter and proceed to make a decision for the children.

The Legal Background

Jurisdiction

33. The first issue to be addressed is the court's jurisdiction to make the declarations sought. These proceedings concern France and the United Kingdom. Both are signatories to the two relevant conventions I must consider: i. the 1980 Hague Conventions and ii. the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation In Respect of Parental Responsibility and Measures For the Protection of Children (hereafter "the 1996 Convention").

34. The court had jurisdiction to determine and dismiss the application for a return order pursuant to the 1996 Convention given it was an urgent matter (Article 11), see Lady Hale DPSC (as she then was) (with whom the rest of the Court agreed) in *In re J (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 1291 ("*Re J*").

35. The question remains what is the court's jurisdiction to determine the application for the declarations sought on behalf of the children? Clearly having made the non-return order, Article 11 of the 1996 Convention is no longer relevant.

36. It is helpful to begin with Article 1 which sets out the Objects of the 1996 Convention:

> "(1) The objects of the present Convention are –
>
> a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
>
> b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
>
> c) to determine the law applicable to parental responsibility;
>
> d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
>
> e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.
>
> (2) For the purposes of this Convention, the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights,

powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child."

37. It is necessary to consider Article 7 of the 1996 Convention which states:

> (1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another 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 State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.
>
> (2) 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.

> The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.
>
> (3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child."

38. Black LJ (as she then was) in *Re J supra* (with the agreement of Moore-Bick and Gloster LJJ) said the following about Article 7 in the Court of Appeal at paragraph 53:

> The wrongful removal imports Article 7 into the equation. It has the effect that the Moroccan authorities keep their jurisdiction unless the conditions set out in Article 7(1) ("the Article 7(1) conditions") are satisfied. Article 7(1) is silent as to timing, not spelling out whether the focus is upon whether the conditions are satisfied at the time the English court is seised or when it makes its decision or at some other time. However, it matters not on the facts of this case. ….

39. Moylan LJ stated in *Hackney supra*, at paragraph 44, that:

> "Article 7(1)(b) shows that, even in respect of an abduction, a change in a child's habitual residence can lead to jurisdiction under the 1996 Convention changing."

40. Importantly for the purposes of this application, his Lordship does not say that in the case of an abducted child, a change in habitual residence *must* lead to a change in jurisdiction. This obviously reflects the language of Article 7 of the 1996 Convention which he had just quoted in his judgment in *Hackney*.

41. Also of note is Moylan LJ's conclusion at paragraph 49 of *Hackney* that it is appropriate for the court to consider and take into account Professor Lagarde's *Explanatory Report* on the 1996 Convention, for the purposes of interpreting the 1996 Convention.

42. Professor Paul Lagarde's *Explanatory Report* states the following in respect of Article 7 at paragraph 46 (with emphasis added):

> The underlying idea is that the person who makes a wrongful removal should not be able to take advantage of this act in order to modify for his or her benefit the jurisdiction of the authorities called upon to take measures of protection for the person, or even the property, of the child. But, on the other hand, the wrongful removal, if it persists, is a fact that cannot be ignored to such a point as to deprive the authorities of the new State, which has become that of the new habitual residence of the child, of this jurisdiction over protection. <u>The difficulty consists therefore in determining the temporal threshold from which jurisdiction would pass from the authorities of the State from which the child has been wrongfully removed, to those of the country to which he or she has been taken or in which he or she has been retained.</u>

> This difficulty is partly resolved, at least as concerns rights of custody, by Article 16 of the Hague Convention of 25 October 1980 mentioned above, under the terms of which, after having been informed of the wrongful removal or retention of the child 'the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.' A provision of the Convention confirming the primacy of the 1980 Convention would have, for questions of custody rights, dealt with the problem, but only in the relations between Contracting States of the future Convention and States Parties to the Convention of 25 October 1980 (see, in this sense, Art. 50 below). A specific general provision was nonetheless necessary in order to resolve this question in a uniform way in respect of all the Contracting States, whether or not they are Parties to the Convention of 25 October 1980. Article 7 goes in this direction.

43. As can be seen, Professor Lagarde is describing the balance between the improper advantages of wrongful abduction as seen against the cardinal principle of the 1996 Convention that habitual residence is the basis for jurisdiction. There is an attempt to manage this tension in the 1996 Convention but as Professor Lagarde notes: "Article 7 goes in this direction" but there is not a complete overlap with Article 7 of the 1996 Convention and Article 13 of the 1980 Convention. The reason for Article 7 going in the direction but not having arrived at the same destination of the 1980 Convention, is

explained by Professor Lagarde at paragraph 48 of his *Explanatory Report* where he says the following (again with emphasis added):

> 48 *a* The first branch of the alternative is that 'each person, institution or other body having rights of custody has acquiesced in the removal or retention' (Art. 7, para- graph 1 *a*). If this is the case, and if, as indicated above, the child has acquired a habitual residence in another State, the authorities of the State of the former habitual residence lose the jurisdiction which they had under Article 5. This circumstance is one of those set out in Article 13 of the Convention of 25 October 1980, in order to authorise the requested State not to order the return of the child and at the same time allowing it to rule as to custody rights on the merits (Art. 16, mentioned above, of the same Convention). <u>It is, however, notable that in the new Convention it is acquiescence in the wrongful removal which triggers, if it is added to the other conditions required, the disappearance of the jurisdiction of the authorities of the child's former habitual residence, rather than the decision of the authorities of the State to which the child has been removed to refuse return.</u> The Commission followed on this point the comments of the United States delegation, and <u>it wanted to avoid jurisdiction to take measures of protection for the child being able to depend, to any extent at all, on a decision of the authorities of the State to which the child has been removed</u>, even if this decision were founded on the grave risk that the return of the child expose him or her to physical or psychological danger (Art. 13 *b*, Convention of October 1980).

44. Nonetheless for two countries who are parties to the 1996 and 1980 Conventions (such as France and the United Kingdom) Article 50 of the 1996 Convention is relevant:

> This Convention shall not affect the application of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, as between Parties to both Conventions. Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

45. Therefore, on the facts of this case, there is nothing in Article 5 or 7 (in particular) of the 1996 Convention which affects the operation of Article 16 (in particular) of the 1980 Convention.

46. Article 16 of the 1980 Hague Convention states:

> "After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

47. The difference between ‘rights of custody and ‘rights of access’ is explained in the definition at Article 5 of the 1980 Convention as follows:

> For the purposes of this Convention –
>
> a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
>
> b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

48. In the *Explanatory Report* to the 1980 Convention Professor Pérez-Vera notes at paragraph 84, in respect of the definition of ‘custody rights,’ that:

> “It is therefore a more limited concept than that of 'protection of minors', despite attempts made during the Fourteenth Session to introduce the idea of 'protection' so as to include in particular those cases where children are entrusted to institutions or bodies. But since all efforts to define custody rights in regard to those particular situations failed, one has to rest content with the general description given above. The Convention seeks to be more precise by emphasizing, as an example of the 'care' referred to, the right to determine the child's place of residence.”

49. In *C v C* [1989] 1 W.L.R. 654 Lord Donaldson considered the meaning of rights of custody where he held:

> "Custody," as a matter of non-technical English, means "safe keeping, protection; charge, care, guardianship" (I take that from the Shorter Oxford

English Dictionary, 3rd ed., rev. (1973)); but "rights of custody" as defined in the Convention includes a much more precise meaning which will, I apprehend, usually be decisive of most applications under the Convention. This is "the right to determine the child's place of residence." This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right—in so far as the child is to reside in Australia, the right being that of the mother; but, in so far as any question arises as to the child residing outside Australia, it being a joint right subject always, of course, to the overriding rights of the court."

50. In the same case, Neil LJ notes that the right to determine residence is a right which is "included" amongst the rights of custody.

Habitual Residence

51. Counsel referred me to the following Supreme Court authorities in respect of habitual residence: *A v A (Children: Habitual Residence)* [2013] UKSC 60; [2014] AC 1; (the seminal case, adopting as part of English law, the test as developed by the CJEU); *Re KL (A Child) (Abduction: Habitual Residence: Inherent Jurisdiction)* [2013] UKSC 75; [2014] 1 FLR 772 (discussed more fully below); *Re LC (Children) (Abduction: Habitual Residence: State of Mind of Child)* [2014] UKSC 1; [2014] AC 1038; ("In the debate in this court about the occasional relevance of this dimension, references have been made to the "wishes" "views" "intentions" and "decisions" of the child. But, in my opinion, none of those words is apt. What can occasionally be relevant to whether an older child shares her parent's habitual residence is her *state of mind* during the period of her residence with that parent"); *Re AR v RN (Habitual Residence)* [2015] UKSC 35; [2015]

2 FLR 503 (stability of residence is important not permanence) and *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4; [2016] AC 606 (Lord Wilson's learning is quoted below by Moylan LJ in Re A).

52. Reference was also made to Court of Appeal's decision in *Re B (A Child) (Abduction: Habitual Residence)* [2020] EWCA Civ 1187 and the clear summary of Hayden J in *Re B (A Minor) (Habitual Residence)* [2016] EWHC 2174 at §17.

53. Amongst this case law helpful guidance for the trial judge is located in the analysis of Moylan LJ (with the agreement of Bean and Snowden LJJ) in *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659 at paragraphs 41-48:

> "I have referred above to what Hayden J said in *Re B*, at [17(i)] and [17(x)]. The former derives from what was said in *A v A* which, in turn, derived from what was said by the CJEU in *Proceedings brought by A* [2010] Fam 42, at [44], namely that:
>
> > "the concept of "habitual residence" under article 8(1) of the Regulation must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment."
>
> It is also right to note that Lady Hale referred to this in *A v A*, at [54(iii)], as being the "test adopted by the European Court".

It is clear, however, not only from *Proceedings brought by A* itself but also from many other authorities, that this is a shorthand summary of the approach which the court should take and that "some degree of integration" is not itself determinative of the question of habitual residence. Habitual residence is an issue of fact which requires consideration of all relevant factors. There is an open-ended, not a closed, list of potentially relevant factors.

In *Proceedings brought by A*, the CJEU had earlier dealt with the issue at greater length, as follows:

> "[37] The "habitual residence" of a child, within the meaning of article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case.
>
> [38] In addition to the physical presence of the child in a member state, other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.
>
> [39] In particular, the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration.
>
> [40] As the Advocate General pointed out in para 44 of her opinion, the parents' intention to settle permanently with the child in another member

> state, manifested by certain tangible steps such as the purchase or lease of a residence in the host member state, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that state.
>
> [41] By contrast, the fact that the children are staying in a member state where, for a short period, they carry on a peripatetic life, is liable to constitute an indicator that they do not habitually reside in that state.
>
> [42] In the light of the criteria laid down in paras 38-41 of this judgment and according to an overall assessment, it is for the national court to establish the place of the children's habitual residence."

The broad nature of the analysis can also be seen from Lady Hale's later comments (in a minority judgment but reflecting, on this issue, the majority judgment of Lord Wilson) in *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038, when she referred, at [59], to whether the residence had "the necessary degree of stability" and when she said, at [60]:

> "All of these factors feed into the essential question, which is whether the child has achieved a *sufficient* degree of integration into a social and family environment in the country in question for his or her residence there to be termed "habitual"." (emphasis added)

The same can be seen from what Lord Reed said in *Re R*:

> "[17] As Baroness Hale DPSC observed at para 54 of *A v A*, habitual residence is therefore a question of fact. It requires an evaluation of all relevant circumstances. It focuses on the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It is necessary to assess the degree of integration of the child into a social and family environment in the country in question. The social and family environment of an infant or young child is shared with those (whether parents or others) on whom she is dependent. Hence it is necessary, in such a case, 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 inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce."

I refer to the above, not to put forward any gloss on the meaning of habitual residence, which the Supreme Court cautioned against in *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)*[2016] AC 606 ("*Re B 2016*"), at [46], but simply to demonstrate that "some degree of integration" is not a substitute for the required global analysis.

I would add that, self-evidently, a test of whether a child had "some degree of integration" in any one country cannot be sufficient when a child might be said to have *some* degree of integration in more than one State. This is why, as referred to in my judgment in *Re G-E (Children) (Hague Convention 1980: Repudiatory Retention and Habitual Residence)* [2019] 2 FLR 17 ("*Re G-E"),*

at [59], the "comparative nature of the exercise" requires the court to consider the factors which connect the child to each State where they are alleged to be habitually resident. This is reflected in Mr Tyler's written submissions when he referred to the relevance of a child's "degree of connection" with the State in which he/she resided before they arrived in the new State.

In *Re G-E*, I also quoted the "expectations" set out by Lord Wilson in *Re B 2016*, at [46], which bear repeating, namely:

> "(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."

I have already dealt with the legal approach to habitual residence at some length in this judgment but, finally, I would refer to *In re B (A Child) (International Centre for Family Law, Policy and Practice intervening)* [2020] 4 WLR 149 when, at [83]-[89], in addition to *Re B 2016*, I referred to the CJEU's

decision of *Proceedings brought by HR (with the participation of KO) (Case C-512/17)* [2018] Fam 385 and to Black LJ's (as she then was) judgment in *In re J (A Child) (Finland) (Habitual Residence)* [2017] 2 FCR 542 ("*Re J*"). Black LJ, at [57], referred to "the relevance of the circumstances of a child's life in the country he has left as well as the circumstances of his life in his new country" and, at [62], she said:

> "What is important is that the judge demonstrates sufficiently that he or she has had in mind the factors in the old and new lives of the child, and the family, which might have a bearing on this particular child's habitual residence.""

54. Also helpful is the decision of Cobb J at paragraphs 23-26 of *FB v MG* [2022] EWHC 2677 (Fam) with 'iv' being read in the context of what Moylan LJ said later about 'some degree of integration':

> "The key principles engaged in this case (not exhaustive on the issue of habitual residence) are as follows:
>
> i) habitual residence is a question of fact and not a legal concept such as domicile;
>
> ii) the child's place of habitual residence must be established on the basis of *all the circumstances specific* to each *individual* case; what is required is "a global analysis" of the individual child's situation;
>
> iii) the presence of the child in the particular country should not be in any way temporary;

iv) perhaps most significantly, habitual residence is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question; it is to be noted that the phrase used is "some degree", not – for instance – "total/complete/full" integration;

v) the social and family environment of an infant (as here) or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned;

vi) the intention of the parents to settle with the child in a given member state, where that intention is manifested by tangible steps, may also be taken into account in order to determine the child's place of habitual residence

vii) it is useful and indeed appropriate to take into consideration factors such as the duration, regularity, conditions and reasons for the child's stay in the territory of the different member states concerned, the place and conditions of the child's attendance at school (where relevant), and the family and social relationships of the child in those member states;

viii) 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."

55. The following non-exhaustive bullet point guidance is relevant to the determination of this application:

a. habitual residence is a question of fact and is not a legal concept;

b. the factual inquiry requires consideration of all relevant factors applied to the *individual* circumstances of the children and the court should not permit the gloss of legal concepts to produce a different outcome from the factual inquiry;

c. the list of relevant factors is open-ended and should provide for a global analysis;

d. whilst helpful to look for 'some degree of integration by the child in a social and family environment' this is not a substitute for a holistic analysis and (likely) may not be sufficient to fully grapple with a holistic determination, particularly if there are two competing jurisdictions in respect of which it might be said there is some degree of integration;

e. it might be helpful to pose the question whether the child's residence in the jurisdiction has achieved a 'necessary degree of stability' when carrying out the required global analysis for the individual child, but without requiring facts to demonstrate permanence of residence;

f. if more than one jurisdiction for the child's habitual residence is to be considered then the court should consider a comparative analysis of each jurisdiction where it is said they have a connection and assess the relative strengths of those connections;

g. when carrying out the global and comparative analysis the court should bear in mind that:

    i. the deeper the child's integration in the former jurisdiction probably the less fast his/her integration into the following jurisdiction;

    ii. the greater the pre-planning by the adults to effect the move from one jurisdiction to another, may impact the speed of the integration;

iii. the transition from one jurisdiction to another of many, or all, central family members, from the child's perspective, may impact on the speed of integration;

h. the court must bear in mind the factors of the 'old' and 'new' lives for the individual child;

i. habitual residence is unlikely to be achieved in one jurisdiction if the child's position can be described as temporary (but that may depend on the nature of the integration in the other competing jurisdictions);

j. the intention/state of mind of the parents (not as a legal concept but as to the reasons for leaving/staying) and of the older child (depending on their understanding) may be taken into account in the global analysis;

k. a parent may unilaterally change habitual residence without the consent of the other parent.

56. The timing of the determination of habitual residence was considered by Moylan LJ in *Hackney* where he held at paragraph 111-114:

> "I next turn to the relevant date for the determination of habitual residence.
>
> I would first note that, unlike BIIa which stipulated the date on which the court was seised, there is nothing in the 1996 Convention which expressly provides when a court will be vested with jurisdiction. Nor is there anything in the *Explanatory Report* or the *Practical Handbook* which addresses this issue. I agree with the submissions made in this appeal that the fact that the principle of *perpetuatio fori* does not apply, does not mean that the court's jurisdiction is

not, at least initially, determined at the outset of the proceedings. Indeed, it would be contrary to legal certainty and, as Mr Setright submitted, the integrity of the proceedings, if the question of what, if any, jurisdiction the court had was not determined at the outset of proceedings. This applies, in particular, to the primary ground of jurisdiction, namely habitual residence.

In my view, therefore, in order to provide clarity and certainty, as is plainly required, I consider that this should initially be determined by reference to the date on which proceedings were commenced. This is the date on which the court's jurisdiction was invoked and it seems to me appropriate that this should be the date by reference to which the court should initially determine what, if any, jurisdiction it has. If it had no jurisdiction, the proceedings would be liable to be dismissed. In my view, this would also sit more comfortably with the *lis pendens* provisions of Article 13. Further, it provides a benchmark against which any future changes can be measured, in particular whether the child's habitual residence has changed.

In the vast majority of cases this will not cause any difficulties because the child's habitual residence will be obvious."

Analysis

57. The following issues fall to be determined:

a. Does this court have jurisdiction to determine the further application for relief and if so at what dates should the court determine whether it has jurisdiction?

b. what is the relevant date for the assessment of where the children are habitually resident?

c. on this date where were the children habitually resident: England and Wales or France?

d. can/should a declaration be made to the effect?

Jurisdiction – Overview

58. Whether this court has jurisdiction is determined by the 1996 Convention and the 1980 Convention. France and the United Kingdom are signatories to both.

59. These proceedings concern X and Y who were habitually resident in France in August 2022. They were both wrongfully removed from France to the United Kingdom on 18 August 2022. In the 8 August 2023 judgment, the court found that the applicant had acquiesced in X's removal (see paragraph 92). It found that Y should not be returned based *inter alia* on the exception of grave risk of harm (paragraph 100).

60. It follows therefore that in, respect of X, as acquiescence was made out I must consider her habitual residence to consider whether the court has jurisdiction, and whether the English and Welsh courts have primary jurisdiction pursuant to Article 7 of the 1996 Convention. However, in reliance on Article 16 of the 1980 Convention (which is unaffected by the 1996 Convention) in respect of custody rights, the courts of England and Wales have jurisdiction. I am therefore concerned with whether the French courts may have retained jurisdiction in respect of access rights and any wider issues of parental responsibility which are not included with 'rights of custody' (see Article 1 of the 1996

Convention). There is plainly an overlap between the exercise of parental responsibility in English law and the 1980 Convention concept of 'rights of custody.' The separate definition of 'access rights' itself demonstrates rights of custody is not the same as the rights that come with the 'zone' of parental responsibility. This is not surprising in the context where rights of custody form part of the 1980 Convention and fall to be interpreted in the context and purpose of that Convention, which largely focuses on change of residence.

61. In respect of Y, Article 16 of the 1980 also applies. The English and Welsh courts have jurisdiction in respect of custody rights. Determination of access rights and wider issues of the exercise of parental responsibility will depend upon whether he is habitually resident in England and Wales and, given there was no finding in respect of acquiescence on 8 August 2023, whether the second Article 7 1996 Convention limb is made out, namely: whether Y "*has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment."*

Timing – Habitual Residence And Jurisdiction

62. I must consider the timing of determining where X and Y are habitually resident. They were habitually resident in France on 18 August 2022. I did not require to determine their habitual residence on 8 August 2023 for the purposes of determining the exceptions relayed upon by the respondent to the applicant's return order application. In a summary jurisdiction it is not always helpful to add issues for the court to decide other than those

which are strictly necessary. The application for the declarations was issued on 22 August 2023. The hearing of that application took place on 16 October 2023. As noted by Black LJ in *J*, Article 7 is silent on the issue of timing. Although *Hackney* involved public law proceedings, I see no good reason to distinguish the approach taken by Moylan LJ: clarity and certainty remain important across a range of different applications. Therefore, the date for determination of habitual residence in this applications shall be when the proceedings were issued and not the date of the hearing, in respect of habitual residence.

63. For X, the determination of the Article 7 1996 Convention jurisdiction, that is to say habitual residence plus the other necessary conditions, should also be considered as at the date of the issue of the application. It would not be logical sense to separate out different dates for different parts of the test for jurisdiction (although that would not be impossible). In any event, for X it makes little difference as the finding of acquiescence was made on 8 August 2023, therefore whether the date is 22 August or 16 October 2023 is not determinative.

64. For Y, the relevant dates (18 August or 16 October) requires a little further explanation. On either date he has resided in the United Kingdom for more than one year, however, the one year period of time runs not from 18 August 2022, when he was removed by the respondent, but from the date the applicant, "has or should have had knowledge of the whereabouts of the child." At paragraph 40 of the 8 August judgment I recorded the respondent's evidence that he telephoned her on 19 August 2022 to inform her of the abduction of the children. I have re-read paragraph 83 of his witness statement in which he describes informing the applicant had he was in England with the children. The applicant gives evidence she was not provided with details of where in England the

children were, but her written evidence does not dispute she knew the children were in England. What then is the meaning of "whereabouts" for the purposes of Article 7 of the 1996 Convention? It is not defined. Professor Lagarde's report does not appear to cover this topic. I am not aware of any case law on it. The evidence demonstrates that the applicant was aware the children were in England on 19 August 2022 but not that she knew of their exact address. I return to this issue and the question of the settlement below to determine jurisdiction in respect of Y, after consideration of habitual residence.

65. However, I record for the avoidance of doubt, that whilst identify the appropriate date to determine Article 7 jurisdiction on the date of the issue of the proceedings, namely the 22 August 2023, if I am wrong about that and the correct date is 16 October 2023, then the case for this court having jurisdiction is factually stronger for both X and Y.

Habitual Residence

66. As of 22 August (and 16 October) 2023 the children are either habitually resident in England and Wales or France. It is important to analyse these two options.

67. I understood counsel for the children and the respondent to submit that the non-return order has the legal effect that the children are habitually resident in England and Wales, in the context of the wider factual background. That might be permitting a legal concept to determine what is a factual inquiry. This is illustrated by the Supreme Court's decision in *Re KL (A Child) supra* where Lady Hale rejected the argument that a child could not be habitually resident in a country until such time as the appeal against the order permitting him to reside there had been determined. This was: "*seeking to place a legal*

gloss on the factual concept" (paragraph 25). However I accept the non-return order removed doubt about the stability of X and Y's residence in England. This is a powerful additional factual matter to weigh up with all other relevant factors.

68. The case for X being habitually resident in England and Wales on 22 August 2023 is powerful. The applicant acquiesced in X residing here as far back as December 2022. She has attended school in her local area since January 2023, therefore had been at school for two full terms or nearly eight months. She had lived in the UK for just over a year. She has friends and family here. She is integrated into daily life and received her medical care. Her state of mind is also relevant given her age and England is where she wants to be. Her links with France by 22 August 2023 had diminished very considerably. I weigh up carefully the long period of time she lived there and her cultural and linguistic integration into France. It must also be recorded that her life in France was rather peripatetic with frequent changes of home and school, therefore her rate of integration into England and Wales has been achieved more quickly. Her life in France was peripatetic. She had frequent moves around the country and many different homes. She was not in formal education from around March or June 2021 and the applicant's evidence was that she was making arrangements for X to attend school in Switzerland from September 2023, but that if she were returned she would attend school in France instead. I have no hesitation in concluding that she was habitually resident in England and Wales on 22 August and 16 October 2023. Looking at all the factors the degree of integration into England is much more profound than in France. With the making of the non-return order her residence in England is significantly more stable.

69. Y has lived in England and Wales since 18 August 2022. He has attended school in England since March 2023, a considerable period of time. I accept his success and integration into school life and the creation of friends and a wider peer group that his father reports in the written evidence. Whilst he is younger, I also take into account that CAFCASS reported his strong preference to remain in England in June 2023 as evidence of his state of mind (see paragraph 103 of the 8 August judgment). I place some weight on his state of mind, even although he is young. As in respect of his sister, the dismissal of the application for a return order cemented the stability of his residence in England over France. Whilst I am not applying any legal gloss, it removed some uncertainty for Y. I take into account the paucity of links to France and the lack of integration there on 22 August 2023, absent the desire to see his mother. Like his sister, I place weight on the long period of time he lived in France and cultural and linguistic integration, however, his lifestyle there was also peripatetic. Considering all relevant factual matters, I have little hesitation concluding that on 22 August 2023, Y was habitually resident in England and Wales. It also follows from my factual review of these matters I am satisfied that Y is settled in his environment, which includes the home he lives in, the school he attends and the community/family life he shares with his big sister, father and other wider family members, as the respondent evidences.

70. If the date for assessment is in fact the 16 October 2023 both children were further integrated and settled into England and Wales given the passage of time.

Jurisdiction - Conclusions

71. As I have found X was habitually resident in England and Wales on 22 August 2023 and as I found on 8 August 2023 that the applicant acquiesced in her wrongful removal, I am satisfied that the courts have of England and Wales have jurisdiction in respect of all substantive welfare matters, which includes both custody and access rights and disputes in respect of parental responsibility. This is based upon a combination of Articles 16 of the 1980 Convention and Articles 7 and 50 of the 1996 Convention.

72. The Article 7 1996 Convention position in respect of Y is a little more complicated as no finding of acquiescence was made. I have concluded that Y was habitually resident in England and Wales since 22 August 2023. He has lived in England for at least one year from 19 August 2022, where I find that he is settled in his environment. I have not received submissions on whether he is settled or not, but I have received the parties' factual cases on his habitual residence. I have considered Thorpe LJ's analysis in *Canon v Canon* [2004] EWCA Civ 1330; [2005] 1 WLR 32. I am satisfied that Y is physically, emotionally and psychologically settled in England.

73. The only remaining Article 7 1996 Convention condition is whether one year has passed since the applicant knew of his whereabouts and there is no pending return application. I have not received the parties' submissions on this issue, or specific evidence about what exactly the respondent told the applicant when, in respect of the whereabouts of the children. I briefly considered whether I should direct further short evidence and submissions on this matter and make a ruling on the papers. However, I have decided it is not necessary and would be disproportionate in respect of this narrow issue involved.

74. I find that the applicant was aware of X and Y's 'whereabouts' and that it was not necessary she was provided with the exact address. The Convention does not say the

wronged parents must know the address. The address may in any event change. It is important to focus on the purpose of the Convention when considering the interpretation of 'whereabouts'. The applicant was able to notify English law enforcement authorities and to notify the UK Central Authority of the children's presence in England. That would be sufficient to begin the process of giving effect to the 1980 Convention to seek a return order and certainly a location order application could have been made by her. Therefore, by 22 August 2023, a year had passed and no pending return order was yet to be determined by the courts. I do not consider the fact the applicant may have sought an extension of time to appeal against the non-return order, as having the effect that there remains a pending return order application. Finality in litigation dictates against such an approach.

75. Therefore I find the Article 7 1996 Convention factors are met for Y as of 22 August 2023 (or on 16 October 2023). However, it is important to recognise that the residual matter of 'access rights' is a rather academic one for the reasons set out below. Although I accept the same cannot be said for wider parental responsibility under the 1996 Convention (for example a dispute regarding medical treatment).

76. The Court of Appeal considered 'access rights' in *G (A Minor) (Enforcement of Access Rights Abroad)* [1993] Fam 216. Butler-Sloss and Hoffman LJJ surveyed Article 21 of the 1980 Convention and noted the limited role of protection for access rights under the 1980 Convention. The material factual background is as follows:

> "In September 1990, after an incident involving violence between the parents, the mother left and went to a women's refuge. She made allegations of violence against the father, who was arrested, and Tamara was handed over to her mother. The mother then took Tamara to England without informing the father.

> On arrival in England she instituted divorce proceedings and obtained an interim custody order and an injunction restraining the father from removing the child from England. The father instituted proceedings under the Convention on the ground that the mother had wrongfully removed Tamara from the State of Ontario. The application came before Hollis J. on 20th June 1991 who found that the mother had wrongfully removed Tamara and ordered her immediate return to Ontario. The mother returned with the little girl. On 22nd November 1991 in the Ontario Court, Provincial Division, sitting in Toronto, Judge Nevins made a consent order that gave the custody of Tamara to her mother. The mother was given the option to live either in Ontario or in England and there were detailed access arrangements for Tamara with her father in Ontario from 1992 onwards to include three weeks in July/August and two weeks in December/January. At the time of this order she was two years old. The mother has settled in England with Tamara and they are living with the maternal grandparents."

77. The court was not concerned with Article 7 of the 1996 Hague Convention because the case was not one of wrongful removal because the mother brought Tamara to England with the authority of the order made by the Ontario courts. Butler-Sloss LJ (as she then was) identified the limited role of Article 21:

> "Article 21 applies at the administrative level to bring the application to the attention of the Central Authority of the contracting state. On receiving an application the Central Authority, the Lord Chancellor's Department, complies with its obligation under Article 21 by making appropriate arrangements for the applicant and, in this case, by providing for legal aid and instructing English

lawyers to act on behalf of the applicant. This in effect exhausts the direct applicability of the Convention."

78. She noted the proper approach that should have been taken to questions of 'access rights' as follows:

> "In a case where the child is habitually resident in the contracting state, being England, before the breach, the Convention does not directly affect the jurisdiction of the English court. The appellant father's lawyers applied to the High Court but were in error in requiring an order to enforce compliance with the Convention. There are no teeth to be found in Article 21 and its provisions have no part to play in the decision to be made by the judge. The lawyers should have applied on his behalf for a section 8 order under the Children Act 1989 which is the appropriate way to secure the effective exercise of rights of access."

79. There is no order from the French courts setting out access rights for the applicant. Furthermore and very importantly, the Guardian and the respondent are positively supportive of contact taking place between the applicant and the children. This issue is an academic one on the facts. The applicant may request the assistance of the UK Central Authority pursuant to Article 21 of the 1980 Convention but her directly effective Convention rights under English law are very limited. If there is a dispute in respect of contact, the matter should be settled pursuant to section 8 Children Act 1989.

80. Having regard to Article 16 of the 1980 Convention and Articles 7 and 50 of the 1996 Convention, I conclude that the English and Welsh courts now have jurisdiction to determine rights of custody, access and more widely any disputes in respect of the exercise of parental responsibility.

Declaration

81. To avoid any uncertainty, it is necessary to make declarations. The applicant's reasons, as set out in her evidence, for disputing the declarations sought are not good ones. X and Y need certainty. The declarations made are likely to advance contact between the children and the applicant, which is very important for their welfare.

82. I am satisfied that sitting in the Family Division of the High Court I can grant freestanding declarations albeit no other relief is sought given it is permissible to draw from the CPR. I will make the following declaration:

> X and Y are habitually resident in England and Wales and the courts of England and Wales have jurisdiction to determine their welfare, including all custody, access rights and in respect of all disputes arising out of the exercise of parental responsibility.

83. I repeat the need to emphasise the importance of both children (particularly Y) spending time in the physical presence of their mother as soon as possible.

<u>Conclusion</u>

84. I add that satellite litigation of this nature is not to be encouraged. If there is a clear need for such declarations to be made within 1980 Hague Convention proceedings, then they should normally be identified within the evidence and legal submissions/answers well before the 1980 Hague Convention hearing, to ensure the court has all the necessary evidence and material before it to determine the issues at one hearing. In most cases it may not be necessary for such declarations to be made, but the long procedural history and the unusual facts of this case give rise to this satellite matter.

85. I thank all solicitors and counsel for their assistance and ask they draft an order to give effect to my decision.