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Case No: CA-2022-001802/CA-2022-001855

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
FAMILY DIVISION
MRS JUSTICE ARBUTHNOT
FD22P00359

Royal Courts of Justice
Strand, London, WC2A 2LL

17 March 2023

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE STUART-SMITH
and
LADY JUSTICE ELISABETH LAING

Re T (Children) (Jurisdiction: Matrimonial Proceedings)

Michael Gration KC and Katy Chokowry (instructed by Dawson Cornwell LLP) for the
Appellant
The **Respondent** in person

Hearing date: 19 January 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 17 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. The mother appeals from the orders made by Arbuthnot J (“the judge”) on 28 July 2022 and 15 September 2022.
2. By the former order, the judge dismissed the mother’s application for orders in respect of her three children, including specifically that they be returned from Albania (where they had been taken by the father). This was because she determined that it was the courts in Scotland and not the courts in England and Wales which had jurisdiction to make welfare orders based on her finding that the children were habitually resident in Scotland on 3 April 2022 (the date when they went to Albania). That decision was made before it was known that the father had commenced divorce proceedings in England on 18 May 2022. The court and the mother only became aware of this following the judge’s judgment on 13 July 2022.
3. The discovery of the existence of divorce proceedings led the mother to make a further, informal, application to the judge, before the order of 28 July 2022 had been sealed, contending that the English court had jurisdiction to make welfare orders in respect of the children under section 2(1)(b)(i) of the Family Law Act 1986 (“the FLA 1986”) because of the existence of those proceedings.
4. As set out in more detail below, an order under section 8 of the Children Act 1989 (“the CA 1989”) is defined in the FLA 1986 as a section 1(1)(a) order and section 2(1) of the FLA 1986 sets out when a court in England and Wales has jurisdiction to make such an order. Section 1(1) of the FLA 1986 lists a number of orders to which Part I applies and which include child welfare orders which can be made in Scotland and Northern Ireland (all defined as a “Part I order”). I will, at times, describe a section 1(1)(a) order as a section 8 order and a Part I order as a welfare order so as to distinguish between the former, which applies only to England and Wales, and the latter, which applies across all UK jurisdictions.
5. By the second order, the judge determined that the English court still did not have jurisdiction to make a section 8 order under section 2(1)(b)(i) of the FLA 1986. As explained in her judgment, this was because she had already decided that the 1996 Hague Child Protection (“the 1996 Convention”) applied and applied to give Scotland jurisdiction. She also decided, alternatively, that, if the 1996 Convention did not apply, the court did not have jurisdiction under section 2(1)(b)(i) of the FLA 1986 because “the question of making the order [did not arise] in or in connection with matrimonial proceedings”.
6. The mother challenges the judge’s decisions contending: (a) in respect of the former, (i) that the judge was wrong to decide that the 1996 Convention applied to determine jurisdiction between England and Wales and Scotland and (ii) that she should have determined that the children were habitually resident in England at the relevant date; and (b) in respect of the latter, that she should have determined that the court has jurisdiction pursuant to section 2(1)(b)(i).
7. There is a strong argument that this appeal is academic because, since the above orders, the children returned to live in England on 21 September 2022 and have remained here since then. However, I was (just) persuaded by Mr Gratton’s submissions that the judge’s judgments and orders were continuing to have adverse

consequences for the mother, in particular in respect of her endeavours to obtain legal aid. Why this should be so was not entirely clear but, to avoid any further difficulties, we agreed to hear and determine the appeal.

8. The first issue raised by this appeal is whether the 1996 Convention applies to determine which constituent part of the United Kingdom has jurisdiction to make a Part I order. For the reasons set out below, it is clear that it does not and that the allocation of jurisdiction within the UK is determined by the provisions of the FLA 1986.
9. The second issue is whether the judge was right to decide that the mother's application for orders in respect of the children did not arise in connection with the divorce proceedings so that section 2(1)(b)(i) of the FLA 1986 does not apply. For the reasons set out below, I consider that the judge should have decided that that question did arise in connection with the father's divorce proceedings so as to give the court jurisdiction.
10. The third issue is whether the judge was right to decide that the children were habitually resident in Scotland or whether she should have decided that they were habitually resident in England. It is not necessary for this issue to be decided, having regard to our decision in respect of the above two issues. However, again for the reasons set out below, I consider that the judge was wrong and that the children remained habitually resident in England as at the relevant date.
11. The mother was represented by Mr Gratton KC (who appeared at the first but not the second hearing below) and Ms Chokowry (who did not appear below). The father appeared in person.
12. Unfortunately, due to administrative delays and the intervention of the winter vacation, this case took much longer to be heard than it should have done.
13. At the conclusion of the hearing, we informed the parties that the appeal would be allowed. I set out below my reasons for agreeing with that decision.

Background

14. The background, in brief, is as follows.
15. The mother and the father were both born in Albania. The father moved to live in England in 2002 and became a British citizen in 2007. The parties married in Albania in 2010. The mother came to England in January 2011. Their three children, now aged 11, 9 and 3, were all born in London. Until 20 December 2021, the family lived continuously in London with occasional holiday visits to Albania.
16. In December 2021 the mother and the father agreed to move to Scotland. A property was rented in the same town where a cousin of the father's lived with his family. The property was, it appears, rented for 12 months. The older children were enrolled in a school there. In circumstances which are disputed, the mother left the family home on 17 December 2021. The father and the children first travelled to Scotland on 20 December 2021, so that the older children could attend their proposed school's

induction day on 21 December. They returned to London on 21 December and then went to Albania for Christmas, without the mother.

17. The father and the children returned from Albania and travelled to Scotland on 7 January 2022. The older children attended school there.
18. The mother continued to live in London. She had very limited contact with the children.
19. On 3 April 2022, the father and the children left Scotland and travelled to Albania. They remained living there until 21 September 2022 when they returned to live in England. As referred to above, they have remained here since then.

Proceedings

20. On 4 May 2022, the mother commenced proceedings in England. She issued an application formally under the inherent jurisdiction for an order that the children be made wards of court and that they be returned to England. A without notice order was made giving directions.
21. In her statement, dated 3 May 2022, the mother set out details of her relationship with the father, including allegations that he had been physically and emotionally abusive towards her. This, she said, provided the background to her having left the family home in December 2021. She set out what she said had happened since then and also said that the father had returned to England “recently”.
22. The father’s first statement is dated 11 May 2022. He disputed the mother’s account and said that she had left him and the children because she was in a relationship with someone else. Although he gave his address as the rented property in Scotland, he explained that, having intended to visit Albania only for the Easter holidays, he had decided to remain in Albania because the children were happier there. In respect of their time in Scotland he said:

“We all were stressed and did not find life easy. I was at home and spent my savings and later borrowed money from my family”.
23. At a hearing on 12 May 2022, attended by both parties and their legal representatives, the court directed the parties to file statements dealing with the issue of the children’s habitual residence as at 3 April 2022 “when they travelled to Albania”. The order also recorded the view expressed by the judge that the mother “should apply forthwith through the Central Authority for proceedings to be taken in Albania under the Hague Convention”.
24. Proceedings were subsequently commenced on behalf of the mother in Albania seeking the return of the children under the 1980 Hague Child Abduction Convention. Those proceedings were discontinued or dismissed following the return of the children to England in September 2022.
25. In his second statement, dated 9 June 2022, the father gave his address as a property in Albania. The statement contained a great deal more detail about, and a different perspective (from the brief summary in his previous statement set out above) of, the

time he and the children had spent in Scotland. He said that the children had “settled well into school life” and had made friends; the family “enjoyed many activities”. He considered that the older children “were integrated into the community”. The children “were a little confused that their mother ... was not there with us, they still understood that Scotland would be our new home”. The father did not work because he could not find childcare and was busy looking after the children and the home.

26. The father explained what he had meant when he had said in his first statement that they were stressed:

“As stated in my first statement, in the beginning, the move was challenging for me because I had lost my wife and the children had lost their mother. I stated ... “we were all stressed”. What I meant by this was that I was stressed with the trauma the children were suffering with not seeing their mother. They were adapting to a different parent looking after them all the time.”

He later explained:

“The children were settled in Scotland, and this was our new home. However, as time went on, I was struggling to cope with raising the children by myself. I was a single dad in charge of three children. This was particularly so with [the youngest] as he was still a baby in nappies with a bottle. I spoke with my family, and they suggested coming to see them in Albania.”

27. The father and the children went to Albania on 3 April 2022, intending, he said, to stay for two weeks. However, after a short period “I decided it would be best to stay in Albania where both the children and I had family network to support us”. The father “felt relieved that I had more support”; the children “were enjoying themselves in Albania”; and he considered that being there was “mentally, emotionally and socially” beneficial for the children. During April and May he had spent some weeks living and working (as an Uber driver) in England and some weeks in Albania. However, he had decided from 26 May to stay in Albania subject to getting a job there.
28. In her second statement, dated 27 June 2022, the mother said that she believed the children remained habitually resident in England. They had spent their whole lives in England and had spent less than three months in Scotland. In addition, she asserted that the children were clearly unsettled in Scotland (they “were clearly missing me, their friends and their life in London as they said as much when they spoke to me”); she pointed to the fact that the father had no job; and referred to the father’s own case that the children did not want to return to Scotland at the end of the Easter holiday. It was her case that the children “barely had a chance to settle” in Scotland before they went to Albania.
29. The older two children were seen and spoken to by a Cafcass Officer by video. The oldest child said that “he liked living in [Scotland] the best as it was quiet”. He also described the family as “struggling to manage in Scotland which meant their uncle

had to help them with money”. The second child said she did not enjoy school in Scotland.

30. The first hearing before the judge took place on 13 July 2022. By agreement, there was no oral evidence. Although the father and the children had by then left Scotland, it was his case that any welfare application should be made in Scotland rather than England. The mother contended that the English court had jurisdiction because the children had remained habitually resident here. The judge gave an ex tempore judgment in which she determined that the children were habitually resident in Scotland on 3 April 2022 and that, as a result, the English court did not have jurisdiction. She concluded that any application would have to be made in Scotland.
31. After the judge had delivered her judgment on 13 July, and while the terms of the order were being addressed, the father revealed that he had commenced divorce proceedings in England on 18 May 2022. The mother was not aware of this because she had not opened an email she had received from HMCTS. It subsequently emerged that the Petition asserted that the courts of England and Wales had jurisdiction because “both parties to the marriage ... are habitually resident in England and Wales”.
32. The existence of the Petition led the mother’s counsel subsequently to make an informal application to the judge, before the order was sealed, to reconsider her decision. The submission was advanced that the divorce Petition gave the English court jurisdiction pursuant to the provisions of section 2(1)(b)(i) of the FLA 1986. It was submitted that this gave this court jurisdiction to make welfare orders in respect of the children either within the mother’s existing application or, alternatively, if required, in a new application which the mother would make for such orders.
33. This led to a further hearing on 28 July 2022, at which the parties were represented by different counsel, and a further judgment on 22 August 2022. The father’s case was that, as the judge had already decided, any application for welfare orders had to be made in Scotland. He relied “on the principle of finality” and submitted that the mother should not be entitled to bring “a new claim”. It was also submitted that the FLA 1986 “did not apply to a Hague Convention case such as the one in this case” or that, if it did, “the application was nothing to do with the divorce”.
34. The judge adhered to her previous decision and further decided, as set out in the order of 15 September 2022, that the English court did “not have jurisdiction to make orders in relation to the children pursuant to ss. 2 and 2A Family Law Act 1986”.
35. During the course of the proceedings the court made a number of orders. These all referred to the CA 1989 and the Senior Courts Act 1981 in their headings. The children were made wards of court at the initial without notice hearing but that order was discharged at the first hearing at which both parties were represented. I refer to this because the question of whether the court has jurisdiction will depend on the powers the court is being asked to exercise, in particular whether the court is being asked to make an order under section 8 of the CA 1989 or an order under the court’s inherent jurisdiction. I deal with this briefly below, but, although the mother’s initial application was for a specific order under the inherent jurisdiction (the return of the children to England), it seems clear that she was in fact seeking a Part I order within the scope of the FLA 1986. For example, in the judge’s first judgment she referred to

the dispute as being whether Scotland or England had “jurisdiction to consider [the children’s] *welfare*” (emphasis added). In her second judgment there is a more express reference when the judge identified the mother’s case as being that the court had jurisdiction to make an order within section 1(1)(a) of the FLA 1986, namely an order under section 8 of the Children Act 1989.

Judgment

36. The judge referred, in particular, to *Re B (A Child) (Habitual Residence: Inherent Jurisdiction)* [2016] 1 FLR 561 on the issue of habitual residence. She then said:

“8. The first question in relation to habitual residence I must ask myself – the primary principles in *Re B* – is, one, of a child's level of integration in a social and family environment in Scotland. I turn to the evidence from the father. He has provided a photograph of their five-bedroom home in ... Scotland. This was a rental home. The two older children went to the school in Scotland, and the school and the home in Scotland were organised in advance and the mother participated in the organisation of the home and the school. It is not clear to the extent she participated in the choices, but she was named in the rental agreement that is exhibited to the father's statement.”

37. She then referred to the text the mother had sent the father on 17 December 2021. The judge considered that it was clear from that text “that the father was to keep the children and look after them”. The father had “struggled, it was clear from his statements, but the children settled into their Scottish life”.
38. The judge then considered “the degree of connection between the children and England”:

“Of course these children had been born in England. They have been brought up in England. They left England to go on holidays. They went to English schools and [the youngest child] would have followed, no doubt, his older brother and sister into the schools that they were attending. So the degree of connection before the departure between the children and this jurisdiction was an obvious strong connection. It was a family home that they had in England with their mother and father, their mother being the primary carer.”

39. She next considered their connection with Scotland:

“12. The next matter I remind myself of is the children need not be fully integrated into the jurisdiction of Scotland. There was integration. They had their new home which the mother and father had been involved in choosing. It was a five-bedroom home. I have seen a photograph. They had a garden. It was rented for, I think, 12 months. The father who was by then

caring for the children was the only carer for them at that time. Their new school was in Scotland. They had been up there on 21 December 2021 for an induction day at the school before going away for the Christmas holidays to Albania, and they returned to the new Scottish school on 9 January 2022 for the new term, at the start of the new term period.

13. So the children's lived experience – and I have no doubt they were missing their mother until he gave them his side of the story of why she left – is that they were at school. They were in their new home. They had cousins nearby and they were making friends. There was, therefore, integration within the social and familial environment in Scotland. In my judgment there was sufficient integration in the way I have explained.”

40. The judge agreed with the mother’s submission that, because the children had been “deeply integrated in England, the less easy it would have been for integration in the new state of Scotland”. However, she concluded that “the requisite degree of integration had occurred in Scotland” by 3 April adding that the “reason for departing in April was for a holiday” which meant that they “were leaving their place of habitual residence for a short period” although “they stayed on”.
41. It can be seen that the judge’s analysis of the relevant factors did not substantively extend beyond 3 April. In particular, apart from the words “they stayed on”, it did not take into account the significant factor that the children had left Scotland permanently as from that date so that they had only lived in Scotland for three months. It also did not refer to the fact that the mother, who had been their primary carer, had remained living in England. The judge was, at that stage, unaware of the Petition which contained the highly relevant assertion by the father that he and the mother were habitually resident in England and Wales.
42. In her second judgment of 22 August 2022, the judge set out the mother’s case that the English court had jurisdiction under section 2(1)(b)(i) of the FLA 1986 to make an order within section 1(1)(a) because “the question of making ... a section 8 order arises in connection with the divorce”. She referred to *Lachaux v Lachaux* [2019] 2 FLR 712 (“*Lachaux*”) and *Re A (Jurisdiction: Family Law Act 1986) (Application for Amplification)* [2021] EWFC 105 (“*Re A*”).
43. As referred to above, the father relied on “the principle of finality” and submitted that the mother “should not be able to bring a new claim on a different ground of jurisdiction”. He relied on *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16 and *AR v ML (Financial Remedies: Finality of Judgment)* [2020] 1 FLR 523, in which Mostyn J referred to *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 2. It was also submitted that the 1996 Convention applied so that the mother could not rely on section 2(1)(b)(i) and that, if that provision did apply, the mother’s “application was nothing to do with the divorce”.
44. The judge repeated that she had previously decided that the English court did not have jurisdiction under the 1996 Convention because the habitual residence of the children was in Scotland. This meant that the Hague Convention *did* apply but it applied to

give jurisdiction to Scotland and not England. This also meant that section 2(1)(b)(i) of the FLA 1986 did not apply.

45. The judge went on to consider what the position would be, if the 1996 Hague Convention did not apply. She decided that the mother's application was *not* "in connection with" the divorce so that section 2(1)(b)(i) did not apply. The judge adopted "a broad view". She noted that "the same parties are involved in the litigation" and that "there was a temporal connection". However, she concluded that the divorce "has no connection to the children and their welfare"; there was "no overlap or link between the application for a section 8 order and the divorce". She also commented adversely on the mother's lack of awareness of the divorce.
46. The judge refused the mother's application and declared that the English court did not have jurisdiction.

Submissions

47. The father made very brief oral submissions in which he indicated that he did not consider proceedings were necessary because he and the mother had, he said, agreed arrangements in respect of the children following their return to England.
48. Mr Gration submitted that the judge was wrong to decide that the 1996 Convention applied to determine jurisdiction in this case because it does not apply to determine which part of the UK has jurisdiction. He submitted that the issue of intra-UK jurisdiction is determined by the FLA 1986. He relied on *Re W-B (Family Proceedings: Appropriate Jurisdiction Within the UK)* [2013] 1 FLR 394 ("*Re W-B*") and *Re PC, YC and KM (Brussels IIR: Jurisdiction Within United Kingdom)* [2014] 1 FLR 605 ("*Re PC*").
49. Mr Gration relied significantly on the effect of the judge's decision which was that no court in the UK had jurisdiction to make welfare orders in respect of the children. This was because of the combined effect of: (a) the judge's determination that the courts of England and Wales did not have jurisdiction; and (b) the provisions of section 11(1) of the FLA 1986, as set out below, which meant that the courts in Scotland also did not have jurisdiction because of the divorce proceedings in England.
50. He submitted that this outcome showed that the judge had been wrong to decide that the English court did not have jurisdiction under section 2(1)(b)(i) of the FLA 1986. She should have decided that "the question of making the order arises in or in connection with matrimonial proceedings ... and the condition in section 2A of this Act is satisfied". He relied, in particular, on *Lachaux* and what was said in the 1985 Report from the Law Commissions of Scotland and England and Wales, as referred to below. He also referred us to the obiter observations of Parker J in *AP v TD (Relocation: Retention of Jurisdiction)* [2011] 1 FLR 1851 ("*AP v TD*") and to Bodey J's decision in *J v U (Child Arrangements Order: Jurisdiction)* [2017] Fam 235 ("*J v U*") but submitted that they should not be followed.
51. Mr Gration also challenged the judge's decision in respect of the children's habitual residence and submitted that it was wrong. He recognised that he had to surmount a high hurdle in order successfully to challenge a finding of fact. He submitted, however, that the judge had failed properly to take material factors into account

including, in particular, the short length of the period that the children lived in Scotland before leaving for Albania, where they had remained living at the date of the hearing before the judge; the fact that the mother remained living in England throughout; the fact that the father and the children had been “struggling” when they were in Scotland; that the father was returning to England to live and work in April and May July 2022 (spending, he said, “some weeks in Albania and some weeks in England”); and the depth of the children’s connections in England. He further submitted that, if the judge’s decision was set aside, it was also highly relevant that the father’s Petition, dated 18 May 2022, had asserted that he and the mother “are habitually resident in England and Wales” and that the children returned to live in England, and not Scotland, in September 2022.

Legal Framework

52. The relevant legal issues are: (a) does the 1996 Convention apply in this case to determine which constituent part of the UK has jurisdiction to make a welfare order in respect of the children or is that determined by the FLA 1986; (b) when does “the question of making [a section 1(1)(a)] order [arise] in or in connection with matrimonial proceedings” so as to give the English court jurisdiction to make such an order, pursuant to section 2(1)(b)(i) of the FLA 1986; and (c) the proper approach to the issue of habitual residence.
53. The UK is a Contracting State to the 1996 Convention. It has “the force of law in the United Kingdom” pursuant, following the UK’s departure from the EU, to section 3C of the Civil Jurisdiction and Judgments Act 1982, inserted by section 1 of the Private International Law (Implementation of Agreements) Act 2020.
54. The relevant provisions of the 1996 Convention are as follows.
55. Article 1(1) sets out the ‘objects of the present Convention’. These include:
- “a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child ...”

Article 5 provides:

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

There are other provisions dealing with jurisdiction. These include article 10, which deals with jurisdiction to make orders in respect of children when there is a “pending divorce or legal separation of the child’s parents”. That article does not apply in the present case because jurisdiction has to be accepted by both parents.

56. Article 46 provides:
- “A Contracting State in which different systems of law or sets of rules of law apply to the protection of the child and his or her property shall not be bound to apply the rules of the

Convention to conflicts solely between such different systems or sets of rules of law.”

Article 47 provides:

“In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units -

(1) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;

...

(8) any reference to bodies or authorities of that State, other than Central Authorities, shall be construed as referring to those authorised to act in the relevant territorial unit ...”

57. The *Explanatory Report* on the 1996 Convention by Professor Paul Lagarde makes clear the scope of the Convention. Paragraph 10 of the *Report* deals with the provisions of article 1(1)(a):

“[10] The Convention determines the State whose authorities have jurisdiction, but not the competent authorities themselves, who may be judicial or administrative and may sit at one place or another in the territory of the said State. In terms of conflicts of jurisdiction, it could be said that the Convention sets international jurisdiction, but not internal jurisdiction.”

That this is the intended effect of the 1996 Convention is repeated in the *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*, published in 2014 by the Hague Conference on Private International Law:

“[2.5] The first objective of the Convention, as set out at Article 1 a), is to determine the Contracting State whose authorities have jurisdiction to take measures directed to the protection of the person or the property of the child. It should be noted that the Convention determines only the relevant Contracting State whose authorities have jurisdiction and not the competent authorities within that State”

58. The *Explanatory Report* also deals with article 46:

“Article 46 (non-application of the Convention to internal conflicts)

[162] The Convention is intended to deal with international conflicts of authorities and laws in respect of protection of children. A Contracting State in which different systems of law apply in this area may, if it wishes to, apply the Convention’s rules to resolve these conflicts, but this article sets it out that

such State is in no way bound to do so. It should be pointed out that the conflicts internal to a Contracting State to which this article relates may be inter-territorial conflicts, equally as well as inter-personal conflicts.”

59. In *Re W-B*, the Court of Appeal had to determine whether England and Wales or Scotland had jurisdiction to make a Part I order. At the date of that decision, section 2 of the FLA 1986 referred only to “the Council Regulation”, because the 1996 Convention did not then apply. One issue which had been raised during the course of the proceedings was the relevance and applicability of the Council Regulation, being the EU Council Regulation 2201/2003 (described in the judgment as BIIR). By the time the case was before the Court of Appeal, neither party contended that that Regulation was relevant. It was, therefore, dealt with quite shortly. McFarlane LJ (as he then was) said:

“[10] ... It is now common ground before us, as it was by the time the recorder came to give his judgment, that reference to BIIR is of no relevance to the present case. The issue of jurisdiction that fell for the recorder to determine was between England and Wales and, on the other hand, Scotland, but both of those jurisdictional entities are part of one Member State, namely the United Kingdom, and BIIR, therefore, is to no effect.

[11] Notwithstanding that erroneous early mounting of the argument on behalf of the mother, counsel, Ms Christine Dooley, who appeared below and now appears before us, refocused her submissions to the Family Law Act 1986, which is relevant and does govern the determination of matters of jurisdiction as between Scotland and England and Wales ... The learned recorder gave a judgment on the point and we have considered that. The learned recorder rightly identified the area for judicial determination as being that of identifying what the 'relevant date' was in relation to the various applications before him.”

This meant that, for the purposes of section 2 of the FLA 1986, at [14], “the Council Regulation ... does not apply”. In *Re W-B* was followed by Baker J (as he then was) in *Re PC*.

60. I would add that *Re W-B* has been said to have “settled” any debate about the relationship between the European Regulation and the FLA 1986 and, “by parity of reasoning”, the relationship between the 1996 Convention and the FLA 1986. In *International Movement of Children, Law Practice and Procedure*, Lowe, Everall, Nicholls, 2nd Edition, 2016 the editors commented, at [6.4]:

“In fact, there had been some doubt about the inter-relationship of the 1986 Act and the revised Brussels II Regulation but it is now settled that [that] Regulation (and, by parity of reasoning the Hague Protection Convention) has no application to choice of jurisdiction within the United Kingdom (and the Isle of Man

and Jersey) and that in consequence that question continues to be governed by the 1986 Act.”

61. It is also relevant to note, as submitted by Mr Gration, that no substantive further amendments were made to the FLA 1986 when it was amended to include reference to the 1996 Convention. As he pointed out, the FLA 1986 would have had to have been very significantly amended if the 1996 Convention was intended to deal with the issue of intra-UK jurisdiction.

62. I propose next, briefly, to deal with section 8 of the CA 1989. A section 8 order is a “child arrangements order”, a “prohibited steps order” or a “specific issue order”. Section 8(3) provides:

“(3) For the purposes of this Act “family proceedings” means any proceedings—

(a) under the inherent jurisdiction of the High Court in relation to children; and

(b) under the enactments mentioned in subsection (4),

but does not include proceedings on an application for leave under section 100(3).”

A number of enactments are listed in subsection (4) including the Matrimonial Causes Act 1973 (“the MCA 1973”).

63. The relevant provisions of the FLA 1986 are as follows.

64. Part I contains provisions setting out when the courts of each constituent part of the UK have jurisdiction to make a Part I order. In particular, it stipulates when the respective courts in England and Wales or in Scotland or in Northern Ireland will have jurisdiction so as to avoid jurisdiction conflicts. Chapter II deals with England and Wales; Chapter III with Scotland; and Chapter IV with Northern Ireland.

65. Chapter I sets out the orders to which Part I applies. As referred to above, they are listed in section 1(1) and are defined as a “Part I Order”. They include:

“(a) a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order;

...

(d) an order made by a court in England and Wales in the exercise of the inherent jurisdiction of the High Court with respect to children—

(i) so far as it gives care of a child to any person or provides for contact with, or the education of, a child; but

(ii) excluding an order varying or revoking such an order ...”

66. Chapter II, section 2 provides:

“Jurisdiction: general.

(1) A court in England and Wales shall not make a section 1(1) (a) order with respect to a child unless—

(a) it has jurisdiction under the Hague Convention, or

(b) the Hague Convention does not apply but—

(i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2A of this Act is satisfied, or

(ii) the condition in section 3 of this Act is satisfied.

...

(3) A court in England and Wales shall not make a section 1(1) (d) order unless—

(a) it has jurisdiction under the Hague Convention, or

(b) the Hague Convention does not apply but—

(i) the condition in section 3 of this Act is satisfied, or

(ii) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection.”

67. Section 2A provides:

“2A Jurisdiction in or in connection with matrimonial proceedings or civil partnership proceedings.

(1) The condition referred to in section 2(1) of this Act is that the proceedings are proceedings in respect of the marriage or civil partnership of the parents of the child concerned and—

(a) the proceedings—

(i) are proceedings for divorce or nullity of marriage, or dissolution or annulment of a civil partnership, and

(ii) are continuing;

(b) the proceedings—

(i) are proceedings for judicial separation or legal separation of civil partners,

(ii) are continuing,

and the jurisdiction of the court is not excluded by subsection (2) below;

...

(2) For the purposes of subsection (1)(b) above, the jurisdiction of the court is excluded if—

(a) after the grant of a decree of judicial separation or the making of a judicial separation order, on the relevant date, proceedings for divorce or nullity in respect of the marriage, or

(b) after the making of a separation order, on the relevant date, proceedings for dissolution or annulment in respect of the civil partnership,

are continuing in Scotland or Northern Ireland.

(3) Subsection (2) above shall not apply if the court in which the other proceedings there referred to are continuing has made —

(a) an order under section 13(6) or 19A(4) of this Act (not being an order made by virtue of section 13(6)(a)(i)), or

(b) an order under section 14(2) or 22(2) of this Act which is recorded as being made for the purpose of enabling Part I proceedings to be taken in England and Wales with respect to the child concerned.

(4) Where a court—

(a) has jurisdiction to make a section 1(1)(a) order by virtue of section 2(1)(b)(i) of this Act, but

(b) considers that it would be more appropriate for Part I matters relating to the child to be determined outside England and Wales,

the court may by order direct that, while the order under this subsection is in force, no section 1(1)(a) order shall be made by any court by virtue of section 2(1)(b)(i) of this Act.

68. Section 3 provides:

“3 Habitual residence or presence of child.

(1) The condition referred to in section 2(1)(b)(ii) of this Act is that on the relevant date the child concerned—

(a) is habitually resident in England and Wales, or

(b) is present in England and Wales and is not habitually resident in any part of the United Kingdom,

and, in either case, the jurisdiction of the court is not excluded by subsection (2) below.

(2) For the purposes of subsection (1) above, the jurisdiction of the court is excluded if, on the relevant date, matrimonial proceedings or civil partnership proceedings are continuing in a court in Scotland or Northern Ireland in respect of the marriage of the parents of the child concerned ...”

There are then provisions, section 3(3), which disapply the provisions of section 3(2) in certain circumstances, namely when the courts in Scotland or Northern Ireland have decided, in summary, that it would be more appropriate for any application for a Part I order to be determined in England and Wales.

69. Section 5 gives the court the general power to stay proceedings in England and Wales in a number of situations including if “it appears to the court ... that it would be more appropriate for those matters to be determined in proceedings to be taken outside England and Wales”.

70. Section 7 deals with the interpretation of certain expressions within Chapter II. These include:

“(b) “matrimonial proceedings” means proceedings for divorce, nullity of marriage or judicial separation;

(c) “the relevant date” means, in relation to the making or variation of an order—

(i) where an application is made for an order to be made or varied, the date of the application (or first application, if two or more are determined together), and

(ii) where no such application is made, the date on which the court is considering whether to make or, as the case may be, vary the order ...”

71. Section 42(2) sets out when divorce proceedings will be “treated as continuing” for the purposes of Part I, which includes for the purposes of section 2A(1)(a)(ii) and for the purposes of section 11 (referred to below):

“For the purposes of this Part proceedings in England and Wales or in Northern Ireland for divorce, nullity or judicial separation in respect of the marriage of the parents of a child shall, unless they have been dismissed, be treated as continuing until the child concerned attains the age of eighteen—

(a) in the case of proceedings for a decree of divorce, nullity or judicial separation, whether or not a decree has been granted and whether or not (in the case of a decree of divorce or nullity of marriage) that decree has been made absolute;

(b) in the case of proceedings for a divorce, nullity of marriage or judicial separation order, whether or not an order has been made and whether or not (in the case of a divorce or nullity of marriage order) that order has been made final.”

There is a similar provision in respect of Scotland, section 42(3), save that proceedings are treated as continuing until the relevant child is 16.

72. It can be seen from these provisions that matrimonial proceedings are treated as continuing, for the purposes of giving the court jurisdiction under section 2(1)(b)(i) to make a section 8 order, for many years after the conclusion of those proceedings. For example, if a decree was made absolute or final when a child was aged two, the proceedings would be treated as continuing for a further 16 years. This is an important aspect of the context for determining whether, under section 2(1)(b)(i), “the question of making the order arises ... *in connection with* matrimonial proceedings” (emphasis added). I return to this further below.
73. I would also note that, as adverted to in paragraph 35 above, not every order which a court can make in respect of children will be a Part I order: *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* (“*A v A*”) [2014] AC 1. In that case, the Supreme Court decided that, for example, an order requiring only the return of children to England and Wales is not necessarily a Part I order. Such an order could be classed as a “specific issue order” made under section 8 of the CA 1989 or as an order made under the inherent jurisdiction but not one within section 1(1)(d) of the FLA 1986. As explained by Baroness Hale:

“[26] The court has power to make any section 8 order of its own motion in any “family proceedings” in which a question arises with respect to the welfare of any child: see section 10(1) (b). Proceedings under the inherent jurisdiction of the High Court are family proceedings for this purpose: see section 8(3) (a). So, assuming for the moment that an order to return or bring a child to this jurisdiction falls within the definition of a specific issue order, the judge might have made such an order even though this was not what the mother applied for. But that is not what he did. There are many orders relating to children which may be made either under the Children Act 1989 or under the inherent jurisdiction of the High Court: an order

authorising a blood transfusion for a Jehovah's Witness child is a good example. There is no mention of the Children Act 1989 in the order made by Peter Jackson J, which specifically refers to the inherent jurisdiction and moreover also makes the children wards of court, which is not an order available under the Children Act 1989.”

Her conclusion in that case was, at [28], “that the order made by Peter Jackson J and repeated by Parker J fell neither within section 1(1)(a) or section 1(1)(d) of the 1986 Act and was therefore not covered by the jurisdictional prohibitions in section 2 of that Act”.

74. Chapter II of the FLA 1986 deals with the jurisdiction of the courts in Scotland to make a Part I order. The provisions include:

“9 Habitual residence.

Subject to section 11 of this Act, an application for a Part I order otherwise than in matrimonial or civil partnership proceedings may be entertained by—

(a) the Court of Session if, on the date of the application, the child concerned is habitually resident in Scotland;

(b) the sheriff if, on the date of the application, the child concerned is habitually resident in the sheriffdom.”

Section 11 provides:

“11 Provisions supplementary to sections 9 and 10.

(1) Subject to subsection (2) below, the jurisdiction of the court to entertain an application for a Part I order with respect to a child by virtue of section 9, 10 or 15(2) of this Act is excluded if, on the date of the application, matrimonial or civil partnership proceedings are continuing in a court in any part of the United Kingdom in respect of the marriage or civil partnership of the parents of the child.”

It can be seen from section 11(1) that, as submitted by Mr Gration, the jurisdiction of the courts in Scotland to make a Part I order is *excluded* if there are matrimonial proceedings “continuing” in any other part of the UK.

75. It is also relevant to refer to the Law Commission and the Scottish Law Commission’s joint 1985 Report, *Family Law, Custody of Children – Jurisdiction and Enforcement within the United Kingdom* (Law Com. No. 138) (Scot. Law Com. No. 91) (“the 1985 Report”). The 1985 Report assists with understanding the intra-UK structure of the FLA 1986 and the reasoning behind the length of time for which proceedings are treated as continuing for the purposes of giving the respective courts jurisdiction to make a Part I order.

76. As to the former, the relevant passage makes clear that, for the purposes of determining which part of the UK has jurisdiction to make certain orders in respect of children, precedence was expressly given to that part of the UK in which matrimonial (and, later, civil partnership) proceedings were taking place or had taken place. This was a deliberate choice, as can be seen from the following:

“4.3 These proposed bases of jurisdiction would not of themselves remove the possibility of jurisdictional conflicts, for a basis might exist in more than one United Kingdom country: for example, a child’s parents might be involved in divorce proceedings in England and Wales and the child himself might be habitually resident in Scotland and physically present in Northern Ireland. If conflicts are to be avoided, it will be necessary to know in which country the courts are to exercise custody jurisdiction. Our scheme includes provisions for determining the priority of the bases of jurisdiction. Broadly speaking, *we propose that, subject to emergencies, jurisdiction in divorce, nullity of marriage or judicial separation should have priority over the other bases* and that the basis of habitual residence should have priority over the basis of physical presence. In the example given, therefore, the court entitled to exercise custody jurisdiction would be the divorce court in England and Wales; in the absence of divorce proceedings the court entitled would be the court of habitual residence in Scotland; and in the absence of divorce proceedings and habitual residence in the United Kingdom the court entitled would be the court of physical presence in Northern Ireland ...”
(emphasis added)

This makes it clear that, if it was otherwise in doubt, section 11(1) of the FLA 1986 means what it says because, for the purposes of determining intra-UK jurisdiction to make a Part I order, priority is given to that part of the UK in which there are *or were* matrimonial proceedings.

77. As to the reasoning behind the jurisdiction continuing, the *1985 Report* explained why a court’s jurisdiction to make Part I orders should continue throughout a child’s minority after there had been matrimonial proceedings. It first noted, at [4.7], its recommendation, which had been “generally approved”, that a UK court with divorce jurisdiction should also have child jurisdiction. The *1985 Report* then continued:

“4.8 The practical application of this general principle raises a problem as to when, for the purpose of custody jurisdiction, proceedings for divorce, nullity or judicial separation should be regarded as coming to an end. The effect of existing law in all three United Kingdom countries is that once the court is duly seised of the matrimonial dispute, it *retains* jurisdiction to deal with questions relating to custody of and access to the children. This jurisdiction is retained however long ago the divorce was granted, however distant the connection of the child with the country in which the divorce took place, and however close and long-standing the child’s connection with some other part of

the United Kingdom. The question we have to answer is whether, for the purposes of our scheme, the jurisdiction of the divorce court to make custody orders should continue so long as the child is within the appropriate age limit, i.e. 18 in England and Wales and Northern Ireland and 16 in Scotland.

4.9 We have reached the conclusion that a court dealing with divorce, nullity or judicial separation proceedings should remain entitled to exercise custody jurisdiction until the child attains the appropriate age, even where the child or his parents are or have become habitually resident elsewhere in the United Kingdom. Our main reason for reaching this conclusion is the impossibility of devising any general rule to the contrary effect which would not sometimes operate against the interests of the child's welfare or against those of the parents.

4.10 Nevertheless, we recognise that in some cases it will be advantageous for issues as to custody and access to be determined by a court in a United Kingdom country other than that in which the proceedings for dissolution of the marriage are brought, and we make recommendations for this purpose later in this Part of the report."

78. The reference, in [4.8], to the court retaining jurisdiction under the then existing legislation was, in relation to England and Wales, a reference to section 42(1) of the MCA 1973. Section 42(1)(a) provided that the court had jurisdiction to make orders in respect of a child under the age of 18:

"(a) in any proceedings for divorce, nullity of marriage or judicial separation, before or on granting a decree *or at any time thereafter* (whether, in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute) ..." (emphasis added)

It is clear that the Law Commissions did not intend to change this broad ground of jurisdiction nor to limit it, principally for the reason given in [4.9], namely "the impossibility of devising any general rule to the contrary effect which would not sometimes operate against the interests of the child's welfare or against those of the parents". Accordingly, section 2 of the FLA 1986, as originally enacted, provided that the court would continue to have jurisdiction to make a section 1(1)(a) order under section 42(1) of the MCA 1973.

79. It is also interesting, by way of contrast, to see the amendments which were made to section 42(1)(b) of the MCA 1973. This had provided that the court had jurisdiction in respect of a child under the age of 18:

"(b) where any such proceedings [as referred to in (a)] are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal."

This provision was amended by section 4(2) of the FLA 1986, as originally enacted, which provided:

“(2) In section 42(1)(b) of that Act (which enables orders as to custody and education to be made immediately, or within a reasonable period, after the dismissal of proceedings for divorce, etc.) for the words “within a reasonable period” there shall be substituted the words “(if an application for the order is made on or before the dismissal)”.”

It can, therefore, be seen that the extended power previously provided by section 42(1)(b) was restricted, by the deletion of the words “within a reasonable period”, while the broad jurisdiction provided by section 42(1)(a) was not.

80. Section 42 was repealed by the CA 1989. It was replaced by sections 2 and 2A of the FLA 1986 which have since been amended but which have always had the same substantive structure as they do now. This was the first time the words “in connection with” were introduced but, again, there is nothing to indicate that this was intended to restrict the breadth of the jurisdiction which it was replacing, namely that under section 42(1)(a) of the MCA 1973.
81. Returning to the *1985 Report*, the last sentence in [4.10] was a reference to the recommendation made, at [4.97], that “the court should be empowered to waive its jurisdiction to make a custody order where it considers that the matter could more appropriately be determined elsewhere”. This power was originally contained, in respect of England and Wales, in section 4(3) of the FLA 1986. The power is now provided by section 2A(4) (paragraph 67 above) and section 5 (paragraph 69 above).
82. The form of the above provisions, and the observations made in the *1985 Report*, led me to say the following in *Lachaux*:

“[187] The courts should take a broad view as to whether the question arises in or in connection with the other proceedings. In broad terms all that is required is that the parties to those proceedings are “the parents of the child concerned”, that the proceedings are taking place or did place in England and Wales, and that one or other or both of the parents seek a section 1(1)(a) order because their marriage or civil partnership is being or has been dissolved. The reason the court can take a broad view is because this provision only applies if neither BIIa nor the 1996 Convention apply and because section 2A(4) balances the broad scope of section 2(1)(b)(i) by giving the court the power not to exercise this jurisdiction.”

These, obiter, observations have been the subject of some analysis. We were referred to *TK v ML* [2022] 1 FLR 289 and to *Re A*. We were not referred to *R v T* [2022] EWHC 3362 (Fam), 2 December 2022, a decision in respect of which I have since given permission to appeal. In some respects, *R v T* would appear to provide a better opportunity to consider broader issues as to the scope of section 2(1)(b) of the FLA 1986 than the present appeal because both parties are represented.

83. However, I propose to consider the authorities to which we were referred for the purposes of analysing the meaning of the words “in connection with”.
84. The first was *AP v TD* in which Parker J, commented obiter, at [122], that the words “probably [mean] a temporal connection ... but how that connection is to be defined is more difficult”. She went on to conclude that “there must be proximity between the divorce proceedings and the court being asked to determine a question of making an order in relation to children”.
85. In *J v U*, Bodey J decided, at [17]:

“... that there must be some nexus more than just the mere existence of the two sets of proceedings and the fact that the parties to them are the same. It is not entirely easy to see what nexus there can or could be between proceedings seeking quite different reliefs; but it may be that the question is simply one of fact and degree. As a proposition which I put to Mr Scott and he accepted (and from which Mr Hale did not dissent), one can envisage a petition which raises the same issues as a Children Act application made at about the same time (for example “unreasonable behaviour” allegations against the respondent involving his behaviour towards the children). Such issues would be “connected” both as to content and in point of time. But that is not the case here ...”

He reached this conclusion in part because, at [16], he considered that:

“... if the mere existence of divorce proceedings here can clothe the court with jurisdiction to make child welfare orders in respect of children habitually resident elsewhere, then it would drive a coach and horses, or at least a coach, through the now generally accepted approach to the issue of jurisdiction. Clearly, if Parliament had wanted to say that, whenever there are pending matrimonial proceedings here, this court should without more have jurisdiction in respect of issues regarding the parties' children, then it could have done so. But it did not; and yet the criterion for jurisdiction remains “in or in connection with” matrimonial proceedings.”

86. In *TK v ML*, after referring to *Lachaux*, Mostyn J said:

“[41] On this analysis the residual jurisdiction can, at any rate in theory, be invoked years after the divorce provided that the applicant parent can earnestly claim that the child arrangements application is being made 'because' the marriage has been dissolved.

[42] I agree that there must be a clear causal link demonstrated between the child arrangements application and the divorce. A causal link requires the facts giving rise to the present application to be fairly traceable to the now concluded divorce.

This must be so because any other interpretation would make a mockery of the statutory requirement that the question of making the child arrangements order arises 'in connection with' divorce proceedings. I would suggest that taking 'a broad view' of the words of the statute does nonetheless require fidelity to their plain intention.”

He then said, at [43]:

“I see the criterion of temporal proximity as being the prime (but not only) metric for establishing whether there is a causal link between the child arrangements application and the earlier, now concluded, divorce.”

87. In *Re A*, Poole J, at [17], rejected the suggestion that there needed to be “a close temporal connection between the divorce and the s.8 application”. This was because:

“It is not for the court to interpret “in connection with” as imposing a requirement that the s.8 application must have been made within a certain time after the divorce proceedings when s.42(2) of the FLA 1986 provides that matrimonial proceedings are “continuing” even after decree absolute, for so long as the child concerned is under the age of 18.”

He then, at [18], after referring to the *1985 Report*, considered that:

“If the relevant provisions of the FLA 1986 faithfully enact the recommendations, then the use of the term “in connection with” in s.2(1)(b)(i) was used simply to distinguish cases where there were ongoing matrimonial proceedings from those where the matrimonial proceedings had come to an end, albeit they were to be treated as “continuing” by operation of s.42(2) of the FLA 1986.”

88. Poole J was also not persuaded by Mostyn J’s conclusion that there needed to be a “clear causal link”. He considered, at [19], that such a requirement “might produce a narrow test, rather than allowing for a “broad view” ... [and] “may be difficult to find” as referred to by Bodey J in *J v U*. His ultimate conclusion, at [20], was that:

“(ii) There needs to be some connection between the issues raised in the application and the divorce proceedings that goes beyond the mere fact that the divorce proceeded in this jurisdiction. The connection may exist due to one or more factors such as proximity in time, an overlap in the relevant facts or subject-matter, a causal link, or some other matter. However, there is no necessary condition and the sufficiency of any factors to establish a connection will be a question of fact and degree.”

He later said, at [22]:

“There must be one or more factors that establish a sufficient link between the divorce and the s.8 application, be they temporal, factual, causal, or something else. The reason for the application should be connected to the matrimonial proceedings.”

89. In my view, Poole J was clearly right to reject the need for temporal proximity. As he said, to require such proximity would be wholly contrary to the effect of sections 2 and 2A, with section 42(2), of the FLA 1986 which expressly provide that concluded matrimonial proceedings will continue to provide a ground of jurisdiction until the child is 18. It would introduce an arbitrary limitation on what the statute clearly provides and permits. The statutory history, as referred to above, also does not support any such limitation.
90. I also consider that he was right to reject the need for a “clear causal link” as formulated by Mostyn J. With all due respect, to require “the facts giving rise to the present application to be fairly traceable to the now concluded divorce” does not create a test which can be sensibly applied. Prior to its recent amendment, under section 1 of the MCA 1973 “one or more of a number of facts” had to be proved before a court could find that a marriage had irretrievably broken down. They were: “that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent”; “that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent”; desertion for at least two years; and separation for two or five years. As Bodey J said in *J v U*, it is not easy to see what the “nexus” could be between those matters and an application for a section 8 order. The focus is entirely different with those facts having no practical connection with the matters set out in the welfare checklist in the CA 1989.
91. There is now no scope for the *facts* to be “fairly traceable” following the implementation of the Divorce, Dissolution and Separation Act 2020. This has amended section 1 of the MCA 1973. The requirement to establish any of the previously required facts has been revoked. The only ground is that “the marriage has broken down irretrievably” and this is conclusively proved under section 1(3) by a statement to that effect.
92. I also, however, consider that similar problems emerge from Poole J’s preferred formulation. For the reasons set out above, I struggle to see what connection there might be “between the issues raised in the [welfare] application and the divorce proceedings”. It would, with all due respect, create an opaque test for the purposes of determining jurisdiction when it is not clear to me that this is what sections 2 and 2A mean. Nor, I would add, can I see the purpose of imposing such a test when the court has broad powers to stay proceedings.
93. As referred to above, I have been unable to find any suggestion that there was any intention, by the introduction of the words “in connection with”, to limit the very broad nature of the jurisdiction previously provided by section 42(1)(a) of the MCA 1973. Further, the approaches set out in the above cases would have the effect of restricting the broad application of sections 2 and 2A and, in my view, would have the effect eschewed by the Law Commissions in the *1985 Report* of creating a “general rule to the contrary effect which would not sometimes operate against the interests of the child’s welfare or against those of the parents”.

94. Finally, to introduce the tests or approaches referred to above would be difficult to reconcile with section 11 of the FLA 1986. This provides, simply, that the jurisdiction of the courts in Scotland is *excluded* if there are matrimonial proceedings “continuing in a court in any part of the” UK. The sole requirement is that such proceedings are “continuing” as defined by section 42(2). Any further requirement would be contrary to that provision and would create the situation created in the present case, namely that neither England and Wales nor Scotland would have jurisdiction. There are similar provisions in respect of England in section 2A(2) and in respect of Northern Ireland in section 19A in which the sole requirement is, again, that the proceedings are “continuing” in another part of the UK.
95. Accordingly, I remain of the view that the court should take the broad approach I referred to in *Lachaux* and without placing weight on the word “because”. I would add, to address the concern expressed by Bodey J, that this does not drive a coach or a coach and horses “through the now generally accepted approach to the issue of jurisdiction”. This is an alternative basis for jurisdiction and would have to be applied in a manner which did not cut across the jurisdictional framework of the 1996 Convention when that applied. Further, the court has the power to stay the application as referred to above.
96. In summary, and, out of an abundance of caution, subject to any further arguments advanced on the appeal in *R v T*, it seems to me that the simple approach to be applied to sections 2 and 2A of the FLA 1986 is that they give the court jurisdiction when the parties in the matrimonial proceedings are or were “the parents of the child concerned”; that the matrimonial proceedings are taking place or did take place in England and Wales (and concluded other than by dismissal); and that one or other or both of the parents seek a section 1(1)(a) order.
97. I now turn to the issue of habitual residence. The approach to be taken to determining this issue has been addressed in a number of authorities. I do not, therefore, propose to deal with it at any length in this judgment. For the purposes of the present appeal, I would just highlight one point.
98. This is that habitual residence is an issue of fact which requires consideration of *all* relevant factors; it “depends on numerous factors” (*A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2014] AC 1, at [54(i) and (iii)]). It is an open-ended, not a closed, list of potentially relevant factors.

Determination

99. In the light of my analysis of the legal issues as set out above, I now turn to determine the specific issues which arise in this case: (i) does the 1996 Convention or the FLA 1986 apply to determine whether the courts in England and Wales or in Scotland have jurisdiction to make a section 1(1)(a) order; (ii) does the question of making a section 1(1)(a) order arise in or in connection with matrimonial proceedings pursuant to section 2(1)(b)(i) of the FLA 1986; and (iii) was the judge right to decide that the children were habitually resident in Scotland. After the, perhaps, overlong analysis of the legal issues set out above, I can state my conclusions very shortly.

100. Before setting out my conclusions, I would first note that the judge below did not have the benefit of the submissions that have been made in this appeal. In particular, at the second hearing she seems not to have been referred to section 11 of the FLA 1986 and the effect of her decision having regard to that provision.

(i) Does the 1996 Convention or FLA 1986 Apply?

101. It is clear to me that the FLA 1986 and not the 1996 Convention applies to determine whether the courts in England and Wales or those in Scotland have jurisdiction to make a section 1(1)(a) order.

102. As set out in the *Explanatory Report*, at [10], the 1996 Convention “sets international jurisdiction, but not internal jurisdiction.”; and at [162], the 1996 Convention deals with “international conflicts”. This is confirmed in the *Practical Handbook* which states, at [2.5], “the Convention determines only the relevant Contracting State [i.e. the UK] whose authorities have jurisdiction and not the competent authorities within that State”.

103. This is also established, albeit that the point was not argued, by the decision of this court in *W-B*. Further, as submitted by Mr Gration, the intra-UK jurisdictional structure effected by the FLA 1986 could not operate in the manner set out in that Act if the 1996 Convention did determine which part of the UK had jurisdiction. Clearly, additionally, the FLA 1986 and the 1996 Convention have to be applied consistently so that the former does not cut across the jurisdictional framework established by the latter.

104. It is not entirely straightforward to apply this conclusion to the wording of section 2, when it refers to jurisdiction being available under section 2(1)(b) when “the Hague Convention does not apply”. This is probably what lies behind Thorpe LJ’s observation in *Re W-B*, at [29], that the provisions in the FLA 1986 “dealing with jurisdiction are difficult and complicated”. However, in the context of the present case, it seems to me that these words are best construed as meaning that the 1996 Convention does not apply to determine the relevant issue, namely whether the courts in England and Wales or those in Scotland have jurisdiction.

(ii) Does section 2(1)(b)(i) of the FLA 1986 Apply?

105. The second issue is whether section 2(1)(b)(i) applies because “the question of making the order arises in or in connection with matrimonial proceedings”. I have no doubt, for the reasons set out above, that it does. As submitted by Mr Gration, the effect of the judge’s decision is that no court in the UK has jurisdiction. The jurisdiction of the courts in Scotland is excluded under section 11(1) because “matrimonial ... proceedings are continuing” in England and Wales. The exceptions to this provision do not apply in this case. The judge has decided that the courts in England and Wales also do not have jurisdiction. This cannot be right.

106. The only sensible resolution to that conundrum, having regard to the clear wording of section 11(1), is to determine that the question of making a section 1(1)(a) order does arise in connection with matrimonial proceedings so as to give the court jurisdiction pursuant to section 2(1)(b)(i). Further, in any event, applying the approach referred to

above I consider it clear that the question of making a section 1(1)(a) order does arise in connection with the matrimonial proceedings.

(iii) Where were the children habitually resident?

107. I also consider that the judge's decision that the children were habitually resident in Scotland on 3 April 2022 cannot be sustained. This is principally because she effectively excluded a very material factor from her consideration, namely that the children only lived in Scotland for 3 months. However, I also consider that her decision is not reasonably sustainable having regard to all the evidence as to the children's respective connections with Scotland and with England and Wales. The father's comment in his first statement that: "We all were stressed and did not find life easy" provided a very clear summary of their time in Scotland. He tried to explain this away in his second statement but this attempt was belied by the fact that they left Scotland for good on 3 April 2022.
108. Further, if the judge's decision is set aside, we can take into account the following additional significant factors, namely the father's assertion in his Petition that he and the mother were habitually resident in England and Wales on 18 May 2002 and that, when the children returned to the UK in September 2022, they returned to England, not Scotland.
109. Taking all relevant factors into account, it is clear that the children remained habitually resident in England and Wales on 3 April 2022.
110. I would add that it is not entirely clear why the parties considered the relevant date to be 3 April 2022 rather than the date of the mother's application. However, there is no suggestion that their habitual residence had changed between 3 April and 3 May 2022. Finally, for obvious reasons, this case does not raise the issue of the relevant date for the purposes of determining jurisdiction under the 1996 Convention.
111. In conclusion, the above are my reasons for agreeing that this appeal must be allowed and for determining that the courts in England and Wales have jurisdiction to make an order under section 8 of the CA 1989.

Lord Justice Stuart-Smith:

112. I agree.

Lady Justice Elisabeth Laing:

113. I also agree.