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Case No: CA-2023-000216
& CA-2023-000312

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE MacDONALD
[2022] EWHC 1981 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 October 2023

Before:

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LORD JUSTICE NEWEY

Re London Borough of Hackney v P and Others
(Jurisdiction: 1996 Hague Child Protection Convention)

Henry Setright KC and Anita Guha (instructed by **Dawson Cornwell LLP**) for the
Appellant
Mark Twomey KC and Edward Lamb (instructed by **London Borough of Hackney Legal**
Services) for the **First Respondent**
The Second Respondent did not appear and was not represented
Kieran Pugh (instructed by **Duncan Lewis Solicitors**) for the **Third Respondent**
Jacqueline Renton, Charlotte Baker and Frankie Shama (instructed by **Goodman Ray**
Solicitors) for the Intervener

Hearing date: 25 May 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 19th October 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 principal issue raised by this appeal is the date by reference to which the court determines whether it has jurisdiction based on a child's habitual residence, pursuant to the provisions of Article 5 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("the 1996 Convention"). Is it the date of the hearing or is it the date on which the proceedings were issued? This question has divided the judges of the Family Division, as outlined further below. A secondary issue is the extent of the court's jurisdiction to make orders under Part IV of the Children Act 1989 ("the CA 1989") if a child is present, but not habitually resident, in England and Wales nor any other Contracting State to the 1996 Convention.
2. MacDonald J ("the judge") decided in summary: (a) that the relevant date is "the date of the hearing", namely in this case 7 November 2022; and (b) that, alternatively, the court would have substantive jurisdiction to make a Part IV order under domestic rules as to jurisdiction based on the child's presence in England and Wales. I appreciate that the expression, "the date of the hearing", is itself open to interpretation but that is the expression used by the judge and I propose also to use it to describe the effect of his decision.
3. The Appellant, the paternal grandmother of the child who is the subject of the proceedings, appeals. There are two grounds of appeal:
 - (i) that the relevant date for determining habitual residence for the purposes of Article 5 is not "the date of the hearing", as determined by the judge, but the date on which the court is first seised or, alternatively, the date of the hearing when the issue of jurisdiction is listed for determination;
 - (ii) that the judge was wrong to decide that there is a residual domestic jurisdiction based on the presence of a child when he/she is habitually resident in another State which is not a party to the 1996 Convention.
4. The child, H, was born in France in 2009. She lived there until 2017 when she moved to live with her paternal grandmother, N, in Tunisia, pursuant to an order of the French court. H's mother had died in early 2017. Her father is believed to be living in France but cannot be located and he has taken no part in these proceedings.
5. H remained living in Tunisia until she arrived in England on 19 June 2021 to stay with her paternal uncle. The circumstances which led to this are far from clear. H was initially taken into police protection and placed in foster care on 4 July 2021. She was returned to her paternal uncle on 7 July but, as explained in the judgment below, was again placed in foster care on 13 July 2021. The Local Authority commenced care proceedings on 18 August 2021. An interim care order was made on 7 September 2021. H has remained in foster care since then.
6. There were, regrettably, very substantial delays in the progress of the case including in respect of the issue of habitual residence although the question of jurisdiction had

been identified as requiring determination when the proceedings began. There were also regrettably very significant delays in engaging with N. Ultimately, an application was issued by her for a summary return order but, because of the latter delays, this was not made until 27 June 2022.

7. The legal issues in respect of jurisdiction were not substantively addressed until July 2022. In his judgment, dated 29 July 2022, reported as *London Borough of Hackney v P & Ors* [2022] EWHC 1981 (Fam), [2023] 1 FLR 502, the judge decided, at [106], that the relevant date to determine habitual residence for the purposes of establishing the court's jurisdiction under Article 5 "is the date of the hearing" and that, as set out in his order:

"The Court determined that the 1996 Hague Convention governs the question of whether this court has jurisdiction to make orders under Part IV of the Children Act 1989 in respect of the child notwithstanding the involvement in this case of the Republic of Tunisia. Further, and within that context, that if the child is not habitually resident in England and Wales for the purposes of Art 5, the common law jurisdictional basis of presence will subsist in respect of the child. Further that the question of whether the child is habitually resident in this jurisdiction for the purposes of Art 5(1) of the 1996 Hague Convention is the date of the hearing."

A further hearing was then listed to determine the factual issue of habitual residence, with the time for appealing the July 2022 order being extended until after that issue had been determined.

8. H's habitual residence was determined by the judge's second judgment of 19 December 2022. He determined that H was habitually resident in England and Wales at the date of the hearing on 7 November 2022 and that, accordingly, the courts here had jurisdiction under the provisions of Article 5(1) of the 1996 Convention.
9. On this appeal, N is represented by Mr Setright KC and Ms Guha, who appeared below; H is represented through her guardian by Mr Pugh, who did not appear below; and the Local Authority is represented by Mr Twomey KC and Mr Lamb, who both appeared below. The International Academy of Family Lawyers ("IAFL") was given permission to intervene by way of written submissions which were drafted by Ms Jacqueline Renton, Ms Charlotte Baker and Mr Frankie Shama. I am grateful to all counsel for their respective submissions.
10. I would add that other issues, in particular the applicability of the 1996 Convention if the other State involved in the case is not a party to it, as raised in the Respondent's Notice, have fallen away following this court's judgment in *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659, 12 June 2023 ("*Re A*"). The judgment in *Re A* was handed down after the hearing in this appeal but, rather than repeat that judgment, I propose to treat the relevant paragraphs as incorporated into this judgment.
11. In *Re A* it was decided, at [49]-[51], that Article 5 of the 1996 Convention does not apply if a child is not habitually resident in any Contracting State at the relevant date

and, at [57]-[59], that the 1996 Convention applies even if the rival jurisdiction is not a party to the 1996 Convention. The latter was based, by analogy, on what Lady Hale had said in *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] AC 1 (“*A v A*”), at [20], about BIIa (Council Regulation (EC) No. 2201/2003) being the “first port of call” for the purposes of determining the court’s jurisdiction and, at [30], that it applied even if the rival jurisdiction was not an EU Member State. This accords with the judge’s conclusions which were also based in part on *A v A*.

Background

12. I do not propose to set out any details in respect of the factual background beyond those set out above.

Proceedings

13. In the application for a Part IV order, the Local Authority ticked the box indicating that this was a case with an international element and set out that there may be an issue as to jurisdiction. At the first hearing on 7 September 2021, the Local Authority submitted that the issue of jurisdiction should be determined as soon as possible. No doubt because of lack of availability, a hearing was fixed for 20 December 2021 to consider the issue of habitual residence. On 20 December, the case was adjourned to March 2022 because it was determined that substantial further evidence was required. I would also note that N had indicated that she wanted to attend the hearing in December, unrepresented, but had been unable to do so because the court had been “unable to dial her number as it is an international number”.
14. N was finally able to instruct solicitors in England in February 2022. As referred to above, by an application dated 27 June 2022, she sought an order under the inherent jurisdiction for the summary return of H to Tunisia.
15. The case was ultimately listed for a substantive hearing before the judge on 14 July 2022 leading to his judgment dated 29 July 2022. This was followed by the hearing on 7 November 2022 which led to the judgment dated 19 December 2022. The judge determined that H was habitually resident in England as at the date of that hearing. He dismissed N’s application for a summary return order and decided that the court here was the most convenient forum to determine welfare issues, not Tunisia. Understandably, none of these latter decisions are appealed.

Judgments

16. In his first judgment, the judge dealt with three issues, at [3]:
 - “i) Does the jurisdictional scheme under Chapter II of the [1996 Convention] apply to care proceedings under Part IV of the Children Act 1989 and, if so, does it apply to these proceedings notwithstanding this case involves a non-Convention State?
 - ii) If the jurisdictional provisions of Chapter II of the 1996 Hague Convention do not apply to these proceedings under Part IV of the Children Act 1989 involving a non-Convention State,

does jurisdiction arising out of the presence of the child in the jurisdiction subsist for the purposes of care proceedings pursuant to Part IV of the Children Act 1989?

iii) If the question of habitual residence falls to be determined in this case, whether under the jurisdictional provisions of Chapter II of the 1996 Hague Convention or otherwise, what is the relevant date for that determination?"

17. In respect of (i), the judge determined that the 1996 Convention applies to care proceedings. He decided, at [76], that:

“the jurisdictional scheme under Chapter II of the 1996 Hague Convention is the correct scheme by which to determine whether this court has jurisdiction to make orders under Part IV of the Children Act 1989.”

And, at [94], he concluded that Chapter II applies even though the rival jurisdiction is not a party to the 1996 Convention.

18. In respect of (ii), the judge noted that there are no domestic statutory provisions dealing with the court’s jurisdiction to entertain care proceedings in respect of a child. The provisions of the Family Law Act 1986 (“the FLA 1986”) only deal with private law proceedings and, as he said at [25], the CA 1989 “does not itself contain provisions that identify over which children the court has jurisdiction” to make orders under Part IV. The judge referred to a number of cases in which this had been addressed, which I deal with further below, starting with Singer J’s decision in *Re R (Care Proceedings: Jurisdiction)* [1995] 1 FLR 711 (“*Re R*”) and including *Re F (a child) (care proceedings: habitual residence)* [2014] EWCA Civ 789, [2015] 1 FCR 88 (“*Re F*”). Based on these authorities and passages in the *Explanatory Report* on the 1996 Convention by Professor Paul Lagarde and 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, the judge rejected the case advanced on behalf of N that the court’s jurisdiction was limited to that provided by Articles 11 and 12 of the 1996 Convention and could not be based on H’s presence here.

19. The judge also noted, at [103], the apparent consequences of the case advanced on behalf of N:

“Were the court to find in due course that [H] is not habitually resident in this jurisdiction then, absent a residual jurisdiction based on presence, *the court would be precluded from making any substantive orders in respect of her welfare*, notwithstanding that she has now been in the jurisdiction for over a year and has expressed a strong wish not to be returned to the Republic of Tunisia.” (emphasis added)

The judge recognised that the 1996 Convention has no express residual jurisdiction provision unlike BIIa (Article 14). However, he considered that to limit the court’s jurisdiction in this way would be contrary to “the need [to] ensure the protection of

children articulated in the preamble to” the 1996 Convention. Accordingly, he concluded, at [112], that, if the court did not have jurisdiction based on habitual residence, it would have jurisdiction to make orders under Part IV of the CA 1989 on “the common law jurisdictional basis of presence” which had not been removed by the 1996 Convention.

20. In respect of (iii), the judge decided, as referred to above, that the relevant date was the date of the hearing and not the date on which the court was first seised. He relied significantly on passages in the *Explanatory Report*. He referred, at [107], to the relevance of habitual residence being the principal ground of jurisdiction and to the 1996 Convention not applying the principle of *perpetuatio fori*:

“First, the purpose of the connecting factor of habitual residence in Art 5 of the 1996 Hague Convention, which article determines which Contracting State has substantive jurisdiction to pursue the objects and purpose of the Convention, is to ensure that the jurisdiction with the closest factual connection to the child’s family and social life, and the jurisdiction thereby best placed to take substantive decisions regarding the welfare of that child, is the jurisdiction that takes decisions concerning the child’s welfare. Second, the Convention contains no principle of *perpetuatio fori*, by which a Contracting State seised of proceedings in respect of a child habitually resident in that Contracting State will retain jurisdiction for the duration of those proceedings, even if the child loses habitual residence there and becomes habitually resident in another Contracting State.”

21. He then summarised his conclusions, at [108], as follows:

“Further, and in these circumstances, in the absence of the principle of *perpetuatio fori*, it will be the factual situation during the course of proceedings, and whether that situation continues to amount to habitual residence as a matter of fact, that determines whether substantive jurisdiction subsists under Art 5(1). In the absence of the principle of *perpetuatio fori*, it is further axiomatic that habitual residence will fall to be assessed at the current hearing, and not by looking back to an earlier hearing in the proceedings. Indeed, the logical consequence of the foregoing position is that the question of habitual residence will fall to be confirmed at each hearing, albeit that that exercise is unlikely to be an onerous one in the vast majority of cases. Within this context, where the proceedings reach a final hearing the question of whether the court has substantive jurisdiction pursuant to Art 5(1) of the 1996 Convention will still be a potentially live one. This is a fundamental change from the position that pertained under Art 8 of Brussels IIa prior to the departure of the United Kingdom from the European Union.”

22. The judge went on, at [110], to make some further observations about the effect of this decision:

“this position does risk the question of habitual residence, and therefore jurisdiction under the 1996 Hague Convention, being determined by mere effluxion of time over the course of protracted proceedings, particularly where a litigant is seeking to gain advantage by causing delay in proceedings. In cases concerning children who arrive in this jurisdiction, that risk is particularly acute where the court determines upon the issue of proceedings that it has only jurisdiction to take urgent measures under Art 11 of the 1996 Hague Convention. Within this context, as this court observed in [*Warrington Borough Council v T and others* [2022] Fam 107] *it is vital that the question of whether, and on what basis, the court has jurisdiction is determined at the outset of the proceedings and that thereafter the proceedings are resolved in a timely manner based on that determination*. It also further emphasises the need for robust case management generally in order to avoid a situation where substantive jurisdiction is ultimately determined by procedural default.” (emphasis added)

23. In his second judgment, the judge decided that H was habitually resident in England as at 7 November 2022 and dealt with the other issues referred to above. The judge also reiterated, at [60]:

“the necessity of dealing expeditiously with questions of jurisdiction, and with questions of summary return, at the *very outset* of proceedings involving an international element.”

Submissions

24. The parties’ respective submissions essentially mirrored those made to the judge. I summarise them as set out below.
25. In their written submissions, Mr Setright and Ms Guha invited the court to approve Lieven J’s decision in *Derbyshire County Council v Mother and others* [2023] Fam 183 (“*Derbyshire CC*”) in which she disagreed with the judge’s decision in the present case as to the relevant date. She determined that it is the date on which the court is seised, as set out at [26]:

“the purpose of the Hague Convention is best met by habitual residence, and therefore jurisdiction, being determined when the court is seised,”

Mr Setright submitted that it would be “hazardous and undesirable for public law children proceedings to be instituted and sustained without a legitimate jurisdictional basis at their inception, but with their validity tested and affirmed retrospectively (consequentially on a subsequent acquisition of habitual residence) at a later (perhaps much later) date”. It was suggested that such an approach was neither a “just or principled solution”; that it did not fulfil the aims or objectives of the 1996

Convention; and that it was neither “an automatic or necessary consequence of the absence of the principle of *perpetuatio fori*”. It was also submitted that the principle of comity would be “violated” if the court were “to assert a baseless substantive jurisdiction in place of that of the courts of the child’s habitual residence” and then later sought to legitimise orders made prior to any change in habitual residence by relying on a jurisdiction acquired significantly after the proceedings had been commenced.

26. Mr Setright acknowledged that the absence of the principle of *perpetuatio fori* in the scheme of the 1996 Convention suggested that the issue of habitual residence “must be kept under review”. However, he submitted forcefully that proceedings cannot be lawfully commenced without an appropriate jurisdictional foundation. This meant that the issue of jurisdiction must be determined at the first available opportunity, as required by PD 12A of the Family Procedure Rules 2010 (“the FPR 2010”), preferably, he submitted, by reference to the date on which the court was seised. This had the advantage of being a predictable and consistent fixed point rather than the arbitrary and unpredictable timing of when a hearing happened to take place. If a child subsequently became habitually resident in England and Wales, fresh proceedings could be commenced. This, he submitted, maintained procedural certainty and integrity and was consonant with the jurisdictional scheme under the 1996 Convention.
27. As to the second ground of appeal, Mr Setright questioned how any residual jurisdiction, of the type identified by Singer J in *Re R*, could have been preserved following the incorporation into domestic law of BIIa and the 1996 Convention. He relied on what Sir James Munby P said in *Re F*; what was said in *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 606 (“*Re B*”) both by Lord Wilson in his majority judgment and by Lady Hale and Lord Toulson in their joint concurring judgment; and what was said by Black LJ (as she then was) in *In re J (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 1291 (“*Re J*”). His submission, at its highest, was that either the court has jurisdiction under the provisions of the 1996 Convention or it does not have jurisdiction at all. Alternatively he accepted, it appeared, that the 1996 Convention does not eliminate all existing domestic rules or dictate the content of domestic provisions but that, when the latter were inconsistent with the former, they “should give way”. Accordingly, recourse to domestic jurisdiction provisions was “either wrong or bad practice”.
28. Mr Twomey and Mr Lamb submitted that the judge’s decision as to the relevant date should be upheld. It was submitted that Lieven J had wrongly discounted what was set out in the *Explanatory Report*, in particular at [42] and [84] as relied on by the judge, on the basis that it was not within the scope of article 31 of the Vienna Convention on the Law of Treaties (“the VCLT”) including because she had overlooked the provisions of article 32. It was clear from both the *Explanatory Report* and the *Practical Handbook* that jurisdiction by reference to habitual residence was not fixed when the court is seised, in particular because the principle of *perpetuatio fori* does not apply. Mr Twomey also submitted that Lieven J overstated the effect of the relevant date being the date of the hearing when she said, in *Derbyshire County Council v Mother and Others* [2022] EWHC 3405 (Fam), [2023] Fam 183, [2023] 2 WLR 1270 at [24], that it was “also potentially wasteful of judicial

and administrative resources because the procedures for transfer and liaison under the Hague Convention will be rendered pointless because by the final hearing the child has become habitually resident in England”. He submitted that the transfer provisions of Article 8 would still be available and would not be rendered “pointless”.

29. Mr Twomey relied on the decision of the CJEU in *CC v VO* (Case C-572/21) [2022] 2 FLR 1175 (“*CC v VO*”) and on McFarland J’s decision in *In the Matter of LS (A Male Child Aged 8 Months)* [2022] NIFam 9 in which he agreed with the judge as to the relevant date.
30. Mr Twomey also pointed to the dichotomy that would be created by the Appellant’s case in that, although the court would be deprived of jurisdiction to make Part IV orders, the Local Authority would continue to have its statutory obligations under the CA 1989 and relevant child care regulations.
31. As to the second ground of appeal, Mr Twomey submitted that there is nothing in the 1996 Convention, either expressly or by implication, which removes the well-established residual domestic jurisdiction to bring proceedings for a Part IV order on the basis of a child’s presence in England and Wales. In support of that submission he further relied on passages in the *Explanatory Report* and the *Practical Handbook*. Mr Twomey also submitted that it would be surprising and, indeed, inconsistent with the express object of the 1996 Convention to *improve* the protection of children in international situations, if the jurisdiction to commence public law proceedings, designed to protect and safeguard children present in England and Wales from significant harm, had been restricted by that Convention and was more limited than that available under the FLA 1986 in respect of private law proceedings.
32. Mr Pugh supported the judge’s decision in his submissions on behalf of H. He submitted that the judge was entitled, and had been right, to place weight on the *Explanatory Report* contrary to the approach adopted by Lieven J in *Derbyshire CC*. He also submitted that determining the issue of habitual residence by reference to an earlier date than that of the hearing “imports an artificiality into proceedings” because the court would be looking at the historic position rather than the child’s actual current situation. The longer the gap between these dates, the greater the divergence would or could be.
33. Mr Pugh further submitted that the concerns expressed about the approach adopted by the judge had been overstated. In saying, at [108] of his first judgment, that “the question of habitual residence will fall to be confirmed at each hearing”, Mr Pugh submitted that it was not being suggested that the court should review or revisit the issue of habitual residence at every hearing. It was, he submitted, simply being suggested that the court should be alert to whether the circumstances had changed sufficiently such that the child’s habitual residence might have changed. There would, he submitted, need to be substantial grounds to justify the court reconsidering the issue which, typically, would have to be raised by one of the parties. Alternatively, he proposed, while making clear that this was not a proposal made on behalf of Cafcass, that the Guardian might be required to keep this issue under review.
34. In respect of the second ground of appeal, Mr Pugh referred to the judge’s observation, at [103] of his first judgment, that, on N’s case, “the court would be precluded from making any substantive orders in respect of [H’s] welfare

notwithstanding that she has now been in the jurisdiction for over a year”. Inevitably, the Guardian would not support a position which meant that the court was unable to act to protect a child or to make a best interests decision in respect of a child present in the jurisdiction for such a substantial period. Mr Pugh submitted that such a result would be unlikely to have been the intention of Parliament or of the drafters of the 1996 Convention.

35. The IAFL made three overarching submissions as to the objectives which, they submitted, the court should seek to achieve:
- (a) Clarity in the approach adopted so that lawyers, and no doubt others, can provide clear and consistent advice;
 - (b) The relationship between the 1996 Convention and national law should bolster, rather than undermine, the range of powers available to a court when seeking to protect a child; and
 - (c) Any issue as to the court’s jurisdiction should be determined without delay.
36. With those objectives in mind, it was submitted that the “clearest and most straightforward way of interpreting the relevant date under Article 5 is by fixing it to the date the application is issued”. This would provide clarity and certainty and does not conflict with Article 5(2) which is addressing what happens when a child’s habitual residence changes and *not* the date on which habitual residence is initially determined. Reference was made to the Australian decision of *Bunyon & Lewis (No 3)* [2013] FamCA 488, in which Bennett J said, at [187]:

“For the purposes of the 1996 Convention, the child’s place of habitual residence is assessed at the time the court is to take the measure (make parenting orders).”

This is clearly relevant although I would note that the 1996 Convention has been implemented in Australian law by domestic legislation and, as a result, as Bennett J says, at [131], it “is our legislation and regulations, rather than the Convention, which have the force of law in Australia”.

37. It was submitted, with little enthusiasm, that, alternatively, it should be the date of the first hearing listed to determine the issue of jurisdiction which should be listed expeditiously.
38. As to the second ground of appeal, it was submitted that “the correct, purposive construction” of the 1996 Convention, which sought “to improve the protection of children in international situations”, was that it did not exclude alternative grounds of jurisdiction provided under national law, in the event that jurisdiction was not established under the provisions of the Convention. Mirroring the submissions made by Mr Twomey and Mr Pugh, the IAFL submitted that it would be surprising if the effect of a State becoming a party to the 1996 Convention, designed to provide more protection for children internationally, was to limit “the tools available to the court”.

Legal Framework

Legislation

The 1996 Convention

39. Following the UK leaving the EU, as set out by the judge, at [23], and for the avoidance of doubt as to its implementation, the 1996 Convention was directly incorporated into domestic law by s. 3C of the Civil Jurisdiction and Judgments Act 1982 (inserted by s.1 of the Private International Law (Implementation of Agreements) Act 2020). Section 3C(1) provides simply:

“The 1996 Hague Convention shall have the force of law in the United Kingdom.”

40. The Preamble to the 1996 Convention refers to “the need to improve the protection of children in international situations” and confirms “that the best interests of the child are to be a primary consideration”.

41. Chapter I of the 1996 Convention is entitled “Scope of the Convention”. One of its principal objects, as set out in Article 1, is:

“a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child.”

The “measures” included within its scope are broadly defined by Article 3:

“The measures referred to in Article 1 may deal in particular with-

a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;

b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;

c) guardianship, curatorship and analogous institutions;

d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;

e) the placement of the child in a foster family or in institutional care, or the provision of care by kafala or an analogous institution;

f) the supervision by a public authority of the care of a child by any person having charge of the child;

g) the administration, conservation or disposal of the child's property.”

Article 4 sets out those matters to which the 1996 Convention does not apply which include adoption.

42. It can be seen, as set out in the *Explanatory Report*, at [23], that:

“The measures of placement of a child in a foster family or in institutional care are somewhat the prototypes of measures of protection and are obviously covered by the Convention, unless expressly excluded, as is placement with a view to adoption ...”

It is, accordingly, clear that the 1996 Convention applies to public law proceedings under Part IV of the CA 1989.

43. Chapter II of the 1996 Convention deals with jurisdiction. Article 5 defines when a Contracting State will have jurisdiction by reference to a child’s habitual residence:

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

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

This is the primary ground of jurisdiction with the other grounds being subordinate to or exceptions from this general rule. The wording of Article 5(2), on a plain reading, provides that the authorities of the State of the new habitual residence *have* jurisdiction without the need for any other condition to be satisfied and, by using the present tense, acquire it immediately. The latter is confirmed by the French text which uses “sont compétentes”, meaning *are* competent.

44. Article 7 provides:

“(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.”

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.

45. Articles 8 and 9 provide a mechanism by which jurisdiction can be transferred from the State having substantive jurisdiction to, and only to, another Contracting State. This is subject to certain conditions which include that the courts of the other State are "better placed ... to assess the best interests of the child". This is a very valuable mechanism which is potentially available to prevent the issue of jurisdiction from being used, as it might be put, to seek to forum shop in a manner which is contrary to the best interests of the child.
46. Article 10 provides for jurisdiction ancillary to divorce/legal separation and annulment proceedings, "if the law of [the] State so provides". This is also subject to a number of conditions including that jurisdiction "has been accepted by the parents".
47. Articles 11 and 12 deal with urgent and provisional measures based on the presence of a child:

"Article 11

(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.

(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

Article 12

(1) Subject to Article 7, the authorities of a Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take measures of a provisional character for the protection of the person or property of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10.

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under

Articles 5 to 10 have taken a decision in respect of the measures of protection which may be required by the situation.

(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in the Contracting State where the measures were taken as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.”

I would note, in passing, the difference between the provisions of Article 11(2) and those of Article 11(3) reflecting the different way in which the 1996 Convention operates between Contracting and non-Contracting States. Further, the provisions of Article 11(3) would not make sense if the 1996 Convention did not apply if and when the rival jurisdiction was a non-Contracting State.

48. Finally, in respect of the provisions of the 1996 Convention, I quote article 13:

“(1) The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration.

(2) The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.”

As can be seen, this provision does not apply to Articles 11 and 12 because of their scope. I do not consider that this provision can override Article 5 but, on a perhaps overly textual analysis, it is interesting that the end of Article 13(1) uses the words “having jurisdiction ... *at the time of the request*” (emphasis added).

49. It is clear to me that both the *Explanatory Report* and the *Practical Handbook* are appropriate materials to consider for the purposes of determining the meaning and scope of the 1996 Convention. I would first note that, for example, they were both referred to by Lady Hale in her judgment in *Re J* (with which Lord Wilson, Lord Reed, Lord Hughes and Lord Toulson JJSC agreed).

50. Further, as submitted by Mr Twomey, at least the former comes within the scope of article 32 of the VCLT which provides:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.”

The *Explanatory Report* is included within “preparatory work of the treaty” (the travaux préparatoires).

51. As set out in the *Explanatory Report*, at [5], one of the “principal difficulties” which had been encountered with the operation of the jurisdiction provisions of the previous 1961 Convention “came from the fact that it organised competing jurisdiction over the protection of minors on the part of the authorities”. Accordingly:

“[6] Chapter II on jurisdiction is very novel in relation to the 1961 Convention. The general idea is that the Contracting States accept considerable limitation on the jurisdiction of their authorities. The new Convention was intended to eliminate in principle all competition between the authorities of different States in taking measures of protection for the person or the property of the child.”

52. The effect of the 1996 Convention in respect of jurisdiction was further addressed in the *Explanatory Report*:

“[37] As has already been indicated above, the Convention, drawing the lessons from the difficulties of application of the 1961 Convention, is intended to centralise jurisdiction in the authorities of the State of the child’s habitual residence and avoid all competition of authorities having concurrent jurisdiction (Art. 5), except for adapting the jurisdiction of the habitual residence to situations [which] have changed (Art. 5, paragraph 2, and Art. 7 and 14), or for the lack of habitual residence (Art. 6). The jurisdiction of authorities other than those of the State of the habitual residence would have, in principle, to have been requested or authorised by the authorities of this State, where it appears that these other authorities would be in a better position to assess the best interests of the child in a particular case (Art. 8 and 9). And if, in certain cases of urgency or of the need for provisional measures with a local effect, a local jurisdiction may be exercised autonomously, its exercise remains limited by the measures taken or to be taken by the normally competent authority (Art. 11 and 12). The only real exception to the principle of the concentration of jurisdiction is constituted by the jurisdiction of the divorce court which, under rather strict conditions, may be called upon to take measures of protection of the child (Art. 10), and this led the Commission to provide a means of solution for possible conflicts of jurisdiction (Art. 13).”

It can be seen that the alternative grounds of jurisdiction are intended to be subordinate to or exceptions from the substantive ground of habitual residence. Further, however, it can be seen that Articles 11 and 12 provide a narrow exception which is additional to and is “exercised autonomously”, in other words, separately from any substantive ground of jurisdiction which might otherwise exist. This latter point is confirmed by the following passage, at [68]:

“The jurisdiction provided in Article 11 is, as an exception to the principle on which the Convention is based, *a jurisdiction which is concurrent* with that of the authorities of the State of the child’s habitual residence.” (emphasis added)

I return to the issue of *concurrent* jurisdiction below.

53. The use of habitual residence as the principal connecting factor was referred to by Lord Wilson (with whom Lady Hale and Lord Toulson agreed) in *Re B* as follows:

“[27] A child’s habitual residence in a state is the internationally recognised threshold to the vesting in the courts of that state of jurisdiction to determine issues in relation to him (or her).”

He also noted, at [30], as relied on by Mr Setright, after referring again to “the modern international primacy of the concept of a child’s habitual residence”, that:

“In the absence of the habitual residence of children anywhere, Regulation B2R [BIIa] provides a fall-back jurisdiction based on their presence. But, in the context of adult disputes about them, the presence of children in a particular state on a particular day is an unsatisfactory foundation of jurisdiction because, by moving them from one state to another, one of the adults can so easily invoke a favourable jurisdiction or pre-empt invocation of an unfavourable one.”

In their joint concurring judgment, Lady Hale and Lord Toulson noted:

“[61] There is strong reason to approach the exercise of the jurisdiction with great caution, because the very nature of the subject involves international problems for which there is an international legal framework (or frameworks) to which this country has subscribed. Exercising a nationality-based inherent jurisdiction may run counter to the concept of comity ...”

54. I would also note Lord Wilson’s reliance, at [42], on the explicit reference in BIIa to the relevance of “proximity” to the formulation of the grounds of jurisdiction. As he explained, habitual residence was chosen because ascribing jurisdiction to the State with which the child was most closely connected was considered to be consistent with his/her best interests. This has been repeated in BIIa recast, recital [20], and clearly also reflects the choice of habitual residence as the principal ground of jurisdiction in the 1996 Convention. Indeed, the *Practical Handbook* refers to it, at [4.4], as “the primary rule of jurisdiction”.

55. Further, as referred to above, Article 5 does not apply if the child is not habitually resident in any Contracting State at the relevant date. Conversely, if a child is habitually resident in a Contracting State at the relevant date, the 1996 Convention does apply. In addition to the wording of Article 5, this is confirmed by the *Explanatory Report*, at [39]:

“[39] Article 5 is based on the supposition that the child has his or her habitual residence *in a Contracting State*. In the contrary case, Article 5 is not applicable and the authorities of the Contracting States have jurisdiction under the Convention only on the basis of provisions other than this one (Art. 11 and 12). *But nothing prevents these authorities from finding themselves to have jurisdiction, outside of the Convention, on the basis of the rules of private international law of the State to which they belong.*” (emphasis added)

56. This passage is plainly relevant to the issue of the basis of the court’s jurisdiction when Article 5 does not apply (because the child is not habitually resident in any Contracting State) but Articles 11 and 12 potentially apply because of the child’s presence in England and Wales. Is the court’s jurisdiction limited to that provided by those Articles or can the court look to other domestic law provisions? The last sentence in the above passage unambiguously states that the court can have substantive jurisdiction when this is provided by its domestic law. As it states, “nothing prevents” the acquisition of jurisdiction “on the basis of” domestic rules. In my view this is because, as referred to above, Articles 11 and 12 do not confer, what I have called, substantive jurisdiction and, therefore, they neither conflict with nor prevent the acquisition of substantive jurisdiction under national law. They are, at most, a concurrent, albeit limited, ground of jurisdiction.
57. This interpretation is further supported by what is said in the *Explanatory Report* in its “Final Remarks”:

“[84] The rules of jurisdiction contained in Chapter II, which have been analysed above, form a complete and closed system which applies as an integral whole in Contracting States when the child has his or her habitual residence on the territory of one of them. In particular, a Contracting State is not authorised to exercise jurisdiction over one of these children if such jurisdiction is not provided for in the Convention. The same solution prevails in the situations described in Article 6, where the child has his or her residence in a Contracting State. *In the other situations the mere presence of the child gives rise to the application of Articles 11 and 12, but these articles do not exclude the broader bases for jurisdiction that the Contracting States might attribute to their authorities in application of their national law*; only, in this case, the other Contracting States are not at all bound to recognise these broadened bases for jurisdiction which fall outside of the scope of the Convention. The same thing is true, for even stronger reasons, for the children who do not have their habitual residence in a Contracting State, and who are not even present in one. The

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

Again, the words I have emphasised are clear. The “*other situations*” are when a child is not habitually resident in a Contracting State and, importantly, Articles 11 and 12 do “*not exclude the broader bases for jurisdiction*” provided by national law. In other words, they are cumulative or concurrent with any such ground of jurisdiction.

58. For completeness, this issue is also addressed in the *Practical Handbook*:

“[3.13] In contrast, *where a child does not have his or her habitual residence in a Contracting State, the authorities of a Contracting State may exercise jurisdiction upon the basis of the rules of the Convention where possible; but, in addition, there is nothing to prevent the authorities from exercising jurisdiction on the basis of the non-Convention rules of their State.* In this case, the obvious benefit of exercising jurisdiction on the basis of the rules of the Convention, where possible, is that the measure will be recognised and enforceable in all other Contracting States in accordance with the provisions of Chapter IV of the Convention. On the other hand, where jurisdiction is exercised on the basis of non-Convention grounds of jurisdiction, measures of protection are not entitled to be recognised and enforced under the Convention.” (emphasis added)

The words I have emphasised are, again, clear. The important words are “*in addition*”. Their effect is further made clear by a case example, 3(E), given in the *Practical Handbook* on p.26:

“A child is habitually resident and present in non-Contracting State X. The authorities in Contracting State A exercise jurisdiction to take a measure of protection in respect of the child under their non-Convention rules of jurisdiction on the basis that the child is a national of Contracting State A. Contracting State A is entitled to do so but the measure of protection may not be recognised under the Convention in other Contracting States.”

59. The effect of the provisions of Article 5, and in particular Article 5(2), in respect of a child's habitual residence changing, is dealt with in the *Explanatory Report*, at [41]:

“[41] The Commission also admitted unanimously the principle according to which, except for wrongful removal, the change of the child's habitual residence to another Contracting State has as its effect to give jurisdiction *henceforth* to the authorities of this other State ... *The change of habitual residence deprives the authorities of the former habitual residence of their jurisdiction to take measures of protection for the child.* The Commission rejected a proposal of the United States delegation (Work. Doc. No 25) according to which the authorities of the former habitual residence of the child who had taken, before the departure of the child, a measure concerning custody or access, would retain exclusive jurisdiction on these points after the child's departure for a period of two years, if at least one of the parents continued to reside in that State and to maintain a persisting relation with the child. This proposal was based on the fear of seeing the authorities of the new habitual residence, supposedly more favourable to the other parent, immediately put back in issue the measures which had just been taken by the authorities of the preceding habitual residence. This proposal would have brought about a division of jurisdictions which would have been difficult in practice between the authorities of the first residence, for custody and access, and the authorities of the new residence for the other aspects of parental responsibility. It seemed that the concerns at the root of this proposal might find a solution in the mechanisms of cooperation provided by Chapter V of the Convention.”
(emphasis added)

Again, the key words are “henceforth” and “deprives” and their effect is clear, namely that jurisdiction based on habitual residence is lost and acquired simultaneously with “the change of the child's habitual residence”.

60. There is also a passage in the *Explanatory Report* which deals with what happens when a child's habitual residence changes during the course of proceedings in respect of both a change from a Contracting State to another Contracting State and of a change to a non-Contracting State. This is also relevant to the issue of the relevant date for the purposes of determining the issue of jurisdiction:

[42] Where the change of habitual residence of the child from one State to another occurs at a time when the authorities of the first habitual residence are seised of a request for a measure of protection, the question arises as to whether these authorities retain their competence to take this measure (*perpetuatio fori*) or whether the change of habitual residence deprives them *ipso facto* of this jurisdiction and obliges them to decline its exercise. The Commission rejected by a strong majority 27 a proposal by the Australian, Irish, British and United States delegations favourable to the *perpetuatio fori*. Certain

delegations explained their negative vote by their hostility to the very principle of *perpetuatio fori* in this field and wanted jurisdiction to change automatically in case of a change of habitual residence, while other delegations thought that it would be more simple for the Convention not to say anything on this subject thereby abandoning to the procedural law the decision on *perpetuatio fori*. The first opinion appeared to be the more exact in the case of a change of habitual residence from one Contracting State to another Contracting State. Indeed it is not acceptable that in such a situation, which is located entirely within the interior of the scope of application of the Convention, the determination of jurisdiction be left to the law of each of the Contracting States. Moreover this solution is one which currently prevails for the interpretation of the Convention of 5 October 1961. *On the other hand, in the case of a change of habitual residence from a Contracting State to a non-Contracting State, Article 5 ceases to be applicable from the time of the change of residence and nothing stands in the way of retention of jurisdiction, under the national law of procedure, by the authority of the Contracting State of the first habitual residence which has been seised of the matter, although the other Contracting States are not bound by the Convention to recognise the measures which may be taken by this authority.*” (emphasis added)

As to a change of habitual residence from one Contracting State to another, although this is addressed in a slightly circuitous manner, in my view the effect is clear. The proposal that a State “seised of a request for a measure of protection” should retain jurisdiction was rejected. The obvious corollary of this is that jurisdiction is lost under the 1996 Convention. The suggestion that this should be left to the procedural law of each State was “not acceptable” because this was an issue which was within the scope of the Convention. Hence the “first opinion” was the more accurate. I have emphasised the passage addressing a change of habitual residence to a non-Contracting State and the comment, consistent with what is said elsewhere, that “nothing stands in the way of retention of jurisdiction, under the national law of procedure”.

61. The effect of a change of habitual residence, including during the course of proceedings, is addressed in the *Practical Handbook*:

“(b) what happens when a child’s “habitual residence” changes?

[4.8] Jurisdiction follows the habitual residence of the child so that when the child’s habitual residence changes to another Contracting State, the authorities of the State of the new habitual residence will have jurisdiction [Art 5(2)].

[4.9] Although the Convention does not provide for the concept of “continuing jurisdiction”, it should be remembered that a change of the habitual residence of the child does not terminate

any measures already taken. These measures remain in force until, if necessary, other appropriate measures are taken by the authorities of the Contracting State of the child's new habitual residence.

[4.10] Where the child's habitual residence changes from one Contracting State to another at a time when the authorities of the first Contracting State are seised of a request for a measure of protection (i.e., during pending proceedings), the Explanatory Report suggests that the principle of *perpetuatio fori* does not apply and jurisdiction will therefore move to the authorities of the Contracting State of the child's new habitual residence (121). Where it does occur, consideration might be given to use of the transfer of jurisdiction provisions.

[4.11] Where the child's habitual residence changes from a Contracting State to a non-Contracting State during proceedings for a measure of protection, the principle of *perpetuatio fori* also does not apply. However, Article 5 of the Convention will cease to be applicable from the time of the change of the child's habitual residence. Nothing therefore stands in the way of a retention of jurisdiction by the authorities of the Contracting State under their non-Convention rules (i.e., outside the scope of the Convention). However, it is important to remember that in this scenario other Contracting States will not be bound by the Convention to recognise the measures which may be taken by this authority."

The *Practical Handbook* also points out, at footnote 121:

"Note that a different solution was reached under the Brussels IIa Regulation, see Art. 8: **"The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised."** (emphasis in footnote)

62. It can be seen that [4.10] deals with a change of habitual residence from one Contracting State to another and [4.11] deals with a change to a non-Contracting State. The former uses the word "suggests" but otherwise supports the former State losing jurisdiction even though seised of proceedings. The latter clearly states that jurisdiction can be retained under domestic law.

The FLA 1986

63. The FLA 1986, as referred to above, only deals with private law proceedings. However, of relevance is the fact that it gives the court alternative grounds of jurisdiction in the event that, as set out in s.2(1)(b) and s.2(3)(b), the 1996 Convention "does not apply". These alternative grounds include the child's presence in England and Wales. I would also note that the relevant date for the purposes of determining jurisdiction, under s.7 of the FLA 1996, is the date of the application or, if no application has been made, the date on which the court is making an order.

The Children Act 1989

64. I propose to refer only to the provisions of ss.31 and 38 of the CA 1989 for the purposes of providing some context for the circumstances in which the court will be exercising its jurisdiction under Part IV. The latter gives the court power to make an interim order. Section 38(2) provides:

“(2) A court shall not make an interim care order or interim supervision order under this section unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2).”

The circumstances “mentioned in section 31(2)” are:

“(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to—

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

(ii) the child’s being beyond parental control.”

The relevant date for the purposes of establishing whether the threshold criteria have been established is the date on which proceedings were commenced or, if earlier, the date when protective measures were put in place.

65. I have set these provisions out because, having regard to the reference to “significant harm”, it seems unlikely that, if the s.38(2) test was satisfied, the provisions of Article 11 of the 1996 Convention would not also be satisfied. Alternatively, if there was any doubt about this, Article 12 would be available. The result is that the court would have jurisdiction to make interim orders on the basis of a child’s presence in England and Wales even if they were not habitually resident here or if there was a substantive issue as to whether they were.

Authorities

66. I start with those dealing with the court’s jurisdiction to make orders under Part IV of the CA 1989 prior to the implementation of BIIa and the 1996 Convention. As has been pointed out by, among others, Sir James Munby P in *In re E (A Child) (Care Proceedings: European Dimension) Practice Note* [2014] 1 WLR 2670 (“*Re E*”), at [23]:

“It is a curious fact that the jurisdictional reach of the courts of England and Wales in relation to public law (care) proceedings brought under Part IV of the Children Act 1989 is not spelt out in any statutory provision ...”

67. In *Re R*, Singer J decided that the court’s jurisdiction to make Part IV orders should mirror, and should certainly not be less than, that set out in respect of private law orders in the FLA 1986. Accordingly, he concluded at p.714:

“I therefore take the view that the jurisdictional basis for an application under Part IV is effectively the same as that in relation to s 8 orders established by the Family Law Act 1986. I hold that for the court to have jurisdiction to entertain a local authority’s application under Part IV the child in relation to whom the application is made should be either habitually resident in England and Wales, which I take to mean the same as ‘ordinarily resident in England and Wales’ or that that child should be present in England and Wales at the relevant time, which it seems to me is the time when the application to the court is made.”

Hale J, as she then was, “entirely agreed” with this conclusion in *Re M (Care Orders: Jurisdiction)* [1997] Fam 67, at p.71 F. Further, although the jurisdiction of the court was not challenged, Dame Elizabeth Butler-Sloss P adopted Singer J’s reasoning in *In re B (A Child) (Care Proceedings: Diplomatic Immunity)* [2003] Fam 16, at [11]; as did Bodey J in *Lewisham LBC v D (Criteria for Territorial Jurisdiction in Public Law Proceedings)* [2008] 2 FLR 1449 (“*Lewisham*”), at [22]. I return below to the effect of BIIa and the 1996 Convention on our domestic rules.

68. The need to address the issue of jurisdiction at the “very outset of proceedings”, as referred to the judge, including in respect of public law proceedings, is well established. For example, in *Re F* Sir James Munby P (with whom Ryder LJ and Bodey J agreed) said, at [11(iv)], when addressing the issue of habitual residence, and repeating what had been said by Ryder LJ (as he then was) in *Nottingham City Council v LM and others* [2014] 2 FLR 1372, at [47]:

“Since the point goes to jurisdiction it is imperative that the issue is addressed at the outset. In every care case with a foreign dimension jurisdiction must be considered at the earliest opportunity, that is, when the proceedings are issued and at the Case Management Hearing”

69. I now turn to authorities which have considered the relationship between our domestic grounds of jurisdiction and international instruments, namely BIIa and the 1996 Convention.

70. In *Re F*, Sir James Munby P referred to the impact the implementation of BIIa had had on the application of the grounds of jurisdiction established by *Re R* and other decisions, as referred to above. He first said, at [10], repeating what he had said at first instance in *Re E*, that this had been “fundamentally modified by” BIIa. He then went on to say, at [11]:

“The consequences of this can be spelt out very shortly:

“(i) Where [BIIa] applies, the courts of England and Wales do not have jurisdiction merely because the child is present within

England and Wales. The basic principle, set out in Article 8(1), is that jurisdiction under [BIIa] is dependent upon habitual residence. It is well established by both European and domestic case-law that BIIR applies to care proceedings. It follows that the courts of England and Wales do not have jurisdiction to make a care order merely because the child is present within England and Wales. The starting point in every such case where there is a foreign dimension is, therefore, an inquiry as to where the child is habitually resident.”

Although perhaps not as clearly expressed as they might be, it is clear to me that these observations were addressing, and only addressing, *when* BIIa applies in respect of jurisdiction based on habitual residence. They do not deal with the situation when it does not apply and by that I mean, when it does not apply to give jurisdiction to England and Wales or another EU Member State because of the child’s habitual residence in any such State. However, I agree with the observation that, in every case with a potentially rival foreign jurisdiction, the “starting point” is an inquiry into or consideration of where the child is habitually resident.

71. The case of *Re J* concerned the issue of whether the court could make an order for the summary return of a child to Morocco, whose accession to the 1980 Hague Abduction Convention had not then been accepted by the UK but was a party to the 1996 Convention. At first instance, the court had made a summary return order. This order had been overturned by the Court of Appeal on the basis that the court had no jurisdiction to make such order either under the 1996 Convention or otherwise. The Supreme Court decided, overturning the decision of the Court of Appeal, that the court did have jurisdiction pursuant to the provisions of Article 11 of the 1996 Convention. As a result, the observations in the Court of Appeal about the application of the 1996 Convention have been overtaken and are not binding. Further, because the child had been habitually resident in Morocco before his wrongful removal to England, this meant that the English court did not have substantive jurisdiction under Article 5 (including because of Article 7) and only had the limited jurisdiction provided by Article 11. However, those observations are, understandably, relied on by Mr Setright.
72. In the course of her judgment Black LJ said, at [33], that if BIIa and the 1996 Convention “apply to a given set of circumstances, they govern jurisdiction”. Then, at [34]:

“In so far as the submissions to us suggested that the inherent jurisdiction of the English courts was unaffected by these instruments, and remained there in the background awaiting the call, it is not a suggestion I can accept. Where one or the other instrument applies, recourse can only be had to the inherent jurisdiction if that is permitted by the jurisdictional code that that instrument establishes. The decision of the Supreme Court in *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] AC 1 (“*A v A*”) demonstrates this in relation to Brussels IIa and I see no reason why matters should be different in relation to the 1996 Hague Convention.”

In her analysis of *A v A*, Black LJ noted that the Supreme Court's route to jurisdiction was through BIIa which was held to be applicable in that case:

“[36] This led the court ultimately to the domestic common law rules as to the inherent jurisdiction of the English High Court (para 59ff) but it is vital to recognise that the gateway to these rules and to the exercise of the inherent jurisdiction was article 14 of Brussels IIa. Article 14 is a residual jurisdiction provision to the effect that where no court of a member state has jurisdiction, jurisdiction is to be determined in each member state by the laws of that member state. *A v A* is not authority, therefore, for the proposition that the courts of England and Wales can supplement their jurisdiction under Brussels IIa by free exercise of the inherent jurisdiction. Where Brussels IIa applies, if it does not entitle the English court to intervene, the English court cannot do so.”

73. This led to Black LJ's ultimate conclusion that the English court had no jurisdiction at all:

“[74] So far, I have established that Brussels IIa did not apply to this case and that the 1996 Hague Convention did not confer jurisdiction to make the order that was made. It remains to consider whether there was any other basis on which Wood J had jurisdiction to make the order that he did. The instinctive reaction of the English lawyer in these circumstances is to reach for the inherent jurisdiction. However, in my view, it cannot assist here. In so far as it concerns jurisdiction, the whole purpose of the 1996 Hague Convention, as with Brussels IIa, is to determine, *as between contracting states*, the state whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child: see article 1(1)a). That would be defeated if, notwithstanding an absence of jurisdiction under the Convention, a contracting state were to be able to assume jurisdiction by virtue of a domestic rule. I referred earlier to *A v A* [2014] AC 1 in order to explain how it was that the Supreme Court had recourse to the inherent jurisdiction there—it was through the Brussels IIa jurisdiction provisions not in spite of them. There is no similar route available in this case. I conclude, therefore, that the inherent jurisdiction had no proper part to play in Wood J's decision.” (emphasis added)

I have emphasised the words, “*as between contracting states*”, because, clearly, Black LJ's observations are limited to that situation and do not apply when the other relevant State is not a Contracting State.

74. Black LJ's ultimate conclusion was that the English court did not have any jurisdiction to make a summary return order and that the proceedings should have been dismissed. She observed, at [83], that the “consequence of that may seem rather strange”. I would agree although I reiterate that her conclusions were in the context

of a case in which both relevant States were parties to the 1996 Convention. She was *not* addressing the situation where no Contracting State had substantive jurisdiction under the 1996 Convention.

75. This applies also to Black LJ's earlier observation that if either BIIa or the 1996 Convention "apply to a given set of circumstances, they govern jurisdiction". Turning that round, they govern jurisdiction *if* they apply to give jurisdiction to a Contracting State. Conversely, if the 1996 Convention gives jurisdiction to no Contracting State then, plainly, it does not apply to govern jurisdiction (I will deal with Articles 11 and 12 below). In my view, this is self-evident and is what Black LJ meant.
76. In any event, as referred to above, the Supreme Court decided that a summary return order could be made under Article 11, so broader issues as to jurisdiction did not arise. I would also note that, at [19], Lady Hale agreed that the effect of the Court of Appeal's decision was rather strange because:

"A procedure which had been adopted for many years by the English court in order to effect the summary return of an abducted child from this country to his home country had apparently been precluded by a Convention, which was designed 'to improve the protection of children in international situations'".

77. I do not propose to refer to all the first instance decisions which have dealt with the issues which arise on this appeal. This is partly because a number of them were dealing with different situations and/or because the observations made in them were obiter. I will refer only to *H v R and the Embassy of the State of Libya* [2022] 2 FLR 1301 ("*H v R*") and *Derbyshire CC*.
78. In *H v R*, Peel J dealt with the application of Article 5 of the 1996 Convention when the rival jurisdiction was a non-Contracting State, namely Libya. He considered that the position was not the same as when a case concerned two Contracting States. After quoting what was said in the *Explanatory Report*, at [42], about "a change of habitual residence from a Contracting State to a non-Contracting State", he said, at [40]:

"... this suggests to me that the position is different where the other State is a non-Contracting State. If at the date of the final hearing, habitual residence lies in the country of origin, then so does jurisdiction. If, however, between issue and final hearing habitual residence moves to the non-Contracting State, jurisdiction does not travel with it, but nor does it remain with the Contracting State under the Convention. Therefore, as the report says, Art 5 ceases to apply and national law takes over. I accept that there is no specific Article to this effect, but the report is clear, and, in my view, it is logical that jurisdiction should not transfer to a non-Contracting State. After all, why should a non-Contracting State be fixed with jurisdiction pursuant to a Convention which it has not signed? It is equally logical that if *perpetuatio fori* does not apply, then the 1996 Hague Convention gives no answer to the issue of jurisdiction if habitual residence is lost from the country of origin, and, as

the Lagarde Report says, the position then reverts to domestic law. This outcome avoids the unsatisfactory situation where children are in a non-Contracting State, and lengthy proceedings play into the hands of a party who seeks to dispute the jurisdiction of England and Wales, including, as here, raising a challenge to jurisdiction very late in the day, so as to fix habitual residence and jurisdiction in a State with which this country has no reciprocal Treaty arrangements.”

I agree with these observations.

79. I would also note that Peel J, at [38], expressed “some misgivings” if the relevant date was the date of the hearing because this would provide an opportunity for a party “to manufacture delay, so as to engineer a change of habitual residence”. This might mean that an “innocent party may act promptly and properly, yet find themselves in a habitual residence race against time, powerless as the court proceedings take their course”.
80. In *Derbyshire CC*, Lieven J concluded that the relevant date on which to determine the habitual residence of a child for the purposes of determining jurisdiction under Article 5 of the 1996 Convention was the date on which the court was first seised. She relied on Article 31 of the VCLT and made the following observations:

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

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

“[23] The factual position is that although, for the reasons I have explained below, I have no doubt the children were habitually resident in Spain when these proceedings commenced, there is a real possibility that by the time of a final hearing their habitual residence will have shifted to England ...”

[24] Further, delay is endemic in the system. An interpretation of the Hague Convention that leaves the court's jurisdiction at the mercy of such delay, whether being deliberately encouraged

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

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

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

81. In respect of domestic authorities, I would finally refer to what I said in *S (Children: Parentage and Jurisdiction)* [2023] EWCA Civ 897 (decided after the hearing in the current appeal), at [97]:

“There is no equivalent in the 1996 Convention to the residual jurisdiction provision (article 14) in BIIa but I do not see how the absence of such a provision can be used to prevent a court from applying its domestic provisions when the Convention does not apply. The opposite would, in my view, be illogical. Such a conclusion would also be contrary to what is set out in the Explanatory Report on the 1996 Convention by Professor Paul Lagarde, in particular at [39].”

If I might be permitted to say so, in my view this connects with Lady Hale's observation in *Re J*. As was submitted in the present appeal by Mr Twomey and Mr Pugh, it would be strange if a convention designed to improve the protection of children had the effect of limiting the court's ability to do so by precluding the application of domestic jurisdiction provisions which did not conflict with the application of the 1996 Convention.

82. The decision of *CC v VO* is important because, although not directly applicable because the 1996 Convention is not an EU instrument, it seems likely significantly to effect the interpretation of the Convention in EU Member States. The court determined that the effect of BIIa was as follows:

“[44] ... Article 8(1) ... read in conjunction with Article 61(a) ... must be interpreted as meaning that a court of a Member State that is hearing a dispute relating to parental responsibility does not retain jurisdiction to rule on that dispute under Art 8(1) of that Regulation where the habitual residence of the child in question has been lawfully transferred, during the proceedings, to the territory of a third State that is a party to the 1996 Hague Convention.”

As can be seen, this decision was based principally on the wording of BIIa. However, in addition, the court based its decision on the fact that this interpretation of the effect of BIIa would be consistent with the 1996 Convention:

“[39] The limitation set out in Art 61(a) of Regulation No 2201/2003 on the application of Art 8(1) of that Regulation from the moment when the child no longer has his or her habitual residence on the territory of a Member State but on that of a third State that is a party to the 1996 Hague Convention is also consistent with the EU legislature's intention not to undermine the provisions of that Convention.

[40] *In that regard, it should be noted that, under Art 5(2) of the 1996 Hague Convention, in case of a change of the child's habitual residence to another contracting State, the authorities of the State of the new habitual residence have jurisdiction*”; and

“[42] As the French Government and the Commission correctly pointed out in their written observations, *if the court of a Member State had to retain its jurisdiction, in accordance with the perpetuatio fori rule provided for in Art 8(1) of Regulation No 2201/2003, despite the lawful transfer during the proceedings of the habitual residence of the child to the territory of a third State that is a party to the 1996 Hague Convention, such a prorogation of jurisdiction would run counter to both Art 5(2) and Art 52(3) of that Convention. Accepting such an interpretation of Art 8(1) of Regulation No 2201/2003, which ignored the scope of Art 61(a) of that Regulation, would lead Member States to act in a way that was*

incompatible with their international obligations (see, to that effect, judgment *SS v MCP* (Case C-603/20 PPU) EU:C:2021:231, [2022] 1 WLR 1923, [2021] 2 FLR 927, at para 56).” (emphasis added)

The CJEU’s understanding of the meaning of Article 5(2) is clear, namely that jurisdiction moves to the new State even when the change of habitual residence occurs “during the proceedings”.

Family Procedure Rules 2010

83. The FPR 2010 contain provisions dealing with the issue of jurisdiction in respect of proceedings under Part IV of the CA 1989. These are set out in PD12A, Guide to Case Management. As set out in [1.1]:

“The Public Law Outline set out in the Table below contains an outline of –

- (1) the order of the different stages of the process;
- (2) the matters to be considered at the main case management hearings ...”

The Public Law Outline itself sets out the key stages of the court process which include the following (emphasis added):

“Stage 1 - Issue and Allocation” ...

Within a day of issue (Day 2):

- *Court considers jurisdiction in a case with an international element.”*

Then:

“Stage 2 - Case Management Hearing

Advocates' Meeting (including any litigants in person)

No later than 2 business days before CMH (or FCMH if it is necessary) ...

- *Identify the parties' positions about jurisdiction, in particular arising out of any international element ...*

CMH : Not before day 12 and not later than day 18 A FCMH is to be held only if necessary, it is to be listed as soon as possible and in any event no later than day 25

Court gives detailed case management directions, including:

— *Considering jurisdiction in a case with an international element ...*”

Then later, at [2.4]:

“Where a party has requested an urgent hearing a) to enable the court to give immediate directions or orders to facilitate any case management issue which is to be considered at the CMH, or b) to decide whether an ICO is necessary, the court may list such a hearing at any appropriate time before the CMH and give directions for that hearing. *It is anticipated that an urgent preliminary case management hearing will only be necessary to consider issues such as jurisdiction, parentage, party status, capacity to litigate, disclosure and whether there is, or should be, a request to a Central Authority or other competent authority in a foreign state or consular authority in England and Wales in an international case. It is not intended that any urgent hearing will delay the CMH.*” (emphasis added)

84. The standard form of order made at the first Case Management Hearing includes the following paragraph:

“The court in England and Wales has jurisdiction in relation to the child[ren] on the basis that:”

85. I would finally note that the manner in which the 1996 Convention has been implemented is not the same in every Contracting State. I have briefly referred above to Bennett J’s observation that it “is our legislation and regulations, rather than the Convention, which have the force of law in Australia”. This does not, of course, mean that there will be a difference but care must be taken when considering the effect both of such legislation and of decisions made in a State.

Determination

86. All the parties, including Mr Setright, submitted that the 1996 Convention should be interpreted and applied purposively in a manner which supports the protection of children and their welfare interests. I agree with those submissions. As I do with the submission that, as a matter of principle, the issue of whether the court has, and the scope of its, jurisdiction should be capable of being determined with a sufficient degree of predictability. With those aims in mind, I turn to the specific issues raised by this appeal.
87. It is clear, as noted by the judge, that the court *must* determine whether it has jurisdiction and the basis of its jurisdiction at the outset of proceedings. That this is required is clear, for example, from what Sir James Munby P said in *Re F* when he used the word “imperative”. It is also required by the provisions of the Public Law Outline, as referred to above. The court cannot simply postpone that decision until a significantly later hearing. If there is any substantive question as to the court’s jurisdiction, directions would need to be given for this to be determined at the earliest possible opportunity.

88. The reason why the court needs to determine what jurisdiction it has to make a Part IV order is obvious. The court needs to know the nature and extent of its powers, if any. If there needs to be further investigation then, as suggested by Sir James Munby P in *Re F*, at [12(i)], the first order should include a recital along the lines of “Upon it provisionally appearing that the child is habitually resident ...” or, I would add, “Upon the child being present in England and Wales and appearing to be in need of urgent protection ...”.
89. There is a further reason why the issue of jurisdiction needs to be determined expeditiously. As referred to by Lieven J and Peel J, a party might seek to delay proceedings or seek to take advantage of delay to procure a jurisdictional advantage. As submitted by the IAFL, delay might encourage parties to seek to take steps to “bolster their case on habitual residence” which might be contrary to a child’s welfare. Also, as was submitted in this case, it would be wrong for proceedings to be issued by a party on a speculative basis or in the hope that, by the time the issue was determined, the court had acquired jurisdiction.
90. Delay in decision making is always contrary to the best interests of children but, in this situation, the longer the determination of any jurisdictional issue is delayed, the more established the child's situation becomes. It would be wrong for this delay to be the cause of the jurisdictional picture changing or, even, becoming determinative of that issue. I would, however, point out that the court can moderate the impact of this, in the appropriate case, by using the transfer of jurisdiction provisions in the 1996 Convention to ensure that the Contracting State better placed to make welfare decisions is able to do so. There is also the power, again in the appropriate case, to make a summary return order in respect of both a Contracting and a non-Contracting State. These options would, at least to some extent, further ameliorate the understandable concerns expressed by the judge and, more particularly by Lieven J, about the potential for the process to be manipulated.
91. I now turn to the application of the 1996 Convention on the assumption that the child, the subject of proceedings for a Part IV order is, at least, present in England and Wales.
92. The 1996 Convention clearly applies to public law children proceedings.
93. I also consider, as set out in *Re A*, that the 1996 Convention is the “first port of call” including when the rival jurisdiction is not a Contracting State. In that limited sense, the 1996 Convention applies. However, there are significant differences in the manner in which it applies depending on whether the rival jurisdiction is or is not a Contracting State, including in respect of the issue of jurisdiction.
94. The court should first decide where the child is habitually resident. As referred to above, I agree with Sir James Munby P’s observation in *Re E* that, in every case with a potentially rival foreign jurisdiction, the “starting point” is an inquiry into or consideration of where the child is habitually resident. I will deal with the relevant date of this determination below.
95. If the child is habitually resident in another Contracting State, that State has substantive jurisdiction under Article 5. It would be open to the English court to request the transfer of jurisdiction under Article 9. Conversely, if the child is

habitually resident in England and Wales, the courts here have substantive jurisdiction under Article 5. It would be open to the English court to make a request under Article 8 that another Contracting State assume jurisdiction. I do not address the situation of a child having no habitual residence.

96. If the child is present in England and Wales but habitually resident in a non-Contracting State, Article 5 has no application. In those circumstances, the court may have jurisdiction under Article 11. Indeed, as referred to above, having regard to the terms of the relevant provisions of the CA 1989, in particular the reference to “significant harm”, it would seem probable that the case would be one of urgency and necessity. I would also mention that Article 11 can provide jurisdiction pending a decision about habitual residence.
97. Can jurisdiction also be established on the basis of presence under our domestic rules as referred to above? In my view, for the reasons set out below, in agreement with the judge and contrary to Mr Setright’s submissions, I consider that the answer is that it can.
98. First, there is nothing in the 1996 Convention which expressly excludes domestic rules as to jurisdiction. It is clear, if not expressly at least by necessary implication, that domestic rules cannot be relied on in a manner that would conflict with the provisions of the 1996 Convention. Accordingly, the English court could not exercise substantive jurisdiction on the basis of presence if the child was habitually resident in another Contracting State. This would conflict with Article 5 and the 1996 Convention’s objective, as set out in the *Explanatory Report*, at [6] and [37], of eliminating or avoiding “all competition between the authorities of different States”.
99. There is, however, nothing which expressly or by implication restricts a court’s ability to use domestic rules as to jurisdiction when the child is not habitually resident in any Contracting State. Article 5 *only* applies if the child is habitually resident *in* a Contracting State. Article 11(3), which was relied on by Mr Setright, does not support that conclusion because it merely provides that measures taken under Article 11(3), in respect of a child who is habitually resident in a non-Contracting State, will lapse when, and I would add, *if* measures taken by “the authorities of another State are recognised in the Contracting State in question”. This is only directed at Article 11 and not at any other ground of jurisdiction either in the 1996 Convention or under domestic law.
100. I also do not consider that the mere absence of a provision similar to Article 14 of BIIa (residual jurisdiction) would support such a strong conclusion especially as the 1996 Convention pre-dates BIIa (and its predecessor in 2000). At most, it is moot. Further, however, I agree with the submissions made in this appeal that it would be surprising, as noted by Lady Hale in *Re J* at [19], if the 1996 Convention, designed ‘to improve the protection of children in international situations’, had the effect of limiting, or indeed, removing the court’s powers to act to protect a child.
101. Take the present case. The court undoubtedly had jurisdiction to make an interim care order under Article 11. Equally, applying *Re J*, the court would have had jurisdiction to make a summary return order. The question is, having refused the latter, and assuming this order had been made before H became habitually resident in England and Wales, would the court then have had no jurisdiction to make any other

order? This, with all due respect to Mr Setright, would not provide a coherent jurisdictional structure for the protection of a child or for welfare decisions. This includes because any order which might have been made in Tunisia would not be enforceable as of right in England and Wales. Absent there being jurisdiction based on presence, it seems to me that the court here would not even have jurisdiction to consider what further orders to make.

102. That is why, as submitted by Mr Twomey and Mr Pugh, I consider that any such conclusion would be contrary to the 1996 Convention's objectives especially because, as noted by the judge at [103], the effect of Mr Setright's case would be that "absent a residual jurisdiction based on presence, the court would be precluded from making any substantive orders in respect of her welfare". Accordingly, I agree with the judge when he said in *London Borough of Hackney v P & Others* [2023] 1 FLR 502 at [102]:

"A residual common law jurisdiction with respect to public law proceedings based on presence where the child is not habitually resident in a Contracting State for the purposes of Art 5 is not incompatible with that object and, indeed, is consistent with it."

103. I have dealt in some detail above with the fact that Articles 11 and 12 are subordinate *and* concurrent grounds of jurisdiction under the provisions of the 1996 Convention. It would, therefore, be illogical for them to have a different effect in respect of a non-Contracting State.
104. As noted by Mr Setright during the course of his submissions, Article 11 contains "no limit of time". However, he also questioned what happened in respect of jurisdiction, if a child was not habitually resident in England and Wales after Article 11 ceased to apply perhaps, I suppose, because the specific "urgency" had passed.
105. In my view, it is clear that, if the 1996 Convention does not provide substantive jurisdiction, the court can turn to our domestic law as an alternative source of jurisdiction. In this respect, while Mr Setright acknowledged that the application of the 1996 Convention might be different in some respects if the rival jurisdiction is not a Contracting State, in my view, there are fundamental differences. There are no provisions in the 1996 Convention that address what should happen if the other State which potentially has jurisdiction is not a Contracting State. The *lis pendens* provisions do not apply nor do the provisions dealing with the recognition and enforcement of orders. Accordingly, to found jurisdiction on domestic law is not, as he submitted, either inconsistent with the 1996 Convention nor is it bad practice. This is simply the result of there being no international family law instrument which applies between the respective States.
106. If there were any doubt about the above, the position is made clear by passages in both the *Explanatory Report* and the *Practical Handbook*. I do not propose to repeat them all. I just repeat, by way of example, the following from the *Explanatory Report*:

"[39] Article 5 is based on the supposition that the child has his or her habitual residence *in a Contracting State*. In the contrary case, Article 5 is not applicable and the authorities of the

Contracting States have jurisdiction under the Convention only on the basis of provisions other than this one (Art. 11 and 12). *But nothing prevents these authorities from finding themselves to have jurisdiction, outside of the Convention, on the basis of the rules of private international law of the State to which they belong.*” (emphasis added)

107. I acknowledge, as referred to by Lord Wilson in *Re B*, that a “child's habitual residence in a state is the internationally recognised threshold to the vesting in the courts of that state of jurisdiction to determine issues in relation to him (or her)”. However, that does not mean that a court is necessarily deprived of jurisdiction on other grounds if that is permitted under national law. I also appreciate that Lord Wilson referred to presence as “an unsatisfactory foundation of jurisdiction”. But he was dealing with a different situation and was not addressing the issue in the present case, namely whether the 1996 Convention has deprived the court of jurisdiction based on presence or whether that would, in some way, conflict with, or as Mr Setright submitted “trespass” on, the terms of scope of the Convention. In my view it is clear, as set out above, that jurisdiction based on a child’s presence, by reference to our domestic law, does not conflict with or trespass on the 1996 Convention. Indeed, I consider that it would be wrong and bad practice to interpret the 1996 Convention as having this effect, in particular because, I repeat, it would be contrary to its objectives.
108. I would add that, because this case involves a non-Contracting State, it does not engage comity in the manner described by Lady Hale and Lord Toulson in *Re B* because there is no “international legal framework” to which both England and Wales and Tunisia have subscribed. Indeed, orders made in either jurisdiction have no automatic entitlement to recognition or enforcement in the other. This is another reason why, as referred to above, depriving England and Wales of substantive jurisdiction based on presence would create a gap in the State’s ability properly to protect a child present in its jurisdiction and to make “the best interests of the child ... a primary consideration” as set out in the 1996 Convention.
109. In summary, therefore, if a child is present in England and Wales and habitually resident in a non-Contracting State, the courts here have jurisdiction to make a Part IV order either under Article 11 or under our domestic law. The former would be confined to “cases of urgency” and “necessary measures” so would probably be confined to interim orders under s.38 of the CA 1989 (or similar urgent orders). The latter would provide jurisdiction for substantive care proceedings including orders under s.31 of the CA 1989.
110. I would add that this does not necessarily mean that the court should or will exercise such a jurisdiction. It may be, as was sought below in the present case, that the court might decide to make a summary return order and/or that it would be more appropriate for proceedings to take place in the other State. We have not heard argument as to whether the court has the latter power but there would seem no reason why it should not. Although, I would also add that, from experience of the application of the transfer of jurisdiction provisions in BIIa, it can take some time to engage the relevant public authorities in the other State so this will need to be addressed as soon as possible.
111. I next turn to the relevant date for the determination of habitual residence.

112. 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.
113. 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.
114. In the vast majority of cases this will not cause any difficulties because the child's habitual residence will be obvious. In those cases where it is not obvious, if the provisions of the FPR 2010 are followed, there should not be any significant delay in the determination of this issue. This is clearly something which will require appropriate case management directions. I would also point out that it will be equally urgent for the court to determine any application for a summary return order in respect of which the court will, in any event, have jurisdiction under Article 11.
115. I next deal with the issue of the loss or acquisition of jurisdiction during the course of proceedings.
116. It is clear, again by reference to the materials set out above, that a State can lose jurisdiction under Article 5 *during the course of proceedings* if the child ceases to be habitually resident in that State. The court must retain jurisdiction at the date of the final substantive hearing. If, for example, the child ceases to be habitually resident in England and Wales and becomes habitually resident in another Contracting State, it is clear from the wording of Article 5(2), the *Explanatory Report*, the *Practical Handbook* that that other State acquires jurisdiction and England and Wales loses it. This is also consistent with the CJEU decision in *CC v VO* and has the considerable advantage that our approach would be the same as the EU Member States. I am also aware of, at least, a decision of the Austrian Supreme Court which supports this conclusion and it would appear to be consistent also with the position under Swiss law.
117. There is, however, a clear difference between a move to a Contracting State and a move to a non-Contracting State. In the former case, the other State acquires Article 5 jurisdiction. In the latter case, the other State does not. The consequence is that, in the former, the original State cannot retain jurisdiction by reference to domestic law, while in the latter case, it can. In my view, this is unlikely to cause difficulties if the

child has moved from the State in which the proceedings have been taking place, because the court would be likely to have sanctioned the move and would have needed to consider the consequences of such a move, including as to jurisdiction and recognition/enforcement, before it was sanctioned. There may, of course, be more complex cases in which there has been a wrongful removal or retention but I do not propose to address what might happen in such a situation.

118. The other situation I clearly need to address, having regard to the circumstances of the present case, is what happens if a child *becomes* habitually resident in England and Wales during the course of proceedings. It is clear that, by the date of the hearing before the judge in November 2022, H had become habitually resident here.
119. Despite what happened in this case, I would hope that in future this would be unlikely to occur merely by reason of delays in determining where a child is habitually resident. However, I recognise, as referred to by Lieven J, that robust case management will not necessarily prevent this occurring. It may occur for a number of reasons. Whatever the reason for the delay, in such a situation it is clear that the English court will have acquired substantive jurisdiction under Article 5.
120. I do not think it would be sensible to seek to deal with circumstances other than those present in this case. The court may need to consider whether new proceedings should be commenced which may depend on what, if anything, has happened in the rival jurisdiction. It may require individual responses to the circumstances of the individual case although I would refer again to the likely availability of Article 11 in respect of interim care/supervision orders under the CA 1989. I would also again mention the court's power to transfer jurisdiction if the court were to consider that the other State, if it was a Contracting State, was better placed to make welfare decisions. It would not, however, seem necessary for the court to request the transfer of jurisdiction to England and Wales because the court would have jurisdiction under Article 5.
121. In the present case, the transfer of jurisdiction provisions are not available. However, as referred to above, the English court has had substantive jurisdiction from the outset because of H's presence here. This is the consequence of Tunisia not being a party to the 1996 Convention. I do not see that this causes any legal or other difficulties. There is, therefore, no need for new proceedings to be commenced. It also means that the court's decisions have, appropriately, been governed by H's welfare interests. Further, even if I was wrong about jurisdiction based on presence and the court only acquired substantive jurisdiction when H became habitually resident here, there would be no need to require new proceedings to be commenced as the court would have had jurisdiction to make the interim orders which it did, in particular the interim care order, under Article 11.
122. I would agree with Mr Setright that the question whether to make a summary return order should have been determined at a much earlier stage of the proceedings. This was caused by the failure properly to engage N in the proceedings and then, it would appear, by being distracted by issues as to jurisdiction. In my view, that decision should have been prioritised. It would clearly be relevant to consider how H came to be in England and whether, putting it colloquially, her home remained in Tunisia. I am, however, not sure that it was necessary formally to decide the issue of habitual residence in order to determine whether to make a summary return order.

123. Finally, I deal with the judge's observation that "the logical consequence of [his conclusions] is that the question of habitual residence will fall to be confirmed at each hearing". I agree that this is theoretically right because the child's habitual residence might have changed. However, while the court clearly needs to be satisfied that it retains jurisdiction at the date of the final hearing, I do not consider that this issue needs to be reviewed at every hearing. In this respect, as submitted by Mr Pugh, there would need to be substantial grounds to justify the court reconsidering the issue which, typically, would have to be raised by one of the parties. Further, as referred to above, the court will clearly be aware of the fact that the child has moved to live in another country, for which the court's permission or approval would likely have been required.
124. The effect of the acquisition of habitual residence in England and Wales will depend on the circumstances of the individual case, including whether the child was previously habitually resident in a Contracting or a non-Contracting State and whether there are or are not extant proceedings in that State. However, in the present case, for the reasons set out above, the courts of England and Wales have always had substantive jurisdiction in respect of the proceedings.
125. In summary, my conclusions on the issue of jurisdiction are as follows:
- (i) the 1996 Convention applies to proceedings for an order under Part IV of the CA 1989;
 - (ii) the court must determine the issue of jurisdiction at the outset of proceedings by reference to the date on which the proceedings were commenced;
 - (iii) jurisdiction under the 1996 Convention can be lost during the course of proceedings, if it was based on habitual residence and the child has ceased to be habitually resident in England and Wales. Accordingly, the court must be satisfied that it retains jurisdiction at the final hearing;
 - (iv) jurisdiction is acquired under Article 5 from the date on which a child becomes habitually resident in England and Wales; the effect of this on existing proceedings will depend on the circumstances of the case;
 - (v) the court in England and Wales will likely have jurisdiction to make interim orders under Part IV under Article 11 when the child is habitually resident in a Contracting State;
 - (vi) the court in England and Wales will likely have jurisdiction to make interim orders under Part IV under Article 11 and will also have substantive jurisdiction based on a child's presence here when the child is habitually resident in a non-Contracting State.

Conclusion

126. The effect of the above is that, in my view, the appeal must be allowed in respect of Ground 1 but dismissed in respect of Ground 2.
127. As to Ground 1, the judge was wrong to decide that *the* relevant date for determining habitual residence for the purposes of Article 5 is "the date of the hearing". However,

this does not affect the judge's determination that the courts of England and Wales have substantive jurisdiction in respect of the proceedings brought by the local authority. This is because, contrary to the case advanced in respect of Ground 2, he was right to decide that the courts have had substantive jurisdiction from the outset of the proceedings under our domestic rules. This means that there is no question of fresh proceedings being required. I would also note that the judge was right to decide that the courts of England and Wales have substantive jurisdiction under Article 5 because H *is* habitually resident here. This now provides an alternative basis of jurisdiction which would be relevant if it became necessary to consider questions of enforcement and recognition in another Contracting State.

128. It can be seen that, in some respects, I agree with both Lieven J and the judge in that jurisdiction must first be determined at the date of the commencement of the proceedings but also must be present during the proceedings, in particular because jurisdiction under Article 5 can be lost if a child ceases to be habitually resident in England and Wales. I have dealt in more detail above with the consequences of this.

Lord Justice Newey:

129. I agree.

Lady Justice King:

130. I also agree.