Case No: B4/2014/3515

Neutral Citation Number: [2015] EWCA Civ 329
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE FAMILY DIVISION
MR JUSTICE WOOD
FD14P00436

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/04/2015

Before :

LORD JUSTICE MOORE-BICK
Vice President of the Court of Appeal, Civil Division
LADY JUSTICE BLACK
and
LADY JUSTICE GLOSTER

- -

RE J (A CHILD) (1996 HAGUE CONVENTION) (MOROCCO)

- -

Mr James Turner QC & Ms Finola Moore (instructed by **JD Spicer Zeb Solicitors**) for the **Appellant**
Mr Henry Setright QC & Mr Edward Devereux (instructed by **Dawson Cornwell**) for the **Respondent**
Teertha Gupta QC & Jacqueline Renton (instructed by **Bindmans LLP**) for the **Intervener**

Hearing date: 10th February 2015

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Judgment

Black LJ:

1. This appeal concerns S who was born in January 2007 and is 8 years old. It is against an order made by Wood J on 10 October 2014 that S's mother return or cause the return of S to the jurisdiction of Morocco. The mother appealed against that decision. S's father opposed the appeal.

2. Both parents were represented by leading and junior counsel before us. We also had the benefit of a skeleton argument and short oral submissions from Reunite which was permitted to intervene to this limited extent in view of the importance of the issues arising in the appeal.

3. The appeal has involved a consideration of the 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 Hague Convention"), Council Regulation (EC) No 2201/2003 ("Brussels IIa") and domestic law, including the case of In re J (a child) (Custody Rights: Jurisdiction [2005] UKHL 40 [2006] 1 AC 80.

4. The 1996 Hague Convention came into force between England and Wales and Morocco on 1 November 2012 and is therefore undoubtedly of potential relevance to the present case. As always, Brussels IIa must be considered because its reach is wide and case law makes clear that it can apply even when the foreign state is not a Member State of the European Union. The 1980 Hague Convention on the Civil Aspects of International Child Abduction is not relevant because, although Morocco has acceded to that Convention, its accession has not been (indeed cannot be, see Opinion 1/13 of the CJEU) accepted by United Kingdom.

5. The ground covered in the appeal has been rather different from that covered in front of Wood J and has included a consideration of whether jurisdiction to determine the case lay with Morocco or England and Wales, what orders it was open to Wood J to make, and what principles governed his determination. I think it is fair to say that the argument continued to develop even during the currency of the appeal proceedings. This evolutionary approach to the litigation may not be particularly surprising, given that this is only the second case in the Court of Appeal to focus upon the 1996 Hague Convention, but it has not made the issues any easier to determine.

Background facts

6. I take the background facts largely from the judgment of Wood J.

7. The parties were born in Morocco but they have travelled quite extensively and lived abroad at times. Both are Moroccan nationals and now also have British nationality.

8. They met in Morocco and married there in 2005. They then came to England together and S was born here.

9. The father is an academic. His career took the family to Saudi Arabia in 2009 and then, in February 2011, they moved back to Morocco. By then, the marriage was

failing. There were divorce proceedings and, on 12 July 2012, an order was made by the Moroccan court entrusting "residential custody" to the mother and entitling the father to visiting rights on Sundays and holidays. Wood J considered that the terms of the Moroccan order made it "abundantly clear" that the intention was that the mother and S should live in Morocco.

10. The mother and S lived for a period with the maternal grandparents, some 90 kilometres from where the father lived and worked. Contact between S and the father took place as far as the practicalities permitted. This included S spending the summer holidays in 2012 with the father. There was also regular and frequent indirect contact.

11. In due course, the mother left to live in England. The judge concluded that this was, at the latest, in January 2013. S was left with his maternal grandparents. He saw his father for contact and spent most of the 2013 summer holidays, from 1 July to 7 September, with him. He then returned to school near his maternal grandparents' home.

12. As for the mother, she has formed a new relationship with a man to whom she was married in January 2013 according to Islamic law. In her statement of 9 September 2014, she said that her new husband arrived in the UK in 1996 and has been in employment here since then. From 2008 until December 2013, he was employed in a restaurant in London. In December 2013, he was made redundant and at the time of the hearing before Wood J, he was seeking new employment here. He is a Moroccan national but has indefinite leave to remain in this country. The mother was pregnant at the time of the hearing before Wood J and a baby has since been born to her and her husband.

13. The sequence of events which culminated in the hearing before Wood J commenced on 12 September 2013 when the mother flew to Morocco from this country, collected S and, on 14 September 2013, returned to England with him.

14. In response, the father issued proceedings in Morocco on 23 September 2013 complaining that the mother had removed S from Morocco without his consent and prevented him from maintaining his parental relationship with his son, and seeking the revocation of the order of 12 July 2012. He sought an order granting him residential custody instead. The Moroccan court refused his application by order of 16 January 2014. It is recorded in the order that there was no evidence which would enable the court to decide conclusively whether the mother had gone to England for a "casual, temporary stay" or to stay on a permanent basis and for that reason, and because the father was unable to make a woman available to look after the child, "his request does not meet the legal and religious conditions required to allow him to look after his own child pursuant to article 400 of the aforesaid code" (E11). It is not clear to me from the translation of the order to which code this is a reference.

15. The father commenced proceedings in England and Wales on 14 March 2014. The delay in doing so was because of a lack of money. The judge commented that the case had since proceeded at "a somewhat laggardly pace", partly because of funding problems on the mother's part.

16. S meanwhile had started school here. He began at an infant school and moved to primary school from about April 2014. He spoke almost no English when he arrived and, at the time of the hearing before Wood J, he still had significant problems with the language despite a very positive attitude on his part and the provision of daily tuition. Nevertheless, overall the school report available to Wood J was a good one and S was popular and trying hard. By the time of the hearing before Wood J, he had been here for 14 months.

The judge's findings

17. The father's case was that S was habitually resident in Morocco prior to the mother wrongfully removing him on 14 September 2013 and that, by virtue of Article 7 of the 1996 Hague Convention, the Moroccan courts had retained jurisdiction to resolve disputes between his parents about him.

18. The judge found that the mother, the father and S were indeed habitually resident in Morocco prior to 14 September 2013. Whatever questions there might have been as to the mother's habitual residence by that time, the judge's conclusion about S's habitual residence could not realistically be questioned and I refused permission to appeal in relation to it. He considered, on good evidence, that S was "rooted" in Morocco before the mother brought him here (§36).

19. The mother took issue with the suggestion that she had wrongfully removed S from Morocco but it seems that, although she referred in her statements to her belief that she had the right to bring him here under the Moroccan court order giving her residential custody, by the time of the hearing before Wood J, her case was put only on the basis that the father had agreed to the removal. The questions put by the parties in writing to the expert on Moroccan law, Maître Abdellah Benlamhidi, did not include any enquiry about the effect of the Moroccan custody order and, although there was a general question about the principles that determine an application under Moroccan law for parental responsibility or rights, custody, access and permission to relocate permanently abroad, there was no question directed to whether or not the mother was entitled to bring S to live here without the father's consent

20. On the basis of the mother's own evidence, the judge rejected the mother's case that the father had agreed to the removal. Given the terms of §14 of the mother's statement of 13 June 2014 (C26), this is not surprising. He found that she did not tell the father that she was removing S from Morocco until after it had happened and that the removal of S from Morocco was wrongful (see §§16 and 37 of the judgment).

21. Neither in the mother's written grounds of appeal nor in her oral submissions at the permission hearing (at which time she was represented by Ms Moore who had also represented her before Wood J) was there any direct challenge to the judge's finding of wrongful removal. Mr Turner QC was instructed to lead Ms Moore at the appeal hearing and he argued that the mother's appeal in relation to the judge's treatment of Maître Benlamhidi's evidence encompassed an appeal against the wrongful removal finding. I am not persuaded by that. Such a challenge would have had to be spelled out and it was distinctly unpromising given that the ground had not been covered at all in the instructions to the

Moroccan lawyer. I would not therefore permit the mother to challenge Wood J's finding of wrongful removal.

22. The judge considered the evidence as to S's progress in England and the views he had expressed to Ms Odze, the CAFCASS officer who had interviewed him in preparation for the hearing. He found that S spoke almost no English when he arrived here and still had significant problems with it despite his very positive attitude (§20). The judge took into account, however, that his school report was a very good one, he was clearly very popular, and he tried hard at his work (§21). S spoke to Ms Odze readily about Morocco and when asked what was good about it, he spoke of swimming and his holidays with his father. He said he liked his maternal grandparents and his father (§22). In England, he liked his school and he had made friends. He told Ms Odze that he would be sad if he were to be returned to Morocco because he wants to stay with his mother. He did not appear to contemplate that his mother might accompany him (§23). Ms Odze's conclusions included that S was a resilient child who did not appear to have been badly caught up in the conflict between his parents, who had nothing bad to say about his father or life in Morocco, and who wanted to remain in England because he wanted to be with his mother but showed no outward sign of distress at the mention of a possible return to Morocco (§24).

23. The mother's counsel sought the opportunity to question Maître Benlamhidi who was able to be available on the telephone at the hearing. The judge accepted that his report did not deal with some of the questions that had been posed to him but refused to permit questions by telephone or to adjourn for further enquiries. He took the view that there were sufficient answers in the papers (§28, supplemented by the judge's response to the permission application).

24. He found that Moroccan law would not result in the father automatically being awarded the full time care of S and noted that the father had in any event undertaken in the first instance to leave S with his mother pending an application by him if she wished to take S to England or, if she decided to stay in Morocco, to take no steps to disrupt the current Moroccan order (§32).

25. He also found that there was scope under Moroccan law for the mother to be permitted to live abroad with S irrespective of the father's consent and that an application to do so would be considered on the basis of S's best welfare interests (§34, supplemented by the judge's response to the permission application). However, he indicated that even if he was mistaken about that, he would not consider that would make it wrong to return S to Morocco (§35).

26. Before concluding that it was in S's best interests that he should be returned to Morocco, the judge surveyed a range of factors, set out particularly at §36 et seq of the judgment. He found that before S was brought here in September 2013, the family had lived the sort of domestic lives consistent with the parents' upbringing in Morocco, that the mother speaks scarcely any English, and that it is likely that even now Moroccan French and/or Arabic is spoken in S's home. He found that the father had been prevented from having face to face contact with S since he came here, and that whatever she said of her intentions, the mother had not taken S to Morocco to see the father in the summer holidays and said she could not afford to pay for such trips herself. In reality, he concluded, the father would

probably only have a relationship with S by indirect contact if he remained here. No real welfare concerns had been raised about S returning to Morocco and S was not antipathetic to returning there though he was clear he wanted to be with his mother. Both parents would have access to Moroccan lawyers and had litigated in Morocco already, where the litigation was dealt with swiftly and, notably, in January 2014, the mother had not been required to return S to Morocco, contrary to the father's application.

27. The judge said at §46:

> "Overall, and having considered all the relevant material, not all of which I have referred to above, I have no hesitation that it is in S's best interests to return to Morocco where he was habitually resident for the courts of that country to adjudicate, if required to do so, on welfare issues relating to S."

28. In light of the mother's pregnancy, the judge deferred the return until January 2015. He took into account that the mother said that she would never live in Morocco again but said that if she did not go back, S would go back to live with the father. He explained further in his response to the permission application that there was nothing in the mother's evidence to suggest that she could not return.

S's habitual residence

29. The judge made no findings about S's habitual residence other than at the time of his removal from Morocco in September 2013. He was not invited to consider where S was habitually resident when the English proceedings were issued in March 2014 or at the time of the hearing in October 2014. This may well have been because the parties were focussing upon Articles 5 and 7 of the 1996 Hague Convention.

30. Once one turns to look at other provisions, as I will do in due course, it becomes clear that it might have been material to know where S was habitually resident in March and October 2014. I have therefore had to consider carefully whether it is necessary to return the case to the judge for further findings to be made. Had there been firmer pointers towards a change in respect of habitual residence at some potentially relevant point after September 2013, I might have felt driven to that course. However, I note the view that Wood J expressed, in his response to the permission application, about the limitations on the connection of the case with this country (insufficient, he considered, to justify requesting a transfer of jurisdiction from Morocco so that the English court could determine the welfare issues in respect of S). In the light of that, and of the circumstances of S and the mother between September 2013 and March/October 2014, it can perhaps fairly be said that the case for a change of habitual residence is not clear cut. For my part, therefore, I think it proper to proceed upon the basis that S was not habitually resident here either in March 2014 when the English proceedings began or in October 2014 when Wood J determined them.

Jurisdiction

31. The necessary starting point for this appeal is the question of jurisdiction. It appears that this question did not attract as much critical attention in front of Wood J as it might have done, but it is not something that can be put to one side on that account. Jurisdiction exists or does not exist, irrespective of whether the parties take any point about it. If, on a proper analysis of law and fact, Wood J had no, or only limited, jurisdiction, this court is in no better position than he was.

32. In what follows, I proceed upon the basis that the 1996 Hague Convention is capable of covering this case but I return to that issue later in this judgment to examine it further.

Brussels IIa and the 1996 Hague Convention: introduction

33. Both Brussels IIa and the 1996 Hague Convention are directly applicable in English law. One can approach the question of jurisdiction by going straight to them to see whether either applies in this case, and if so, which. If one were to begin instead with the Family Law Act 1986 ("the 1986 Act"), Chapter II of which contains jurisdictional rules for the courts of England and Wales in family cases, it would soon be apparent that, in so far as the 1986 Act touches upon the sort of orders that are relevant in this case, it expressly defers to Brussels IIa and the 1996 Hague Convention if they apply, see section 2(1) and (3) ibid. In so far as the orders do not fall within the 1986 Act, it is not relevant but the road still leads inexorably to Brussels IIa and the 1996 Hague Convention because, if they apply to a given set of circumstances, they govern jurisdiction.

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 and another (Children: Habitual Residence) [2013] UKSC 60 [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.

35. It is worth looking at A v A at this early stage because it is a useful example of the approach to be taken in applying Brussels IIa and potentially also instructive, by analogy, in relation to the 1996 Hague Convention. Return orders had been made in the Family Division pursuant to the inherent jurisdiction of the High Court. Such orders are not section 1(1)(d) orders for the purposes of section 2(3) of the 1986 Act because they do not give care of a child to any person or provide for contact with or the education of a child, see §27 of A v A. They were not, therefore, covered by the jurisdictional prohibitions in section 2 of the Act (§28), but nonetheless the English court did not have a free hand in relation to jurisdiction. The order requiring that the children be brought to this country from Pakistan related to the exercise of parental responsibility as defined for the purposes of Brussels IIa and was therefore within the scope of that regulation (§29) which was directly applicable (§20). Having determined that the regulation applied notwithstanding that the rival jurisdiction was a non-Member State, the

Supreme Court went on to apply its provisions in order to determine whether the English court had jurisdiction.

36. This led the court ultimately to the domestic common law rules as to the inherent jurisdiction of the English High Court (§59 et seq) 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.

Which instrument applies here? Brussels IIa or the 1996 Hague Convention?

37. Before Wood J, the parties proceeded upon the basis that the 1996 Hague Convention was the relevant instrument with no consideration being given to whether Brussels IIa might, in fact, be applicable. The first mention of this possibility came in the skeleton argument filed on behalf of the mother following the instruction of Mr Turner QC. Even before us, I do not think it was positively asserted by either party that matters were governed by Brussels IIa. It was proper that the possibility had been raised, however, and it required careful attention.

38. The relationship between the 1996 Hague Convention, Brussels IIa and domestic law is described, in what might be thought to be something of an under-statement, in *Dicey, Morris & Collins: The Conflict of Laws* as one "of no little complexity" (§19-041 ibid).

39. Particularly material to the relationship are Articles 61 and 62 of Brussels IIa which provide:

> **Article 61**
>
> **Relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children**
>
> As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:
>
> (a) where the child concerned has his or her habitual residence on the territory of a Member State;
>
> (b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the

territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention.

Article 62

Scope of effects

1. The agreements and conventions referred to in Articles 59(1), 60 and 61 shall continue to have effect in relation to matters not governed by this Regulation.

2. The conventions mentioned in Article 60, in particular the 1980 Hague Convention, continue to produce effects between the Member States which are party thereto, in compliance with Article 60.

40. Article 61(b) does not apply here. Article 61 can only possibly be relevant, therefore, if Article 61 (a) applies, that is if S was habitually resident in England and Wales. There is no finding that S has been habitually resident in England and Wales at any time; I dealt earlier with this. Article 61 is silent as to when the material time for habitual residence in the Member State is, but whatever it is, S was not habitually resident here then. There is no question therefore of Brussels IIa applying in consequence of Article 61. In those circumstances, I infer from Article 61 (perhaps with some support from Article 62(1)) that the field is left clear for the 1996 Hague Convention and that it is to its provisions that one must turn to discover where jurisdiction lies.

41. Had the position as to habitual residence been such as potentially to bring the case within Article 61, some difficult questions as to the interpretation of that Article may have required consideration. However, this is something I can leave to be explored in a case where the issue is of relevance, turning instead to examine the impact of the 1996 Hague Convention in this case.

The application of the 1996 Hague Convention to these facts: is the order sought within the Convention?

42. So far, I have worked upon the assumption that the 1996 Convention extends to the circumstances of this case. Now I must confirm that by considering whether the order that the father sought, namely an order for the return of S to his country of habitual residence following wrongful removal, is within its ambit.

43. This depends upon Chapter I of the 1996 Hague Convention which deals with its scope. Article 1 provides:

(1) The objects of the present Convention are –

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

b) to determine which law is to be applied by such authorities in exercising their jurisdiction;

c) to determine the law applicable to parental responsibility;

d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;

e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

(2) For the purposes of this Convention, the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

44. Article 3 provides, so far as is material:

"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)…."

45. Article 4 lists matters to which the Convention does not apply but none are relevant here.

46. In my view, these provisions do cover the order sought in this case; it could fall either within Article 3a) or Article 3b).

47. Article 50 reinforces the impression that such an order was intended to fall within the Convention. It is the second sentence of the Article which is of relevance but I will set the Article out in full:

"**Article 50**

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

48. Baroness Hale's conclusion in A v A that an order requiring a child to be brought to this country was within the definition of parental responsibility in Brussels IIa lends further support. The order there in question was not precisely the same in nature but it was of a similar type. And although the Brussels IIa definition of parental responsibility, contained in Article 2, is not precisely the same as the definition in the 1996 Convention, it bears sufficient resemblance to it for Baroness Hale's decision to be of relevance, as can be seen by comparing Articles 1 and 3 of the 1996 Hague Convention (above) with Article 2 of Brussels IIa which, so far as is material, reads:

> "7. the term 'parental responsibility' shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;
>
> ….
>
> 9. the term 'rights of custody' shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;
>
> 10. the term 'rights of access' shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time;"

The application of the 1996 Hague Convention to these facts: the jurisdiction provisions of the Convention

49. The relevant jurisdiction provisions of the 1996 Hague Convention are Articles 5 and 7 which provide:

> **Article 5**
>
> (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.

Article 7

(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

> a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
>
> b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

(2) The removal or the retention of a child is to be considered wrongful where -

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

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

(3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child."

50. Article 11 deals with the jurisdiction of the authorities in whose territory the child is present to take urgent measures of protection, notwithstanding that they do not have jurisdiction otherwise. It provides:

> **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."

51. Article 12 deals with the jurisdiction of the authorities in whose territory the child is present to take provisional measures which have a territorial effect limited to the State in question. It provides:

> **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."

The application of the 1996 Hague Convention to these facts: the jurisdiction provisions applied

52. As S was habitually resident in Morocco immediately before the mother wrongfully removed him to this country, at that time the Moroccan courts had jurisdiction under Article 5.

53. The wrongful removal imports Article 7 into the equation. It has the effect that the Moroccan authorities keep their jurisdiction unless the conditions set out in Article 7(1) ("the Article 7(1) conditions") are satisfied. Article 7(1) is silent as to timing, not spelling out whether the focus is upon whether the conditions are satisfied at the time the English court is seised or when it makes its decision or at some other time. However, it matters not on the facts of this case. The first condition in Article 7(1) is that the child has acquired a habitual residence in another State. For reasons that I have explained earlier, I consider it appropriate to proceed upon the basis that S was not habitually resident here at any point prior to Wood J determining the proceedings before him. Accordingly, at all potentially material times, the Article 7(1) conditions were not satisfied and Article 7(1) preserved the Moroccan jurisdiction. By Article 7(3), the jurisdiction of the English court, in the person of Wood J, was therefore confined to that conferred by Article 11.

54. I have cited Article 12 above, but it does not, in fact, confer jurisdiction on the English court in the circumstances of this case because:

    i) Article 7(3) expressly limits the jurisdiction in wrongful removal cases to jurisdiction under Article 11 ("can take only such urgent measures under Article 11…"); and

    ii) Article 12 is expressed to be "[s]ubject to Article 7".

55. The operation of Article 11 is not entirely straightforward and I will need to examine it in some detail in order to determine whether it covers an order returning S to Morocco in circumstances such as there are here.

The application of the 1996 Hague Convention to these facts: does Article 11 entitle the court to make a return order?

56. There is no decided authority of which I am aware that casts light directly on this question. It may be helpful to have regard to the Explanatory Report on the 1996 Convention by Paul Lagarde. I have also looked at the guide produced by our Ministry of Justice to the 1996 Convention, and the Practical Handbook produced by the Hague Conference on Private International Law, because it is of interest to see how the matter is approached in these publications.

    (1) The Explanatory Report on the 1996 Hague Child Protection Convention by Paul Lagarde

57. The Lagarde report deals with Article 11 of the 1996 Hague Convention at page 567 et seq. The author says:

> "68. …. It might be said that a situation of urgency within the meaning of Article 11 is present where the situation, if remedial action were only sought through the normal channels of Articles 5 to 10, might bring about irreparable harm for the child. The situation of urgency therefore justifies a derogation from the normal rule and ought to be construed rather strictly….
>
> If this jurisdiction had not been provided, the delays which would be caused by the obligation to bring the request before the State of the child's habitual residence might compromise the protection or the interests of the child…..
>
> 70. …. The Commission deliberately abstained from setting out what measures might be taken on the basis of urgency in application of Article 11. This is indeed a functional concept, the urgency dictating in each situation the necessary measures."

(2) The 1996 Hague Convention Practice Guide: Ministry of Justice: February 2013

58. The Ministry of Justice has produced a Practice Guide for the 1996 Hague Convention, the principal author of which was Peter McEleavy. It says of Article 11 (at page 17):

> "This provision would, for example, enable [the court of the Contracting State where the child is present] to authorise emergency treatment for a child, or provide for his or her care whilst a determination is made on return of the child following abduction."

(3) Practical Handbook on the operation of the Hague Convention of 19 October 1996: Hague Conference on Private International Law: 2014

59. The Practical Handbook gives the following examples of potential uses of Article 11:

> "6.4 Examples of cases involving such a situation of "urgency" might include: (1) the child is outside the State of his / her habitual residence and medical treatment is required to save the child's life (or to prevent irreparable harm occurring to the child or his interests being compromised) and parental consent cannot be obtained for the treatment; (2) the child is exercising contact with a non-resident parent outside his/her State of habitual residence and makes allegations of physical/sexual abuse against the parent such that contact needs to be suspended immediately and /or alternative temporary care found for the child; (3) it is necessary to make a rapid sale of perishable goods belonging to the child; or (4) there has been

> a wrongful removal or retention of a child and in the context of proceedings brought under the 1980 Hague Convention, measures need to be put in place urgently to ensure the safe return of the child to the Contracting State of his/her habitual residence."

60. The footnote to this passage records that it was suggested at the 2011 Special Commission on the practical operation of the 1980 and 1996 Hague Convention (Part 1) that "a case involving the need for measures to be taken to ensure a child's safe return to the State of his/her habitual residence would usually be a 'case of urgency' such that Art. 11 can be relied upon".

61. The next port of call is Article 20 of Brussels IIa which may be informative by analogy.

(4) Article 20 of Brussels IIa

62. Article 20 of Brussels IIa provides:

> **Article 20**
>
> **Provisional, including protective, measures**
>
> 1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.
>
> 2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

63. The similarity between Article 20 of Brussels IIa and Article 11 of the 1996 Hague Convention is apparent although there are also obvious differences. One respect in which it differs from Article 11 is that Article 11 is a rule of jurisdiction, found in the chapter of the Convention dealing with jurisdiction, whereas Article 20 is not, and the position as to enforcement is also different, see the decision of the CJEU in Purrucker v Vallés Pérez (No 1) (Case C-256/09) [2011] Fam 254 at §§87 et seq. These differences are not sufficient to lead me to abandon my consideration of the jurisprudence on Article 20, however.

64. We were told that courts in England and Wales have made orders requiring the return of children under Article 20, although there is little in the reported authorities to demonstrate this. Counsel did not cite any such authorities. I found Re S (A Child) (Care Proceedings: Jurisdiction) [2008] EWHC 3013 (Fam) which concerned a child who was habitually resident in Romania and which may be relevant. On the facts, the 1980 Hague Convention did not apply but Brussels IIa did. Charles J said that an application of Articles 17 and 20 founded a return of the

child to Romania so that the authorities there could exercise their jurisdiction, and the making of practical arrangements relating to the return to protect her and promote her best interests pending decisions by the Romanian courts and authorities.

65. In addition to the Purrucker decision, two earlier decisions of the CJEU are also relevant. They are Proceedings brought by A (Case C-523/07) [2010] Fam 42 and Deticek v Sgueglia (Case C-403/09PPU [2010] Fam 104.

66. In Proceedings brought by A, the court considered what powers were available to a court under Article 20(1). It held that to come within Article 20, three conditions must be satisfied: the measures concerned must be urgent, they must be taken in respect of persons or assets in the Member State where the court seised of the dispute is situated, and they must be provisional (§47). The court continued:

> "48. Those measures are applicable to children who have their habitual residence in one Member State but stay temporarily or intermittently in another Member State and are in a situation likely seriously to endanger their welfare, including their health or their development, thereby justifying the immediate adoption of protective measures. The provisional nature of such measures arises from the fact that, pursuant to Article 20(2) of the Regulation, they cease to apply when the court of the Member State having jurisdiction as to the substance of the matter has taken the measures it considers appropriate."

67. In Deticek v Sgueglia, the court reiterated the three conditions identified in Proceedings brought by A and said, of the "condition of urgency",

> "42. Since Article 20(1) of Regulation No 2201/2003 authorises a court which does not have jurisdiction as to the substance to take, exceptionally, a provisional measure concerning parental responsibility, it must be considered that the concept of urgency in that provision relates both to the situation of the child and to the impossibility in practice of bringing the application concerning parental responsibility before the court with jurisdiction as to the substance."

(5) Article 11 itself

68. The terms of Article 11(1) also import three conditions which must be satisfied before a court can exercise jurisdiction. In this Article, the conditions are:

i) The case is one of urgency;

ii) The child (or, where relevant, property belonging to the child) is present in the Contracting State of the court in question;

iii) The steps the court is going to take are "necessary measures of protection".

69. Where, as here, the child is habitually resident in a Contracting State, the measures taken under Article 11(1) lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.

70. The phrase "measures of protection" has a wider meaning than might be thought. It refers back to Articles 1 and 3 and it seems to me that, if a return order is within the 1996 Hague Convention at all, as I think it is for the reasons I explained earlier, then it is capable, in principle, of being a necessary measure of protection within Article 11(1). Whether the case is urgent, and whether/what measures are protective for the particular child and necessary in the circumstances, will depend on the individual facts of the case.

71. I am prepared to accept that there may be cases in which a return order is urgent and necessary. I am also prepared to accept, at least for the sake of argument, that it is possible to make an order such as a return order (the effects of which are less easily reversed than some other possible protective measures) notwithstanding the provisions of Article 11(2) which speak of the measures lapsing when the Contracting State with jurisdiction takes the measures required by the situation.

72. What I cannot accept is that this particular case was a case of urgency for the purposes of Article 11. The Lagarde report suggested, in relation to Article 11, that a situation of urgency may exist where, if remedial action were only sought through the normal channels of Articles 5 and 10, there might be irreparable harm to the child. The view of the court in Deticek v Sgueglia in relation to Article 20 was very similar (see §42 of that decision, quoted above). But in this case, approximately six months had passed before the father took action in our courts and over a year had passed by the time of Wood J's decision. The father showed, by his prior application to the Moroccan courts, that a speedy application to the courts with jurisdiction under Article 5 was entirely possible and there has been no explanation as to why he did not apply in Morocco for a return order rather than a change of residence. I can see that in some cases the passage of time will make a measure of protection *more* urgent rather than less but the facts would be very different from these, in my view. What is potentially harmful to S here is not his living arrangements but the fact that he is not keeping up his relationship with his father by direct contact. It is very important that that be remedied but I cannot accept that there is here a need for urgent protection such as would entitle the court to act under Article 11.

73. Thus it is that in my view Wood J did not have jurisdiction under Article 11 to make the return order that he made.

Was there any other basis on which Wood J could exercise jurisdiction?

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 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.

75. In order not to sow the seeds of confusion for future cases, I should make clear that I am not suggesting that the courts here can never have recourse to the inherent jurisdiction in order to make an order for the return of a child to another country. It is important to recognise that the inherent jurisdiction is a concept which can involve two distinct elements: it can be both a basis for exercising jurisdiction and the source of the power to make orders, as opposed to having recourse, say, to the powers under the Children Act 1989. In a 1996 Hague Convention case, provided the English court has substantive jurisdiction under the Convention, and assuming (as will usually be the case) that the inherent jurisdiction is available according to domestic rules, then it can be utilised to make orders.

The original appeal grounds

76. It would be apparent to anyone who had read the grounds of appeal and skeleton arguments and listened to the oral submissions that the focus of this judgment has been rather different. As can be seen from the terms in which I gave permission to appeal, the appellant's principal focus was upon a) the judge's refusal to permit questions to be asked of the Moroccan lawyer during the hearing about Moroccan law and the conclusions the judge reached about Moroccan law and b) the judge's welfare evaluation which led him to order S's return to Morocco. When I gave permission, like the parties I was thinking in terms of whether the well-known principles in In re J (a Child)(Custody Rights: Jurisdiction) [2005] UKHL 40 [2006] 1 AC 80 would need modification in the light of the coming into force of the 1996 Hague Convention.

77. It is now clear to me that the impact of the 1996 Hague Convention is far more radical. Matters must first be analysed in terms of jurisdiction, as I have sought to do. If the conclusion of this analysis is that the English courts have substantive jurisdiction, it may nonetheless be appropriate to return the child summarily to another country. Depending on the circumstances, the In re J principles may have a place in determining that issue. However, they are not, in my view, applicable where the court's jurisdiction is confined to Article 11. Article 11 itself shapes the court's response. The court can order necessary measures of protection in a case of urgency. What those measures are will depend on the needs of a child in any given set of circumstances.

78. Having concluded that the situation here was not of sufficient urgency to justify action under Article 11, I need not go into the criticisms of the judge's weighing of the various welfare considerations here. The features of the case as identified

by the judge and in argument were material to my consideration of the question of urgency but that is the limit of their relevance here. As Wood J did not in fact have substantive jurisdiction, there is little point in a critique of how he purported to exercise it.

79. The issues as to the questioning of the expert and the judge's conclusions about Moroccan law fall out of the equation in a similar way. It was not necessary for the judge to take a view on Moroccan law in order to exercise such jurisdiction as he had.

Where does that leave matters?

80. The result of my analysis is that, for reasons that were not identified until rather late in the day and were certainly not even hinted at before him, Wood J had no jurisdiction to make the order that he made. It was possible that he could have considered having recourse to Article 9 of the 1996 Hague Convention. That provides:

> "1) If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either
>
> - request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or
>
> - invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.
>
> (2) The authorities concerned may proceed to an exchange of views.
>
> (3) The authority initiating the request may exercise jurisdiction in place of the authority of the Contracting State of the habitual residence of the child only if the latter authority has accepted the request.

81. It was submitted by the mother that Wood J should have utilised Article 9. This submission was made, however, as part of the mother's attack on the judge's return order. Whether she would have sustained the submission had she known that the order would be set aside anyway for want of jurisdiction, I do not know. In any event, Wood J himself dealt with this in his response to the application for permission to appeal. He did not consider that the case was one in which he should request the competent authority in Morocco to authorise the English court

to exercise jurisdiction under Article 9 of the 1996 Hague Convention and nothing that has been said in argument before us has undermined that determination.

82. There being no jurisdiction, Wood J should therefore have been invited to dismiss the proceedings.

83. The consequence of that may seem rather strange. In the aftermath of the dismissal of the father's request for the return of S to Morocco, the jurisdiction picture may be different, with the result that a fresh application made thereafter may fare differently. If S remains habitually resident in Morocco, things would remain the same; Morocco would still be the Contracting State with substantive jurisdiction under Article 5 of the 1996 Hague Convention. However, if it were to be established that by the time of the fresh application S had become habitually resident in England and Wales, it may be different. Even by the time of Wood J's decision in October 2014, S had been resident here for at least one year after the father had knowledge of where he was (Article 7(1)(b)). With the dismissal of the father's request, it could not be argued that there was a request for return still pending (ibid). In these circumstances, Morocco's jurisdiction would no longer be preserved by Article 7; instead, if the 1996 Hague Convention in fact governed jurisdiction at all, the English courts would have jurisdiction under Article 5. In an additional twist, the fact of habitual residence here, in a Member State, may trigger Article 61 of Brussels IIa which might have the consequence of applying that regulation instead of the 1996 Hague Convention (see above). However, as this would lead to exactly the same result, that is jurisdiction in England and Wales, this time by virtue of Article 8 of Brussels IIa, the Article 61 argument could, I think, be side-stepped once more.

General advice

84. Reunite invited us to give general guidance as to how cases under the 1996 Hague Convention should be handled. I do not consider that that would be wise. This case is a perfect example of how unexpected the workings of a new Convention can be and I would prefer to inch forward case by case, ensuring that matters are determined in a way which works both in legal principle and in practice. I can see the force in Reunite's suggestion that cases involving the 1996 Hague Convention should be heard by Family Division judges, at least for the moment, but whether that is a practical way of ordering the business of the Family Division is a matter for the President, it seems to me. Reference must, of course, be made to the Parental Responsibility and Measures for the Protection of Children (International Obligations)(England and Wales and Northern Ireland) Regulations 2010 SI 2010/1898 and to the Family Procedure Rules 2010 which include provisions regulating the level of court in which certain matters under the 1996 Hague Convention are to proceed.

85. What is very clear, however, is that whenever a case has any connection at all to another country, it is vital to consider jurisdiction questions from the very start; domestic jurisdiction provisions are not enough. Does Brussels IIa apply? Does the 1996 Hague Convention apply? Is there any other international instrument which is relevant?

86. This case has involved the relatively unusual situation of a country which is a Contracting State to the 1996 Hague Convention, but which is not an EU Member State, and which is not in a 1980 Hague Convention relationship with this country. Where the 1980 Hague Convention applies, its application is not affected as between parties to both Conventions by the 1996 Convention, see Article 50 of the 1996 Convention. The problem that has arisen here may therefore turn out to be confined to a relatively small number of cases.

Disposal of the appeal

87. For all the reasons set out above, I would allow the appeal, set aside the return order made by Wood J and substitute an order dismissing the father's application.

Gloster LJ:

88. I agree.

Moore-Bick LJ:

89. I also agree.