Case No: 2012/0825

Neutral Citation Number: [2012] EWCA Civ 1396
**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF**
**JUSTICE FAMILY DIVISION**
**MRS JUSTICE PARKER**
**FD11P01347**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/10/2012

**Before :**

**LORD JUSTICE THORPE**
**LORD JUSTICE RIMER**
and
**LORD JUSTICE PATTEN**

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**Between:**

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| **ZA and PA** | **Appellants** |
| **and** | |
| **NA** | **Respondent** |

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**Henry Setright QC & Edward Devereux** (instructed by **Thompson & Co**) for the **Appellants**
**Alistair Perkins** (instructed by **Dawson Cornwell**) for the **Respondent**

Hearing date : 6th July 2012

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# Judgment

**Lord Justice Thorpe :**

1. ZA is the father of four children. He and the children are in Pakistan. PA, his brother, is the second appellant. He is in this jurisdiction and appears to manage the interests of his brother in the London litigation. The respondent to the appeal is their mother, NA, who is also here. The order appealed is that of Mrs Justice Parker dated 20th February 2012.

2. The children are A, born [on a date in] 2001, I, born [on a date in] 2002, Aq, born [on a date in] 2005 and H, born [on a date in] 2010.

Family History

3. The parents are cousins. Their's was an arranged marriage celebrated in Pakistan on the 15th April 1999. On the 24th August 2000 the mother arrived in this jurisdiction on a visa. The first three children were born in this jurisdiction. After Aq's birth problems in the marriage commenced.

4. Between 2006 and 2008 the parties lived apart. The husband was in Pakistan where apparently he had an affair. On his return to the marital home the mother asserts that he was verbally and physically abusive to her.

5. Accordingly, she sought police protection. The husband was arrested but the wife dropped charges under pressure from her family. In the circumstances she sought protection in a refuge until finding accommodation for herself and the children in South East London. Contact arrangements were set up.

6. On the 13th October 2009 the wife took the three children to Pakistan for a holiday. They were booked to return on the 3rd November 2009. However, in Pakistan not only the paternal family but her own pressurised her to reconcile. She did so on the basis that the family would return to England.

7. Her stay in Pakistan soon became involuntary. The children were entered into local schools against her wishes and her husband removed her passport and the children's passports. The battle for survival intensified when in February 2010 she discovered she was pregnant. She resisted pressure for an abortion. She was threatened with death if she attempted to escape and was repeatedly beaten, threatened and abused by the husband and his family. Her telephone was confiscated and she was not allowed out of the house unaccompanied.

8. Following the birth of H, the maternal grandfather commenced proceedings to secure the wife's release. The husband commenced custody proceedings. Both sets of proceedings were subsequently withdrawn or dismissed.

9. On the 15th May the wife was able to visit her father through the intervention of a group of elders. She recovered her passport and on the 17th May 2011 she flew to England and returned to the refuge. On the 24th May 2011, unknown to the wife, the father issued custody proceedings in Pakistan which were not served.

The Proceedings

10. On the 20th May 2011 the wife obtained an order on a without notice application from Peter Jackson J for the immediate return of the children. The order was made in wardship beneath a declaration that all four children were habitually resident in this jurisdiction. The order was served on the husband on the 3rd August 2011.

11. On the 20th June 2011 the wife issued an application for a freezing order. Her prospects of enforcement lay in the husband's ownership of two properties in this jurisdiction, one of them co-owned with his brother. On the same day Her Honour Judge Coates repeated the order for immediate return of the children and gave directions in the application for a freezing order. That application was listed before Mrs Justice Eleanor King on the 31st October 2011 when she made a freezing injunction in relation to the husband's assets within the jurisdiction.

12. On the 28th November 2011 directions were given by Her Honour Judge Cahill QC. She continued the freezing injunction and gave directions for a four day hearing to commence on the 14th February 2012 in order to determine a challenge to jurisdiction raised by solicitors who said that they were instructed on behalf of the husband and seven other members of the paternal family.

13. Thereafter there have been a number of strategic interventions by the paternal family, their acts of commission or omission being heavily criticised by Mrs Justice Parker in several judgments on various dates in February 2012. This conduct is exemplified by an application made apparently without notice to a District Judge who adjourned the four day fixture commencing before Parker J on the 14th February.

14. As to omissions, after the paternal contingent absented themselves on the 15th February, Parker J directed attendance and when that failed, issued a bench warrant. These machinations were the subject of the judgment delivered by Parker J on the 16th February.

15. By her judgment of the 20th February, Parker J yet again repeated the order for the return of the children. In the course of the hearing she had received the oral evidence of the mother which she had herself tested by strong questioning. In her judgment she made clear findings in support of the order for return.

16. The paternal family then instructed fresh solicitors who, in turn, instructed Mr Henry Setright QC. They also instructed juniors who shared the preparation of the appellant's notice, one replacing the other before the filing of the notice out of time on the 5th April 2012.

17. The wife is pursuing enforcement through sequestration proceedings with which we have not been concerned. We were informed that they are listed for hearing on 13th July 2012.

18. It is unnecessary to record applications for permission to appeal earlier orders, all of which were dismissed. The appellant's notice of the 5th April 2012 supported by a skeleton argument written by Mr Edward Devereux, was ordered to be listed for oral hearing on notice with appeal to follow.

Submissions

19. Mr Setright and Mr Devereux have mounted a powerful attack on the order of Parker J. Their principal contentions are:-

i) That the judge was wrong in law to hold that H was habitually resident in this jurisdiction. He was conceived and born elsewhere and the first two years of his life had been spent entirely in Pakistan.

ii) The proceedings in Pakistan were first in time. Under principles of comity, alternatively under the lis alibi pendens rule, London should not have claimed and exercised jurisdiction.

iii) The judge disregarded the rule expressed in paragraph five of the Pakistan Protocol.

iv) The judge failed to recognise that the question of jurisdiction was governed by Regulation Brussels II revised. She should have applied not the English concept of habitual residence but the European concept as established in the judgments of the Court of Justice of the EU: ***Re A*** (Area of Freedom, Security and Justice) (C-523/07) (2009) 2 FLR 1 and ***Mercredi v Chaffe*** (C-497/10) (2011) 1 FLR 1293.

20. Mr Perkins, in presenting the respondent's case, was handicapped by the fact that at a crucial stage public funding was either suspended or withdrawn. Fortunately it was restored in time for Mr Perkins to settle his comprehensive skeleton argument and amplify it with oral submissions. Naturally, Mr Perkins relied strongly on the history and the findings below.

21. As to the law he submits that this case on its facts is on all fours with the facts in ***B v H*** (Habitual Residence: Wardship) [2002] 1 FLR 388 and Parker J rightly followed the path of that authority.

Conclusions

22. Parker J, having recorded and accepted the mother's story, concluded:-

> "The mother's account has been given consistently and it is internally consistent. She was retained against her will, the children were retained against her will and when her son was born in Pakistan this was against her wishes. She wanted to be back in England. Her case is supported by the Pakistan Court documents of 8th December and is supported by the email from the refuge which summarises the account that she has given me.
>
> I reject entirely the father's account that the mother abandoned the children. Her actions upon arriving in this country are wholly inconsistent with that. She applied to the court very soon after she arrived. Her reaction and demeanour when asked about why she had left the children was wholly inconsistent with abandonment. She explained to me that she had had to get out while she could and then

make an application in respect of the children in this jurisdiction. Her case makes absolute sense."

23. The judge's findings establish that the father is an abductor. By force, threats and coercion he prevented the mother from returning with the three children of the family at the conclusion of the holiday on 3rd November 2009. The mother was powerless to remedy the situation until she could escape from the prison that the father and his family had created for her.

24. Were Pakistan a signatory to the 1980 Hague Abduction Convention, on arrival in this jurisdiction she would have been able to initiate an application for a summary return order. As things are her only remedy was the application in wardship within the jurisdiction of habitual residence. Given her vulnerability it would not be realistic to suppose that she could have secured the return of the children by initiating proceedings in Pakistan.

25. The return order made by Peter Jackson J on 20th June 2011 was an impeccable order in relation to the three older children of the family wrongfully detained in Pakistan. The validity of the order in relation to H was clearly more questionable since he had not an English habitual residence prior to the abduction. However at the date of the order H was 8 months of age and had only been a month without his mother. Neither the wife nor the judge had any knowledge of the proceedings issued by the father on the 24th May in reaction to the mother's escape.

26. In my judgment the father cannot be said to be in a stronger position on the 20th February 2012 than he was on the 20th June 2011. When served with the order he disobeyed it, just as he has disobeyed all subsequent orders of this court. He has not engaged in the litigation. No doubt he and his family would have ignored these proceedings were it not for the application of 30th September 2011 for a freezing order directed to the income which the husband receives from the letting of the shop premises and the flat above. Thereafter, in reality the wife has fought for her children whilst the father and his family have fought for their assets within this jurisdiction.

27. On the facts of this case I am in no doubt that the High Court correctly identified its responsibility to protect the three older children, the victims of abduction, and to exercise powers of enforcement against assets within the jurisdiction. The essential paragraphs of the order of the 20th February 2011 are paragraphs two and eight. Paragraph two only reaffirms the return order made by Peter Jackson J. Paragraph 8 advances enforcement against the assets of the husband's family within the jurisdiction.

28. The submission that the High Court has no jurisdiction over H was of course not considered by Peter Jackson J. It was carefully considered by Parker J and her approach has been skilfully and strongly criticised by Mr Setright and Mr Devereux in their skeleton arguments and oral submissions.

29. Of course, as a general rule, habitual residence is dependent upon the physical presence of the individual within the jurisdiction, although that presence may be intermittent. I do not accept the submission that a person who has never been present within a jurisdiction cannot be habitually resident there. Take for example an English mother habitually resident in England who gives birth to a child in France. As a result

of complications mother and child are hospitalised for an extended period before they are fit to come home. In my judgment the child is habitually resident in England from birth and not from the date of the entry into this jurisdiction. The same applies to the mother habitually resident in England but involuntary detained on the Indian sub-continent. In my judgment the child takes the habitual residence of his mother at birth. In these simplified instances it is not necessary to consider the habitual residence of the child's father which is assumed to be the same as that of the mother if they are not estranged.

30. In my judgment the case of ***B v H*** (cited above) was rightly decided by Charles J. It was a case exceptional on its facts and I would accept Mr Setright's submission that its scope should not be extended and that only in exceptional cases will jurisdiction be established. However, the defeat of abduction must be supported, particularly in those cases where there is not a Convention remedy.

31. I am not impressed by Mr Setright's submission that these orders of the High Court will strain or break the bonds of comity that bind England and Pakistan. Whilst it seems that the husband was first in time and that he secured a custody order in Pakistan shortly after the freezing injunction ordered by Eleanor King J on the 31st October, an abductor cannot trump the proceedings for summary return by obtaining what may appear to be a welfare based judgment in the jurisdiction within which the children are wrongfully detained.

32. It follows that I also reject the submission that Peter Jackson J was obliged to invite Pakistan to determine the question of habitual residence pursuant to paragraph 5 of the Pakistan Protocol. Peter Jackson J had no knowledge of pre-issued proceedings in Pakistan. On the facts he was fully justified in making a peremptory return order, which did not preclude the father from applying in this jurisdiction on notice for its discharge on a challenge to jurisdiction or on any other ground.

33. Finally, I do not accept Mr Setright's submission that Parker J should have directed herself by reference to the decisions of the Court of Justice of the European Union. Had she done so it is manifest that she would not have reached a different conclusion. I do not accept Mr Setright's submission that the concept of habitual residence according to the autonomous law of the European Union can be distinguished from the concept of habitual residence now applied by the courts of this member state. Mr Setright particularly focuses on paragraph 49 of the judgment of the court in Mercredi v Chaffe:-

> "As the court explained, moreover, in para 38 of ***Re A***, in order to determine where a child is habitually resident, in addition to the physical presence of a child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent."

34. I do not accept that from that paragraph we can extract a statement that habitual residence is impossible without physical presence. The meaning of the paragraph must be related to the context of the cases which the court considered. Neither case considered habitual residence in the context of child abduction.

35. For me, the key question is whether Peter Jackson J had jurisdiction over all four children when he made the first without notice return order. If he did, nothing that happened thereafter served to divest Parker J of jurisdiction on 20th February. I stress that the order of Jackson J was not challenged when served. It related to a seven month old baby wrongfully separated from the applicant mother. In such circumstances I would not hold that the London judge lacked jurisdiction. However, I recognise that on its facts this case narrowly falls on the right side of an important boundary.

36. In my judgment whilst the orders made by Parker J both flowed from her findings and were not the product of misdirection in law, I recognise that the submissions advanced by Mr Setright are more skilful and wide ranging than any advanced below. Accordingly I would grant the extension and the permission but dismiss the resulting appeal.

**Lord Justice Rimer:**

37. I have had the advantage of reading in draft the judgments of Thorpe and Patten LJJ. I respectfully agree with them, for the reasons they give, that there is no question of the three older children having ceased to be habitually resident in England and Wales at the time of the order of Parker J or of the earlier order of Peter Jackson J.

38. As regards the youngest child, H, the position is different. He was born in Pakistan and has never set foot in England and Wales. In respectful disagreement with Thorpe LJ, I agree with Patten LJ, for the reasons he gives, that it follows that H cannot be said to have been habitually resident in England and Wales at the date of either order. The decisions of this court in *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887 and *Al Habtoor v. Fotheringham* [2001] 1 FLR 951 show that the question of whether a person is habitually resident in a particular country is one of fact. They further show that an essential ingredient in the factual mix justifying an affirmative answer is that the person was at some point resident in that country; and that it is not possible to become so resident save by being physically present there. If there has been no residence there, there can be no habitual residence there.

39. Habitual residence in a particular country is not, therefore, a status in the nature of a legal concept that can, in the case of a child who has never resided there, be attributed to him at birth merely by virtue of his association with a parent who is habitually resident there. I consider, with respect, that it follows that the decision of Charles J in *B v. H (Habitual Residence: Wardship)* [2002] 1 FLR 388 was, as regards child H, wrong. Charles J found that H was habitually resident in England and Wales, but the child had never been there and so the essential factual ingredient of physical presence there was missing.

40. The judge in the present case should, I consider, also have held that H was not habitually resident in England and Wales. The guidance as to 'habitual residence' in the decisions of the Court of Justice to which Patten LJ refers, if applicable to the present case, neither requires nor justifies a different conclusion.

41. I agree with Patten LJ that the appeal against the judge's order should be allowed to the extent that he indicates in his judgment.

**Lord Justice Patten:**

42. As Thorpe LJ has explained, the facts of this case are both disquieting and not unfamiliar. But, as Parker J herself recognised, the court's jurisdiction to make return orders in respect of these children in wardship proceedings depends upon their being habitually resident in this jurisdiction. Although the courts at every level have emphasised that habitual residence is a question of fact to be determined in the light of all relevant circumstances and is not as such a legal construct as in the law of domicile, there are necessarily limits to what is capable of amounting to residence. In this case, that question arises in an acute form in relation to the youngest child (H) who was born in Pakistan and has never left that country. The judge (in reliance on the decision of Charles J in *B. v H. (Habitual Residence: Wardship)* [2002] 1 FLR 388) has held that H acquired at birth habitual residence in England and that the habitual residence of the three older children (which it is common ground was in England prior to their arrival in Pakistan) could not have been and was not changed by their retention in that country contrary to the wishes of their mother.

43. The grounds of appeal challenge the judge's findings in respect of all the children and also criticise the judge for failing to take account of or to apply the *UK-Pakistan Judicial Protocol on Children Matters 2003* ("the Pakistan Protocol") and the principles of comity. It is said that the judge wrongly presumed that the English court should determine jurisdiction notwithstanding that the children are physically within the jurisdiction of the Pakistan court; are already subject there to an order for custody in favour of the father obtained in proceedings which pre-date the mother's English wardship application; and are the subject of an on-going dispute about jurisdiction based on habitual residence. But in a refinement of these criticisms not advanced before the judge, Mr Setright QC also submits that Parker J failed properly to apply the provisions of s.2 of the Family Law Act 1986 by not determining whether the court had jurisdiction to entertain the mother's application under article 8 of Council Regulation (EC) No. 2201/2003 ("Brussels II Revised"). He submits that this Regulation is the first stop jurisdictional framework for all cases involving parental responsibility in England and Wales regardless of whether the other countries concerned are themselves subject to the Regulation. For this he relies on the decision of the Supreme Court in *Re I (A Child) (Contact Application: Jurisdiction)* [2010] 1 AC 319. The practical effect of this argument (if correct) is that the judge should have considered the question of habitual residence by reference to the jurisprudence of the ECJ as recently expounded in the cases of *Re A (Area of Freedom, Security and Justice)* [2009] 2 FLR 1 and *Mercredi v Chaffe* [2011] 1 FLR 1293.

44. Had the judge followed this course she would, it is submitted, have reached the conclusion that a child must be physically present in a particular country before he or she can become habitually resident there. This would mean that H is not habitually resident in England and Wales and that the judge was wrong to base her decision to the contrary on the decision of Charles J in *B. v H.* But the appellants also contend that even if the question of habitual residence falls to be determined by reference to the English authorities decided prior to the application of Brussels II Revised, the same conclusion should have been reached. We are therefore invited to hold that *B. v H.* was wrongly decided.

45. If the right view is that not only H but also the three older children were no longer habitually resident in England and Wales when the mother made her application for a

return order then the judge's order cannot stand. But even if she was only wrong about H, the question is raised as to whether the English court should decline jurisdiction on *forum conveniens* grounds given that the only courts who can exercise jurisdiction over all four children are those in Pakistan where the children are physically present even if not habitually resident. Again the judge was not asked to consider this question and, in the light of her findings on habitual residence, it did not arise.

Habitual residence

46. Habitual residence rather than domicile is now the internationally accepted test for determining jurisdiction in family cases. In relation to children, it was adopted as the jurisdictional test in the 1980 Hague Abduction Convention and serves the same purpose in matrimonial and parental responsibility proceedings under Brussels II Revised. In domestic law it features in the Matrimonial and Family Proceedings Act 1984; the Child Abduction and Custody Act 1985; and the Family Law Act 1986. This is not, of course, an exhaustive list.

47. As a consequence, English courts have had since the 1980's to consider what constitutes habitual residence and the correct approach to its determination. As part of this process a number of boundaries have been defined:

(1) habitual residence is primarily a question of fact to be determined by reference to all the relevant circumstances. It is not to be treated as a term of art nor is it a legal concept in the sense of a set of pre-determined rules designed to produce a particular legal result in given circumstances: see *J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562;

(2) consistently with this, a child does not automatically take the habitual residence of its parents or custodial parent and there is no mandatory coincidence between them: see *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887 at p. 891; *Al Habtoor v Fotheringham* [2001] 1 FLR 951. For the same reason, it is also possible for a person (child or adult) to have no place of habitual residence at any given point in time. Although justifiable concern has been expressed (particularly in the context of international abduction) about a child having no habitual residence in a case where jurisdiction to make protective orders is in general based upon that condition, the law has yet to reach the stage where every child is deemed to be habitually resident somewhere (see *Nessa v Chief Adjudication Officer* [1999[ 1 WLR 1937 at p. 1942) and the contrary has not been argued on this appeal;

(3) the acquisition of habitual residence in any country requires the adult or child in question to be physically present there. In *Re M* (supra) (where the wardship and return order had been made in respect of a child who remained in India) Sir John Balcombe (at p. 895) said:

> "Before a person, whether a child or an adult, can be said to be habitually resident in a country, it is clear that he must be resident in that country. Of course, residence does not necessarily require physical presence at all times. Temporary absence on holiday, or for educational purposes (as in *Re A*)

> will not bring to an end habitual residence. But here the Judge found as a fact, and on ample evidence, that K became habitually resident in India. He has never to this day come back to England. As a matter of fact, he has not been resident in England since he went to India in February 1994. Bracewell, J held that the mother's change of mind both brought to an end K's habitual residence in India and gave him an habitual resident in England.
>
> I have the gravest doubts whether the first proposition is correct. Clearly, the mother's change of mind could not alter the fact that he was, and is, physically resident in India. Whether her change of mind could alone alter the 'habitual' nature of that residence I very much doubt, but in any event it is not necessary finally to decide that point on this appeal, since the one thing about which I am quite clear is that the child's residence in India could not become a residence in England and Wales without his ever having returned to this country. As I said before, the idea that a child's residence can be changed without his ever leaving the country where he is resident is to abandon the factual basis of "habitual residence" and to clothe it with some metaphysical or abstract basis more appropriate to a legal concept such as domicil."

In his judgment Millett LJ said that:

> "Three principles must be borne in mind:–
>
> (1) The question whether a person is or is not habitually resident in a particular country is a question of fact; *Re J (a Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, 578, sub nom *C v S (A Minor) (Abduction)* [1990] 2 FLR 442, 454 per Lord Brandon. The concept of habitual residence is not an artificial legal construct.
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> (2) While it is not necessary for a person to remain continuously present in a particular country in order for him to retain residence there, it is not possible for a person to acquire residence in one country while remaining throughout physically present in another.
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> (3) Where both parents have joint parental responsibility, neither of them can unilaterally change the habitual residence of the child by removing the child wrongfully and in breach of the other party's rights; *Re J* at 572 and 449 respectively per Lord Donaldson, MR."
>
> (4) In *Al Habtoor* (at p. 966) Thorpe LJ affirmed the authority of these passages and the point is not open for argument in this court.

48. The issue therefore in H's case is whether we can and should approve an exception to this rule in a case of a baby who is born abroad of parents or a custodial parent who are at the time habitually resident in this jurisdiction. In the case of the older children, we are faced with the more straightforward question of whether their removal to Pakistan and subsequent living there had by the time of the mother's wardship proceedings resulted in their having ceased to be habitually resident in this country. Like Thorpe LJ, I take the view that it is unnecessary to consider whether the judge ought to have applied the ECJ authorities on habitual residence unless that would have produced a materially different outcome in the proceedings. This is not a case where the mother seeks to rely on article 12 of Brussels II Revised in order to found jurisdiction in the English court and it is common ground that the judge's jurisdiction to make the orders she did is based on the habitual residence of the children however defined. I propose therefore to consider the position of the children (as the judge did) by reference to the relevant English authorities and then to decide whether the recent jurisprudence in the ECJ requires a different approach.

The other children

49. The appeal against the judge's finding that the older children remained habitually resident in England and Wales has a number of obvious difficulties. The children were all born and brought up here and until their removal to Pakistan in 2009 the centre of their family life was clearly in this country. Their parents' marriage was troubled and the father spent a considerable amount of time in Pakistan between 2006 and 2008. Until then both parents had lived together in the family home in England with the children and their extended family and the children were clearly habitually resident in this country.

50. The judge's findings (which are not seriously challenged on this appeal) were that the mother took the children to Pakistan for what was intended to be no more than a temporary visit to her father. They were to return to their schools in England. At the time she was separated from the father but after arriving in Pakistan, she was forced into some kind of reconciliation with the father during which time H was conceived. However, it remained her intention to return to England and she did not wish the children to be educated in Pakistan.

51. H was born in October 2010. The father then issued custody proceedings in respect of the children but these were later either discontinued or abandoned. Eventually in May 2011 the mother was able to regain her passport and, with the assistance of her own family, to return to England. But she was unable to retrieve her children and they remain in Pakistan. The judge found that the mother never agreed to or acquiesced in herself and the children remaining in Pakistan and wished to return with them and H to England. On her findings, that intention has been thwarted by the coercion of the father.

52. In these circumstances, the appeal against the judge's findings that the older children remained habitually resident in England is quite hopeless. Whether one treats both parents or only the mother as having the care and control of the children, it is well established that the habitual residence of the children cannot be changed by the unilateral action of one parent which is not consented to or acquiesced in by the other. This would be a charter for abduction. The forced retention of the children in Pakistan cannot therefore found the basis of a claim that by passage of time and their

inevitable involvement in family life and education in Pakistan the older children have ceased to be habitually resident in England.

53. Would the application of the ECJ authorities on habitual residence have produced a different result? In *Re A (Area of Freedom, Security and Justice)* the ECJ gave guidance about the interpretation of the concept of habitual residence within the meaning of article 8(1) of the regulation:

> "[31] Article 8(1) lays down the principle that the jurisdiction of the courts of the member states in matters of parental responsibility is established according to the place of the child's habitual residence at the time the court is seised, but does not define the content of that concept.
>
> [32] Under Art 13(1) of the Regulation, where a child's habitual residence cannot be established the courts of the member state where the child is present are to have jurisdiction.
>
> [33] Thus, the physical presence alone of the child in a member state, as a jurisdictional rule alternative to that laid down in Art 8 of the Regulation, is not sufficient to establish the habitual residence of the child.
>
> [34] According to settled case law, it follows from the need for uniform application of Community law and from the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the member states for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Community, having regard to the context of the provision and the objective pursued by the legislation in question (see, in particular, *Ekro BV Vee-En Vlees Handel v Produktschap Voor Vee en Vlees* (C-327/82) [1984] ECR 107, para 11 and *Nordania Finans and BG Factoring* (C-98/07) [2008] ECR I-1281, para 17).
>
> [35] Since Art 8(1) of the Regulation does not make any express reference to the law of the member states for the purpose of determining the meaning and scope of the concept of "habitual residence", that determination must be made in the light of the context of the provisions and the objective of the Regulation, in particular that which is apparent from recital 12 in the preamble, according to which the grounds of jurisdiction which it establishes are shaped in the light of the best interests of the child, in particular on the criterion of proximity.
>
> [36] The case law of the Court of Justice relating to the concept of habitual residence in other areas of European Union law (see, in particular, *Magdalena Fernández v Commission* (C-452/93P) [1994] ECR I-4295, para 22; *Adanez-Vega v Bundesanstalt für Arbeit* (C-372/02) [2004] ECR I-10761, para

> 37 and *Kozlowski* (C-66/08) [2008] ECR I-0000) cannot be directly transposed in the context of the assessment of the habitual residence of children for the purposes of Art 8(1) of the Regulation.
>
> [37] The "habitual residence" of a child, within the meaning of Art 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case.
>
> [38] In addition to the physical presence of the child in a member state other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.
>
> [39] In particular, the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration."

54. This guidance was applied in *Mercredi v Chaffe* to a case where a mother who was separated from the father took the couple's child back to the French island of Réunion where she came from. The father applied in England for orders giving him parental responsibility, shared residence and rights of access when the child had been in Réunion for only four days and obtained an *ex parte* order for the child's return. The mother later applied and obtained from the French court orders giving her exclusive parental responsibility. In the English proceedings the issue was whether the child remained habitually resident in this country when the court heard the father's *ex parte* application for rights of custody. On an application for a preliminary ruling the ECJ stated that:

> "[44] In that regard, it must first be observed that the Regulation contains no definition of the concept of 'habitual residence'. It merely follows from the use of the adjective 'habitual' that the residence must have a certain permanence or regularity.
>
> [45] According to settled case law, it follows from the need for a uniform application of European Union law and the principle of equality that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question (see, inter alia, *Ekro BV Vee- en Vleeshandel v Produktschap voor Vee en Vlees* (Case 327/82) [1984] ECR 107, para 11; *Nordania Finans and BG Factoring* (C-98/07) [2008] ECR I-1281, para 17; and Re *A* (Area of Freedom, Security and Justice) (Case C-523/07) [2009] 2 FLR 1, para 34).

[46] Since the Articles of the Regulation which refer to ‘habitual residence’ make no express reference to the law of the Member States for the purpose of determining the meaning and scope of that concept, its meaning and scope must be determined in the light of the context of the Regulation's provisions and the objective pursued by it, in particular the objective stated in recital 12 in the preamble to the Regulation, that the grounds of jurisdiction established in the Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity.

[47] To ensure that the best interests of the child are given the utmost consideration, the court has previously ruled that the concept of “habitual residence” under Art 8(1) of the Regulation corresponds to the place which reflects some degree of integration by the child in a social and family environment. That place must be established by the national court, taking account of all the circumstances of fact specific to each individual case (see Re *A*, para 44).

[48] Among the tests which should be applied by the national court to establish the place where a child is habitually resident, particular mention should be made of the conditions and reasons for the child's stay on the territory of a Member State, and the child's nationality (see Re *A*, para 44).

[49] As the court explained, moreover, in para 38 of Re A, in order to determine where a child is habitually resident, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent.

[50] In that context, the court has stated that the intention of the person with parental responsibility to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence (see Re *A*, para 40).

[51] In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host state, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case.

[52] In the main proceedings, the child's age, it may be added, is liable to be of particular importance.

[53] The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant.

[54] As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.

[55] That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the court's case law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant.

[56] It follows from all of the foregoing that the answer to the first question is that the concept of “habitual residence”, for the purposes of Arts 8 and 10 of the Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State—other than that of her habitual residence—to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that state and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case.

[57] If the application of the abovementioned tests were, in the case in the main proceedings, to lead to the conclusion that the child's habitual residence cannot be established, which court has jurisdiction would have to be determined on the basis of the criterion of the child's presence, under Art 13 of the Regulation.”

55. Much of this guidance has an obvious relevance to the issues which arise in relation to H and I shall return to it in that context. But there is nothing here which would support a finding of an abandonment or change in the habitual residence of the older children where their mother who, on the judge's findings, had their day-to-day control and was responsible for their care found herself and the children retained in Pakistan against her will. An examination of the reasons for the change in the children's place of residence disclosed circumstances which cannot be justified in terms of the welfare of the children and the degree of their integration into a social and family life in Pakistan has to be considered and assessed in that context. This is not a case (unlike *Mercredi v Chaffe*) where a young infant was taken to live abroad by the parent with whom the child lived and by whom he was cared for.

56. For these reasons, I agree with Thorpe LJ that in respect of the older children neither the order of Parker J nor the earlier wardship order made by Peter Jackson J can be impugned on the ground that the children had by then ceased to be habitually resident in England and Wales.

H

57. Apart from *B. v H.* there is no reported case to which we have been referred in which the court has held that a child who is born in one country is to be treated as having acquired at birth the habitual residence of its custodial parent or parents. *B. v H.* therefore remains the only decision on the point. It has not subsequently been either approved or disapproved by this court but it has been treated as limited to its own particular facts by subsequent decisions of the High Court which I will come to.

58. The facts of *B. v H.* bear a striking resemblance to those of the present case. The child was born of Bangladeshi parents who at the time were both habitually resident in England. The child was conceived in England but, whilst on a holiday to Bangladesh, the father refused to allow the mother and their other children to return home. The child was born in Bangladesh. Subsequently the mother was able to return to this country without her children and sought relief from the English court under the 1986 Act based on the children being habitually resident here. Charles J (after an exhaustive review of all the authorities) held that all of the children (including the infant born in Bangladesh) were habitually resident in England. The judge considered and expressly took into account the decisions of the House of Lords in *Re J* and the passages in the judgment of the Court of Appeal in *Re M* which I set out earlier. But, as he pointed out, these were not cases involving the position of a new-born child at birth and the recognition that habitual residence is a question of fact rather than a legal concept militated against the importance of an absolute order that physical presence within a country as a pre-requisite to the establishment of habitual residence there. After quoting what Sir John Balcombe said in *Re M* (as repeated by Thorpe LJ in *Al Habtoor*) he went on:

> "[126] In my judgment for present purposes that passage needs to be read as a whole. It identifies the submission which was rejected by the Court of Appeal because they concluded that the submission approached habitual residence as a legal concept rather than as an issue of fact.

[127] In my view the judgment of Millett LJ also has to be read in the light of the whole of that passage and the facts of the case.

[128] At the heart of the reasoning of Sir John Balcombe and Millett LJ are the propositions that habitual residence (i) is, or is primarily, a question of fact, and (ii) is not an artificial legal concept although Sir John Balcombe recognises that legal concepts are involved in determining that issue of fact (see for example his approval at 892C of the decision of Wall J in *Re S (Minors) (Abduction: Wrongful Retention) [1994] Fam 70, [1994] 1 FLR 82* that one of two parents cannot unilaterally change a child's habitual residence although he, or she, removes the child from his home).

[129] I add that in his comments on the passage in the judgment of Hoffmann LJ in *Re M (Minors) (Residence Order: Jurisdiction) [1993] 1 FLR 495* which I have referred to above Sir John Balcombe points out that in that case the child was physically in England with the mother (see 892B) and thus that that passage is in line with the conclusion reached in *Re M (Abduction: Habitual Residence) [1996] 1 FLR 887.*

[130] Both judges also recognise the fact that a person can be resident in a country whilst temporarily away from it. In my judgment this is clearly in accord with a factual approach to what constitutes habitual residence in the sense set out by Sir John Balcombe in the passage I have cited at 890 of his judgment in *Re M (Abduction: Habitual Residence) [1996] 1 FLR 887.*

[131] In other words as a matter of fact a person can have his settled abode, or home as part of the regular order of his life, in one country when he or she is temporarily living in or visiting another country.

[132] Given that approach of Sir John Balcombe and Millett LJ and the facts of *Re M (Abduction: Habitual Residence) [1996] 1 FLR 887* and *Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FLR 951* the question arises whether it is right to extract the passages from their judgments that

'Before a person whether a child or an adult, can be said to be habitually resident in a country it is clear that he must be resident in that country', and 'it is not possible to acquire residence in one country whilst remaining physically present in another'

and say that they set down either:

(a) a rule or test in law; or

(b) a legal concept

> that determines that a baby born abroad to a married couple who are habitually resident in England is not also habitually resident here until he or she is physically present in England.
>
> [133] In my judgment they do not do so because to give them this effect would run counter to the proposition at the heart of the judgments of Sir John Balcombe and Millett LJ that habitual residence is, or is primarily, an issue of fact and is not an artificial concept.
>
> [134] It follows that in my judgment:
>
> (a) *Re M (Abduction: Habitual Residence) [1996] 1 FLR 887* and *Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FLR 951* do not found the proposition that a new born baby cannot have an habitual residence in England until he or she is (or has been) physically present in England; and
>
> (b) generally a baby of a married couple (who are habitually resident in England at the time of the birth of the child) will also at birth generally be habitually resident in England notwithstanding that he (or she) is born abroad. I say generally because the issue is one of fact to be determined having regard to all the circumstances of the case and it is therefore possible that the intentions of the parents at the date of birth (eg that the child should live with grandparents abroad and that was why the mother went abroad to have the baby) could found a different result."

59. The repeated emphasis by the courts (including the ECJ) that habitual residence requires a multi-factorial inquiry into all relevant circumstances is not inconsistent with there being some limits to the concept of residence. As explained earlier in this judgment, the courts have established a number of principles of general application which do not detract from the need to decide the child's place of habitual residence as a question of fact but nonetheless respect the nature of the jurisdictional concept which is in operation.

60. It is clearly artificial as a matter of ordinary language to say that a child is habitually resident at birth in a country to which it has never been. As the cases recognise, residence denotes and involves a physical presence. Where the parents or parent have established a place of habitual residence in a particular country it will usually require no more than a moment's presence in that jurisdiction for a newly born child to acquire the same status. The child's integration into the family and social life of his parents already centered in that location will be completed by his physical presence there. His situation is completely different from that of an adult or child who already has a place of habitual residence in one country which he leaves to establish a life elsewhere. In such a case an appreciable period of time may have to pass before the process of transition to a new place of habitual residence is complete. This is undoubtedly what Lord Brandon was speaking of in *Re J* and it is consistent with the ECJ jurisprudence on habitual residence.

61. One could construct a rule by which a newly born child was presumed to take on birth the habitual residence of its parents or custodial parent. But the rule would be a legal

construct divorced from actual fact which is what the court in *B. v H.* said that it was anxious to avoid and which has been rejected in all the earlier decisions of this court. It would also run contrary to this court's acceptance in cases such as *Al Habtoor* that a child's habitual residence is not to be treated as necessarily the same as that of his parents. This was Hedley J's concern in *W. and B. v H. (Child Abduction: Surrogacy)* [2002] 1 FLR 1008. I differ from him only in saying that I cannot at the moment envisage any case involving a child who is born and remains abroad where a finding of habitual residence in this country could be factually justified.

62. The pressure to create such a rule is obvious. But, in my view, it should be resisted. Although there are obvious concerns about the wrongful retention of children in countries which are not parties to the Hague Convention and which may carry out a less rigorous assessment of habitual residence in such cases, the rules of jurisdiction are intended to operate and importantly can only operate if applied in a consistent and uniform manner regardless of the competing jurisdiction involved. To adopt a special rule for newly born children is likely in my view to create as many problems as it may solve by derogating from a purely factual analysis of where a child is resident. It would also clearly be inconsistent with the approach set out in *Mercredi v Chaffe* which contemplates a detailed examination of whether a child's presence in a particular jurisdiction involves a sufficient engagement with a settled family life in that place as to amount to habitual residence.

63. I have therefore reached the conclusion that the decision of Charles J in *B. v H.* was wrong even on an application of s.2 of the 1986 Act prior to the coming into effect of Brussels II Revised. It follows that the orders of Peter Jackson J and Parker J in relation to H were made without jurisdiction and must be set aside.

64. That leaves the applicants' submission that the orders made in respect of the other children should also be discharged on *forum non conveniens* grounds or because Parker J failed properly to observe the Pakistan Protocol or to give effect to general principles of comity. Like Thorpe LJ, I am not persuaded that the judge can be criticised for not ceding jurisdiction to the Pakistan court on the grounds that it was already seized of the father's custody application. But the *forum conveniens* argument was not argued as part of the appeal and, because of her decision about the habitual residence of H, the judge did not have to consider this point. It seems to me that the right course is for us now to direct written submissions from the parties on the *forum conveniens* issue in the light of the decision of myself and Rimer LJ that H is not habitually resident in England and Wales. Having considered the submissions the Court will rule on the point in a supplemental judgment.

65. I would therefore grant an extension of time and permission to appeal and allow the appeal to the extent I have indicated.