Case No: FD15P00455

Neutral Citation Number: [2016] EWHC 633 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2016

Before :

MRS JUSTICE ROBERTS

- -

Between :

BP	**Applicant**
- and -	
DP	**Respondent**

(Children: Habitual Residence)

- -
- -

Miss Roshi Amiraftabi (instructed by **Brethertons LLP**) for the **Applicant**
Mr Edward Devereux (instructed by **Dawson Cornwell**) for the **Respondent**

Hearing dates: 22nd, 23rd and 24th February 2016

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Judgment

Mrs Justice Roberts :

1. The issue in this case is whether the court should order the return to Australia of two children who have been living with their father in England since 25 August 2014. On that date they left their home in Australia and flew to this jurisdiction in the care of their paternal grandmother. For the last eighteen months they have shared a home with the father whilst their mother, the applicant in these proceedings, remained in Australia where she has been recovering from some very significant health problems. She now seeks their return pursuant to Articles 3 and 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention), as incorporated into the law of the United Kingdom by the Child Abduction and Custody Act 1985. The father opposes her application.

The facts

2. The mother is an Australian national; the father is British. They met in England in the early part of 1999 and married in April 2001. J, their son, was born in April 2003. He is now 12 years old and holds dual nationality. His sister, C, was born in January 2007. She is 9 years old and is also a British and Australian national. The family lived in England throughout the duration of the marriage which broke down in 2008. By that date, the father was working in Dubai as the finance director of an oil company. Divorce proceedings followed and, in 2009, the family home in this jurisdiction was sold and the proceeds divided. As part of the financial consequences of the divorce, the father has continued to maintain the mother and children from his income which is now derived from his work as a freelance consultant in the gas and oil industry. Neither the mother nor the father has remarried.

3. In July 2008, the mother travelled with the children to Sydney in order to attend the celebrations for her father's 80th birthday. The father was still based in Dubai at this stage. As far as he was concerned, the trip to Australia was nothing more than a holiday. However, once there, the mother confided to her brother that she was struggling with an addiction to painkillers. On her case the marriage had broken down by this point although the father puts the date of their formal separation as later that year in October 2008. In any event, it is common ground that the trip to Australia marked the effective demise of family life as it had been lived up to that point in time. The children did not return to England and were enrolled in new schools in Australia.

4. With the assistance of her family, the mother entered a residential detoxification programme in Sydney. She was discharged after about two weeks. The father flew to Sydney and was told by the mother that she could not contemplate a return to England. The advice from her doctors at that stage was that the mother would require an extended period of outpatient treatment and medical support. With some

reluctance, the father agreed to allow the two children to remain in Australia with their mother. He returned Dubai until the end of that year when he became resident once again in England. For the purpose of the English divorce proceedings which were to follow, the father completed the "Statement of Arrangements for the Children" form by formally confirming his agreement to the children remaining in Australia. Thereafter, he supported the mother's attempts to overcome her addiction by meeting her medical expenses and paying the rent on the flat in which his family was living.

5. For the next six years, the mother and the children made their home in Sydney. The mother rented a flat close to her brother's home and the children attended a local school. The mother was working but remained the children's full-time carer. The father visited Sydney as and when he could although there is an issue as to the frequency of his trips to see the children.

6. However, all was not well with the mother's health. Despite the time she had spent in a detoxification unit in 2008, she began drinking heavily again and, by 2011, was under the care of Professor S, a consultant who specialised in the treatment of addiction. Matters had not improved by late 2012 and her health continued to deteriorate throughout 2013. She describes herself by this stage as "a functioning alcoholic" but the extent of her alcohol addiction is reflected in the fact that, in 2013, she was convicted of drink driving at 10 o'clock in the morning whilst she had both children in the car. In April 2013, the children's paternal grandmother (who lived in Hong Kong) travelled to Sydney to spend time with the children. I have a written statement from this lady. She describes the chaotic state in which she found the flat on her arrival. She was sufficiently perturbed to take photographs of the property whilst the mother was absent at a doctor's appointment. She found Antabuse tablets in the kitchen and a letter of referral to Professor S's clinic. The children reported to their grandmother that the mother was drinking and J said that he had seen bottles in her bedroom. The evidence suggests that the mother was openly drinking throughout the grandmother's ten day stay although, when confronted, she denied that she had a problem. The grandmother enlisted the co-operation of the mother's sister who confirmed that the family was aware of her problem with alcohol. She spoke to the mother's GP and spoke of her concerns to the children's father.

7. This intervention appears to have come at the temporary cost of the very close relationship which the paternal grandmother and her husband had hitherto enjoyed with the children. She describes in her written statement how the mother began to make Skype and telephone contact much more difficult. The father says he, too, felt marginalised during this period and had difficulty contacting both the mother and the children. It is the father's case that, in April 2013, during the course of a telephone conversation with J, he learned that his son had become increasingly worried about his mother and asked his father to travel to Australia to "make sure mummy gets better". According to the father's case, by this stage it appears that the children had

observed their mother drinking to the extent that she would frequently fall and injure herself and, on occasions, pass out through inebriation. On the father's account, the children were frequently placed with friends and their existence began to mirror the chaos which then characterised the mother's very unhappy existence. The mother does not accept that the children were exposed in this way to the negative effects of her drinking.

8. At the beginning of May 2013 the father sent the mother an email expressing his shock at the reports which had come back to him from his own mother's visit to the children the previous month. He said this:-

> "Mum's visit has, I know, been a very stressful time for you and as it turned out, for mum too.
>
> I have been shocked to learn that things have become quite so bad, and that you have become dependent upon alcohol.
>
> I know that it is hard for you coping with our children and trying to recover from your alcoholism at the same time on your own.
>
> I have been pondering what I can do to help you recover, and what is also best for the kids, who I have no doubt in some way, to a greater or lesser extent, have picked up on it too.
>
> Would you be willing to open a dialogue with me to look at possible ways that we could give the children the stability that they require while also providing you with the relief to focus on beating your addictions for one and for all ? I think there are a number of ways of doing this, potentially:
>
> 1. You returning to the UK; or
> 2. A sabbatical; or
> 3. A change of primary carer.
>
> It is clear from my own conversations that you are not coping well, and this latest bout of addiction is proof of that.
>
> Please for the sake of the children, and of yourself, let's start to seriously look at what we can do to approach the problems that seems to manifest at the moment.'

9. The mother at that stage clearly had little proper insight into the seriousness of her situation. She herself accepts that. She responded to the father's email by telling him that she did not need to "recover" and she was overcoming her "ongoing battle". She invited him to spend more time with the family in Sydney and to consider moving to

Australia. Moving away from Sydney was not an option she was prepared to consider.

10. By the early summer of 2014, the mother was becoming increasingly erratic and refused to engage with the father at all. On his case, she was refusing to allow him any contact with the children. In mid-July 2014, she sent him an email informing him that she had lost her job and intended to relocate with the children to Queensland to spend time with her family. She planned to enrol the children in new schools and "if it all works out and the children are happy", she intended the move to be a permanent one. This produced an angry response from the father who described her conduct as "outrageous". He reminded her that she had used the stability of the children's education in Sydney as one of the main reasons why she could not contemplate a return to England yet here she was, uprooting the children in the middle of a school term. At the very least, he begged her to wait until the end of the current school year before any move was made. I suspect that the father was unaware just how critical matters had become at this point in time in relation to the imminent and complete breakdown of the mother's health.

11. By August 2014, as the medical and other evidence demonstrates, matters had reached crisis point. The mother's physical health had completely broken down and she was admitted to hospital with major organ failure. Within the material before me is a letter dated 22 July 2014 from Professor S. This was written following his examination of the mother the previous day. He said this:-

> "When I saw her on Monday she was in acute liver failure. Her history and examination findings then, and laboratory tests from last week, point to acute severe alcoholic hepatitis as the cause. I was dismayed by her appearance and presentation, and consider her prognosis to be grim, even with the best available treatment … I would judge [the mother's] mortality rate for her current illness to be at least 50%."

12. Against this somewhat alarming prognosis, her family rallied round to meet the emergency. By this point in time, her brother and his wife had moved with their children from Sydney to Queensland on the West Coast of Australia. J and C flew to the Gold Coast as unaccompanied minors in order that they could be cared for by their extended family. The following day the mother flew to Brisbane and was immediately hospitalised. On 21 July 2014 the father sent an urgent email to the mother's family. He referred to his shock at having been recently informed about the mother's proposed move without any prior notice to him. He said, *"I am out of my head with worry as I don't know anything, nor have I been able to reach them for the last week, or especially this weekend upon being informed of the intended move… I am very concerned for the welfare of my children, as I am worried that [the mother] may be abusing substances once again"*.

13. The following day, the mother's brother, JM, contacted the father in England to tell him where the children were. JM has sworn a statement for the purposes of these proceedings. He has also given oral evidence via a video link which was set up between the court in London and a conferencing suite in Sydney.

14. I have seen a number of emails passing between JM and the father. JM was to tell me during the course of his oral evidence that his relationship with his sister had become increasingly strained over the course of the months leading up to the complete collapse of her health. He was concerned about the children and her ability properly to care for them. He felt that she was making poor choices to the detriment of their wellbeing. However, when the crisis materialised, it was he who co-ordinated both the medical help which his sister required so urgently and the arrangements for the children to travel to England in order that they could be cared for by their father.

15. The prognosis at that stage was that, if the mother survived, she would need to undergo a significant period of treatment and counselling. The time frame for that treatment was between six and nine months during which she would need to remain an in-patient for a good part of the programme. The father immediately agreed to step into the breach. The mother was extremely distressed at the prospect of the children travelling to England to live with their father for such a significant period of time but, as I accept, she had little option but to agree. She had sufficient insight to realise that she could not care for them and her hand was forced to a certain extent by her family who indicated that the only other viable option for the children was likely to be reception into the Australian care system. Having seen and heard from JM, I am not persuaded that the family would necessarily have allowed this to happen had the father not been available for the children. However, I accept that it was probably a means to bring home to the mother the seriousness of the situation and the need to place the children in a safe and stable environment whilst she took steps to recover her health.

16. In order to facilitate the children's move to England and to secure places at local schools, it was necessary for the mother to sign a form of statutory declaration permitting their removal from Australia and sanctioning their residence with their father in England. Whilst she had initially been told that she would need to agree to their absence from Australia for between six and nine months, she was persuaded to extend that period to *"up to twelve months"*.

17. These were the terms of the statutory declaration which the mother signed on 15 August 2014:-

> "I have agreed to allow my children, [J] and [C], to travel to and reside temporarily in London UK at the residential premises of their Father [DP]. I have agreed to this for a period of six to twelve months from the date of this declaration.
>
> I have also agreed for the children to be enrolled in school for the duration of their visit to London.
>
> I have agreed that [the father] and/or his mother … are permitted to travel with the children to the UK and back to Australia (and also to France for short term periodic holidays) within the six to twelve month period.
>
> I have agreed to the above to allow me time to recover from a recent illness and subsequent hospitalisation that have impacted my ability to perform my parental duties.
>
> In have also agreed to the above based on the acceptance by [the father] that once I have recovered sufficiently (as certified by an appropriately qualified medical representative no sooner than 6 months from the date of this declaration) the children will be returned to Australia and all previous parenting arrangements will resume."

18. The signed document was sent to the father on 17 August 2014 by JM who accepted in his oral evidence that the father had no input into its terms. The following day, he acknowledged receipt and indicated that he would *"revert asap as to its suitability".* There was no further discussion between JM and the father as to its terms. The father's case is that he never agreed at that point to the children's return within a twelve month period. As far as he was concerned, he was involved in crisis management and his only intention at that stage was to ensure the children's safety and wellbeing. JM acknowledges that he had concerns about whether or not the father would send the children back to Australia but, per his statement, *"the priority was getting the children into a stable but temporary environment with a parent so that [the mother] could focus on getting better so that the children could return to her care. If [the father] did refuse to return the children, I felt at the time that we would cross that bridge when we came to it".*

19. On 25 August 2014 the children flew with their paternal grandmother from Australia to England. They moved into the father's home and attended their new schools with effect from the beginning of the academic year in September 2014. There they have remained ever since. The father says that they were very thin and pale when they arrived and were generally unkempt and had little knowledge of personal hygiene routines. He describes them then as being "clearly troubled" and "showing real

symptoms of long term neglect". The mother readily accepts that her alcohol use and illness has in the past impacted on the children. However, the father's evidence has to be seen in the wider context of their lives. The children were doing well at school; they appeared to have a wide circle of friends; they were involved in various activities. There had been no concerns expressed by any outside agencies. Since the children came to live with him and, in order to enable him to work as a freelance consultant, the father has employed the services of a daily nanny who covers the delivery to and collection from school during term time. School holidays have, for the most part, been spent in the South of France with the paternal grandmother and her husband who own a property in La Colle sur Loup. However, for all intents and purposes, the father has been the children's primary carer for the best part of a year and a half. They have throughout been registered with local doctors and dentists.

20. Happily for all concerned, the mother's physical health improved and she survived the crisis. I have seen copies of medical reports prepared by her consultant hepatologist, Dr EP, and by her consultant psychiatrist, Dr ES. At the time of her admission to hospital, she was diagnosed as suffering from hepatic encephalopathy, acute kidney injury, a urinary tract infection and progressive hepatic decompensation. She had decompensated cirrhosis exacerbated by heavy alcohol consumption (the mother reporting that she had been drinking two bottles of champagne a day over a two month period). She was discharged from hospital and immediately took up residence in a local rehabilitation unit where she under the care of Dr ES who diagnosed her as being alcohol and codeine dependant. Dr ES's report describes her as suffering from depression with feelings of social isolation, poor self-care and low mood. Whilst in the unit, she received additional support from the specialist psychiatric nursing staff and her assigned case worker. Her placement in the residential unit lasted for six months at which point she was discharged into a 'halfway house programme' with a view to resuming independent living. By March 2015, she was observed to be free of any symptoms of depression and drug and alcohol testing established that she had been abstinent for a period of over seven months.

21. By the time she prepared her report in November 2015, Dr ES was able to confirm that the mother had been totally abstinent for a period of 14 months. At that point, she was shortly due to move into her own rented accommodation. Ongoing support was to be provided through specialist counselling and the regular AA[1] meetings which she attended three times a week. Dr ES concluded her November 2015 report in this way:-

> "Currently I have no concerns regarding [the mother's] mental health and as such cannot foresee any impact that this would have on her functioning capacity to care for the children. However I do not have the information required to provide a more detailed opinion on this and would recommend the

[1] Alcoholics Anonymous

court seek a further opinion from an appropriately experienced therapist if that is deemed necessary.

[The mother's] prognosis regarding her future mental health is very good. She is currently symptom free, has good insight into how to manage any recurrence of symptoms, or risks to her sobriety. Considering the ongoing stress of this case around the children she has managed very well without relapse into substance use or depression and this bodes well for her future."

22. As the mother told me during the course of her evidence, she is currently taking anti-depressant medication but has been advised to continue only for so long as these proceedings are on foot. At their conclusion, she anticipates she will be taking no medication whatsoever.

23. As to her physical prognosis, her consultant hepatologist says this:

"If she remains abstinent from alcohol, her liver function may remain stable and compensated. However, in view of the cirrhosis, she is at risk of developing further episodes of decompensation and liver cancer."

24. The mother left her "halfway", or supported, residential housing in December 2015 and has been living back in the general community in a one bedroom flat which has been provided for her with government assistance. She tells me that she is on the priority waiting list for a three bedroom property and expects alternative accommodation to be made available if the children are returned to her care in Australia at the conclusion of these proceedings. She has yet to find employment as she does not wish to take any steps in this direction until she knows where she will be living and what arrangements will need to be made for the children. She accepts that a return to Australia is likely to involve another change of schools for the children. I remind myself, again, that this is not a welfare enquiry at this stage but an application for summary return of the children pursuant to the Hague Convention. In terms of any protective measures which might be necessary in the event of a return, the mother has indicated that she is quite willing to undergo hair strand drug and alcohol testing on a regular basis. She is prepared to allow details from this case to be passed to the local social services department in Queensland and will open the doors of her home to them for unannounced inspections should they consider these appropriate. She told me that, whilst she was still having counselling, her intention was to gradually wean herself off this form of support.

Litigation in relation to the children

25. On 16 December 2014, some four months after the children's arrival in England, the father issued proceedings in his local Family Court in which he sought a prohibited steps order which prevented the removal of the children from his care and an order that they should henceforth remain living with him. He relied upon the circumstances in which they had come to this jurisdiction and the frailty of their mother's health. In the statement which accompanied his application, he described the rapid progress which the children had made since their arrival. Their school reports were glowing and each of J and C appeared to have settled happily into their new home and were thriving. Nightmares and bed-wetting had stopped. They had made a wide circle of friends and were involved in a number of extra-curricular activities which they enjoyed. The mother, at this stage, remained in residential rehabilitation and the father gave as his reason for issuing the proceedings without notice to her the fact that he wished the English court to be seised of the matter in order to head off any attempt by her or her family to require him to return the children to Australia in circumstances where he knew very little about the progress of her recovery or her current state of health.

26. It is clear that by that point in time that the mother had indeed taken advice about securing the children's return because, on 17 February 2015, the Australian International Social Service (AISS) had written to the father's local Family Court informing the court that the Authority was then in the process of preparing an application for the return of the children under the Hague Convention. It is the mother's case that, on 14 January last year (2015), she had a telephone conversation with the father during the course of which he told her that he was unwilling to return the children to Australia. He denies saying that in terms but accepts that he was unwilling to sanction the children's return until he was satisfied as to the mother's state of health. He contends that he was completely marginalised during the period of her illness and recuperation; he says that any enquiries he did make in relation to her progress were ignored. He accepts that he had been unwilling to sign a letter confirming the date of the children's return in order that the mother could secure government assisted accommodation in Australia. In his written evidence, he justified his stance in this way:-

> "[The mother] did send me communications to ask when the children would be returned to her. It is correct that I did not give her the confirmation that she sought. I did not do so because the children were living in England, were settled, they had security in their lives and their best interests were to remain here. It was very difficult for us all as [she] is their mother and she was clearly unwell. It was also clear from her communications that she had little or no insight into her condition or the damage that had been caused to the children. My enquiries as to her health and treatment were not responded to and on one occasion she told me it was "not relevant". I accept that on occasion, in my frustration, I have been harsh on [her]. This has been borne of my real wish that she face up to her issues and the consequences of her behaviour. I do not recall my saying precisely the words "I won't be sending the children back to you in Australia but you can see them if you move to

> England to live". I did however make it clear that I would not sign the housing letter that she wanted me to sign. Further [she] was fully aware that I was not prepared to send the children to Australia and that they were to remain living with me. It is however true to say that I suggested to her on more than one occasion that she should concentrate on getting better and that she should consider herself moving to the UK."

27. In any event, on the basis of an alleged wrongful retention, the letter from AISS recorded the mother's case that, notwithstanding the original consent which had been given for their removal to England, *"the circumstances under which the children are to be returned to Australia have now eventuated"*. In April 2015, the father's English proceedings were duly stayed.

28. It is the mother's case that she was advised locally in Brisbane that she could not formally issue Hague proceedings for the children's return until the period of 12 months (i.e. the maximum permitted period under the statutory declaration) had expired. She has produced evidence which suggests that this was indeed the advice she received. On 2 July 2015, with the first anniversary of the children's departure a matter of weeks away, she sent the father an email with a view to engaging in discussions about the arrangements for their return. Having heard nothing, she wrote again on 24 July 2015 informing the father that she was now fully recovered from her illness of the previous year. To that email she attached what she described as *"confirmation of my recovery by 'an appropriately qualified medical practitioner'"*. That is what the statutory declaration had provided for. However, it came in the form of a short letter from a gastroenterology registrar who was writing on behalf of Dr EP, the mother's treating physician. It records the results of the mother's attendance earlier that month at an outpatient clinic where she was observed to have gained weight and to have recovered from jaundice. It concluded that she was *"doing excellently as she continues her abstinence … We are happy with her progress"*.

29. The father regarded (and regards) that evidence as falling far short of the level of reassurance he was (and is) seeking in relation to the mother's recovery. He points to the fact that over the course of more than ten years the mother has had episodes of treatment for her addiction followed by subsequent relapses, the last one of which was catastrophic. He believes that the children have become happy, healthy and are thriving in the environment of their home with him in England. They wish to stay with him and, on his case, do not want to return to Australia. They are maintaining frequent contact with their mother by regular telephone calls, Skype sessions and email. J is about to commence an extensive course of orthodontic work and, to the extent that England has become their settled home, they have acquired habitual residence in this jurisdiction. His response to the mother's request for the children's return was the issue of an application to his local Family Court to lift the stay on his original (December 2014) proceedings on the basis that the children were now habitually resident in this jurisdiction and thriving in his care.

The current litigation: the Hague proceedings

30. The mother's application under the Hague Convention was issued on 26 August 2015. It was transmitted through the Central Authority in this jurisdiction on 25 September 2015. On 26 October 2015, the father filed his Answer to the mother's application. In it, he set out his case to the effect that :-

    (i) neither child had been wrongfully retained in this jurisdiction;

    (ii) both children were habitually resident in this jurisdiction at the time of the alleged retention;

    (iii) the mother had consented or, alternatively, acquiesced to their retention in England;

    (iv) there was a grave risk that the return of both children to Australia would expose each of the children to physical and psychological harm or otherwise place them in an intolerable situation;

    (v) both children objected to a return to Australia and they had reached an age and degree of maturity at which it was appropriate to take account of their views.

31. On 28 October 2015, His Honour Judge Wallwork (sitting as a Deputy High Court Judge) rejected an application to join the children as parties to the proceedings but directed CAFCASS to prepare a report in relation to their wishes and feelings; whether they did indeed object to a return to Australia; and whether they wished to see the judge who would be deciding the case. Disclosure orders were made in relation to the mother's medical records and reports were ordered from her treating consultants on the basis of joint instructions.

32. All of that material has been available for the purposes of this hearing, together with written statements from the parties, the children's maternal uncle, JM, and their paternal grandmother, Mrs SD. Mr John Power, an experienced member of the

CAFCASS High Court team, has prepared a written report dated 4 December 2015 and he has also attended court to speak to his report. Before I turn to that evidence and the subsequent developments in the case, I propose to say something about the law.

The law

33. As is now well recognised internationally, the 1980 Hague Convention was adopted into our domestic legislation by the Child Abduction and Custody Act 1985 in order to accord proper recognition to the principle that, in the context of international disputes between estranged parents, a child's interests must be protected *"from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access"*[2].

34. That said, there are some limited and closely defined circumstances where the court may not find that it is in a child's best interests to be returned to his or her country of habitual residence. In *Re E (Children)(Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, the Supreme Court recognised that, whilst the best interests of the child or children concerned is a primary consideration, this does not mean that the welfare of that child or children must be propelled to a level where it becomes the court's paramount consideration. Because of the summary nature of these cases, and the policy of dealing with them expeditiously and within a contained time frame, there will rarely be an appropriate opportunity to conduct a wide-ranging and holistic enquiry into the child's future or the longer term arrangements which should properly be put in place to ensure that the arrangements made are the best which can be devised to ensure his or her future wellbeing and happiness. The policy underpinning the 1980 Hague Convention is that these are matters which should properly be determined by the "home" courts in the place of the child's (or children's) habitual residence. The limited exceptions which are available to a court dealing with such an application for summary return enable that court to determine whether a return would be in accordance with the requirements of the 1980 Hague Convention.

35. Mr Devereux's principal submission on behalf of the father who resists a summary return to Australia is that, in the particular circumstances of this case, these children have lost their habitual residence in Australia and have acquired habitual residence in this jurisdiction. This state of affairs has come about, he contends, as a natural consequence of the passage of time, their integration into life in England and their progress by degrees into an established existence in the home which they share with

[2] See the Preamble and Art 1 of the Convention and *In re H and others (Minors)(Abduction: Acquiescence)* [1998] AC 72.

their father. If they are found to be habitually resident at the point of any retention in this jurisdiction, as he contends, then such retention cannot be 'wrongful' in Convention terms and Article 3 has no application to this case.

36. In terms of structure of the Hague Convention, **Article 12** of the 1980 Convention provides the principal mechanism for return. It is framed in these terms:-

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

37. **Article 3** provides that:-

> "The removal or 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."

38. There is no issue here but that this was not, and could not constitute, a "wrongful removal" of J and C for the purposes of the 1980 Hague Convention. Whilst both parents were exercising rights of custody in relation to the children in August 2014, the mother had plainly consented to their removal to England. That much is clear from the statutory declaration which she signed. However, in this case her consent

was limited in terms of the time during which she was authorising the children's absence from their home in Australia. Equally, there is consensus that, in August 2014, these children were habitually resident in Australia. Whilst the crisis in the mother's health had prompted the unscheduled move to Queensland but a matter of days before they left Australia, they had for the previous six years been living with their mother in Sydney and were fully integrated into their Australian life.

39. What, then, of habitual residence ?

Habitual residence

40. As I have said, it is the father's case that, whatever may have been the situation in August 2014, these children have now acquired habitual residence in England.

41. The law in this area was considered recently by the Supreme Court in *Re A (Jurisdiction: Return of Child)* [2013] UKSC 60, [2014] 1 AC 1, [2014] 1 FLR 111. At para [54] of her judgment, Baroness Hale of Richmond said this:

> "**[54]** Drawing the threads together, therefore:
>
> (i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.
>
> (ii) It was the purpose of the 1986 Act[3] to adopt a concept which was the same as that adopted in the Hague and European Conventions. BIIR must also be interpreted consistently with those Conventions.
>
> (iii) The test adopted by the European court is 'the place which reflects some degree of integration by the child in a social and family environment' in the country concerned. This depends

[3] Here, Baroness Hale was referring to the Family Law Act 1986 which provided a uniform scheme for jurisdiction, recognition and enforcement of custody and related orders as between the three different jurisdictions within the United Kingdom. Those rules were subsequently modified to take account of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, otherwise known as the Brussels II Revised Regulation (BIIR), which is now directly applicable under domestic law in the United Kingdom,

upon numerous factors, including the reasons for the family's stay in the country in question.

(iv) It is now unlikely that the test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.

(v) In my view, the test adopted by the European court is preferable to that earlier adopted by the English courts, being focused on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from *Shah* should be abandoned when deciding the habitual residence of a child.

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

(vii) The essentially factual and individual nature of the enquiry should not be glossed with legal concepts which would produce a different result from that which the factual enquiry would produce.

(viii) As the Advocate General pointed out in para AG45 and the court confirmed in para [43] of *Re A (Area of Freedom, Security and Justice)*[4], it is possible that a child may have no country of habitual residence at a particular point in time."

42. Earlier in her Ladyship's judgment in *Re A* at para 48, she had quoted what she described as 'the operative part of the judgment' from the earlier case of *Re A (Area of Freedom, Security and Justice)* :

> "… The concept of 'habitual residence' under article 8(1) … must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and the reasons for the stay on the territory of the 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. It is for the national court to establish

[4] *Re A (Area of Freedom, Security and Justice)*(Case C-523/07), [2009] 2 FLR 1, ECJ

the habitual residence of the child, taking account of all the circumstances specific to each individual case."

43. The guidance offered in *Re A (Area of Freedom, Security and Justice)* was, as Lady Hale acknowledged, relied on and repeated in the well-known European authority *Mercredi v Chaffe* (Case C-497/10) [2011] 1 FLR 1293, including this:

> "49 … 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.' (Emphasis supplied.)"

44. As to the extent to which that passage in *Mercredi v Chaffe* imported a requirement of permanence for residence to be habitual, Lady Hale in *Re A* pointed to the nuance which had been lost in the translation of the French text of the judgment as reflected in the English version[5]. In the former, the court had referred almost throughout to *'stabilité'* rather than permanence and, in the one place where the court had used the word *'permanence'*, it was as an alternative to *'habituelle'*.

45. Less than two years after the Supreme Court's decision in *Re A*, it was once again required to consider whether the temporary relocation of two children from France to Scotland on the basis of a period of 12 months' maternity leave could result in the children in that case acquiring a habitual residence in Scotland: see *AR v RN (Habitual Residence)* [2015] UKSC 35, [2015] 2 FLR 503. In that case, the Lord Ordinary at first instance had found that the children had not lost their habitual residence in France because there had not been a joint parental intention to leave France permanently. He made a return order. On appeal that decision was overturned on the basis that the Lord Ordinary had incorrectly determined that a shared parental intention to move permanently to Scotland was an essential element in any alteration of the children's habitual residence from France to Scotland. Considering the matter afresh, the court found that the children had become habitually resident in Scotland over the period of four months since their removal from France and their arrival in Scotland.

46. Crucially, the Supreme Court held that, whilst parental intentions in relation to residence in the country in question were a relevant factor, they were not the only

[5] This had been identified by Sir Peter Singer who compared the two texts in *DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal)* [2013] EWHC 49 (Fam), [2013] 2 FLR 163, FD at paras [71] et seq.

relevant factor. In particular, the absence of a joint parental intention to live permanently in the country in question was by no means decisive. The important question was whether the residence had the necessary quality of stability, not whether it was necessarily intended to be permanent.

47. In para 21 of his judgment in *AR v RN*, Lord Reed explained that the judgment of the court below had focused upon the parents' intention as to whether or not the children's residence in Scotland should be permanent. In ignoring the abundance of evidence relating to the stability of the mother's and the children's lives in Scotland, and their integration into their social and family environment there, the court had fallen into an error of approach. The fact that the "left behind" parent in France had not consented to the children's permanent relocation was neither decisive nor determinative.

48. Lord Reed went on to say this:

> "**[23]** ….. [The court below] proceeded on the basis that the stay in Scotland was originally intended to be for the 12 months' maternity leave, that much being uncontroversial. They therefore assumed, in the father's favour, that the stay in Scotland was originally intended to be of limited duration. Their remark that the real issue was whether there was a need for a longer period than 4 months in Scotland, before it could be held that the children's habitual residence had changed, followed immediately upon their statement:
>
> > 'If the salient facts of the present case are approached in accordance with the guidance summarised earlier, the key finding of the Lord Ordinary is that the children came to live in Scotland.'
>
> In other words, following the children's move with their mother to Scotland, that was where they lived, albeit for what was intended to be a period of 12 months. Their life there had the necessary quality of stability. For the time being, their home was in Scotland. Their social life was there. Their family life was predominantly there. The longer time went on, the more deeply integrated they had become into their environment in Scotland. In that context, the question the Extra Division asked themselves did not indicate any error of approach. Nor did their answer:
>
> > 'For our part, in the whole circumstances, we would view four months as sufficient.'
>
> **[24]** The Extra Division therefore considered the evidence on a proper understanding of the nature of habitual residence. In the light

> of the evidence before them, their conclusion that the children were habitually resident in Scotland at the material time is one which they were entitled to reach."

49. Thus, submits Mr Devereux, what must be established in the context of the enquiry into these children's habitual residence is a sense of real stability in that residence rather than a demonstration of its intended permanence.

50. The most recent guidance on the subject of habitual residence flows from the latest decision of the Supreme Court delivered on 3 February 2016. In *Re B (A child)* [2016] UKSC 4, Lord Wilson introduced the analogy of the "see-saw". At para 45, his Lordship said this:

> "I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts *down* those first roots which represent the requisite degree of integration in the environment of the new state, *up* will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it."

51. His Lordship continued:

> "46. One of the well-judged submissions of Mr Tyler QC on behalf of the respondent is that, were it minded to remove any gloss from the domestic concept of habitual residence …., the court should not strive to introduce others. A gloss is a purported sub-rule which distorts the application of the rule. The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him:
>
> (a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;

(b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and

(c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."

Wrongful retention

52. It is trite, but settled, law that the 1980 Hague Convention is not concerned with children who have been wrongfully removed or retained within the borders of their habitual residence. As I have said, there is no issue between the parties in this case about wrongful removal: the mother accepts that the children travelled from Australia to England with her express permission.

53. As far as 'wrongful retention' is concerned, the Convention is only engaged in circumstances where a child has at first been removed with consent (or, rightfully) out of the State of its habitual residence and subsequently retained wrongfully (for example, contrary to a court order or an agreement between its two parents), instead of being returned to the State of its habitual residence : see *Re H; Re S (Abduction: Custody Rights)* [1991] 2 FLR 262 per Lord Brandon of Oakbrook at p 271. That decision of the House of Lords confirmed that, for the purposes of Article 12, "retention" connotes an act or event which occurs on a specific occasion rather than constituting a continuing state of affairs.

54. This is supported by the *Explanatory Report by Elisa Pérez-Vera* where the author explains in para 57 that the reference to children 'wrongfully retained' *"is meant to cover those cases where the child, with the consent of the person who normally has custody, is in a place other than its place of habitual residence and is not returned by the person with whom it was staying"*. The example is then given of a parent who fails to return a child after a period of access or contact rights. Of course, that paradigm example does not apply in this case because the children's period of residence in their father's care for a period of 12 months cannot, in my judgment, be

viewed as being consistent with the exercise by him of any access or contact rights, extended or otherwise. On any view, the agreement of the mother to allow the children to come and live in England during the period of her recovery and recuperation must necessarily have imported into it a quality of residence even if her intention had been to sanction a limited period of residence within his household. She knew that the children would be enrolled in schools in this jurisdiction and, necessarily, that they would put down certain roots and make new friends within their home and school environment. She knew that the children would have to be registered with local health care professionals (doctors and dentists) to ensure their wellbeing and good health. She must also, in my view, be taken to have known that the father, if he was to be in a position to continue to support the family financially, would need to enlist some additional child care support to cover periods when the children were not at school. In that sense, for reasons outwith her control, she was delegating to him for a limited period of time (from her perspective) the primary and sole care of these children.

55. It is the mother's case that there was a specific agreement between the parties embodied in the statutory declaration dated 18 August 2014 that the children would be returned to Australia within six to 12 months and that the father's conduct in January 2015 in taking steps to prevent their return amounts to a retention in breach of that agreement. In the alternative, she submits that such a breach occurred at the expiry of the 12 month term on 25 August 2015.

Anticipatory breach

56. This involves a consideration of whether it is possible as a matter of law for an anticipatory breach of an agreement to amount to a wrongful retention for the purposes of Art 12 of the Hague Convention. The answer to that question is relevant in this case because it informs the point at which the court has to consider the question of the children's habitual residence. If the relevant date is the day after the first anniversary of the children's arrival in this jurisdiction, that is the point at which the court must consider whether the father's (admitted) retention of the children beyond that date attracts the sanctions of the Hague Convention at all. If the children were, by that point, habitually resident here, the Convention is not engaged and the mother's application for summary return must fail. If, however, the wrongful retention occurred some seven or eight months earlier in January 2015 (by which point the father accepts the mother was aware he was unwilling to return them to Australia), then the court's focus will be directed towards the quality of the stability and integration of their lives in England at that much earlier point in time.

57. On behalf of the mother, Miss Amiraftabi took me to the decision of the Court of Appeal in *Re H (Jurisdiction)* [2014] EWCA Civ 1101, [2015] 1 FLR 1132, CA. In

that case the father had issued wardship proceedings invoking the court's inherent jurisdiction and sought orders for the return of two young children whom he alleged were being wrongfully retained in Bangladesh. There was a potential dispute between the parties as to whether the mother's continued presence in Bangladesh was the result of her refusal to return to England with the children (which was the father's case) or of the father abandoning her there (which appeared to be the mother's case). The judge at first instance, Peter Jackson J, declined to make any order on the basis that, even if the father was right and they were being unlawfully retained in Bangladesh, their age when they left England and the length of their stay in Bangladesh led him to the conclusion that they had long since ceased to be habitually resident here.

58. One of the questions which Black LJ had to consider in that case was whether there was any legal force in the so-called 'rule' that one parent who shared parental responsibility for a child with another parent could not unilaterally change the child's habitual residence without the agreement of the other. In para 34 of her Ladyship's judgment, she consigned that 'rule' to history in favour of "a factual enquiry tailored to the circumstances of the individual case". For this reason, she found that the trial judge was not constrained by this, or any other, so-called 'rule' in *Re H* to find that the children had remained habitually resident in this country right up to the issue of proceedings by the father. The enquiry into habitual residence undertaken by Peter Jackson J had been properly focused upon a much more broadly based enquiry into their circumstances. His conclusion that they had long since ceased to be habitually resident in this country could not be impeached.

59. However, having reviewed the three recent decisions of the Supreme Court in *Re A, In Re L (A Child: Custody: Habitual Residence)* [2013] UKSC 75 and *In re LC (Children)* [2014] UKSC 1, Black LJ said this:-

> "30. Overall, what to my mind emerges from Lord Hughes' judgment, as from Baroness Hale's, is a general disinclination to encumber the factual concept of habitual residence with supplementary rules and in particular to perpetuate the 'rule' with which we are concerned here, provided that an approach can be found which prevents a parent undermining the Hague Convention and the jurisdiction provisions of Brussels IIR. The solution that both Lord Hughes (at§78) and Baroness Hale (at §40) had in mind, and seemed to think tenable, involved treating the act of wrongful retention of the child as occurring at an earlier stage than might sometimes be assumed, that is to say as soon as the parent engages in unilateral acts designed to make permanent the child's stay in the new country rather than only when the end of the child's scheduled stay there arrives. This would prevent a parent from establishing a habitual residence in the country to which he has abducted the child before the act of wrongful retention occurs." [my emphasis]

60. The words of emphasis (which are my own) are relied on by Miss Amiraftabi who submits that, whilst not a definitive statement of law, they nevertheless record a judicial acknowledgement of the possibility that an anticipatory breach can, in appropriate circumstances, amount to a wrongful retention. It is her case, on behalf of the mother, that if I find that there was an agreement between the parties as stated by the mother, that is a highly relevant factor in the circumstances of this case.

61. In support of the mother's case, Miss Amiraftabi took me to the much earlier authorities of *Re AZ (A Minor)* [1993] 1 FLR 682 and *Re S (Minors)(Child Abduction: Wrongful Retention)* [1994] 1 FLR 82.

62. In *Re: AZ*, Sir Michael Kerr was considering findings made by the trial judge of wrongful retention at two separate points in time. At pages 688 to 689, he said this:-

> "Without deciding the point, particularly since it has not been pressed in argument, I am doubtful about the first ground on which the judge relied. It seems to me that the uncommunicated decision which the mother took in her mind in November 1991 not to return the boy on 21 January 1992 could hardly constitute a wrongful retention in November 1991. It was at most an uncommunicated intention to retain him in the future from which she could still have resiled. But on balance I am driven to agree with the judge on the second ground (an application by the grandmother on 19 December 1991 for a prohibited steps order preventing the removal of the child and an interim residence order), which she recognised to be the stronger one, although it seems odd that an otherwise lawful and unconcealed application to the court can constitute a wrongful retention. However, the unusual nature of this act as constituting a wrongful retention appears to me to have some relevance to the question of acquiescence."

63. In *Re S*, Wall J expressed a slightly different view. Having initially been doubtful that an anticipatory breach could in law be a wrongful retention, he said this at page 91E and 93:-

> "I confess that I initially shared the misgivings expressed by Sir Michael Kerr. If a parent pursuant to an agreement that a child may live with him for a given period, fears unilateral action by the other parent, it seems to me very hard to suggest that an application to the court designed to protect the presence of the child for an agreed period constitutes an act of wrongful retention. Thus if the mother in the instant case applied for a prohibited steps and residence orders for the sole purpose of protecting the presence of the children within the jurisdiction until 1 September 1993 (the expiry of the 12 month agreed period of retention), I would find it difficult to find that an act of wrongful retention, alternatively, if it was, that the father had not consented to the retention until 1 September 1992 under article 13(a)."

> "However, it seems to me that where a parent as here announces as part of her case that she does not intend to return the children to Israel at all, she can no longer herself rely on the father's agreement to the limited period of removal or retention as protecting her under either article 3 or under article 13(a). As Mr Turner puts it, she cannot have the benefit of the agreement without the burden. Equally as an issue of fact, it seems to me that the decision which precedes the announcement, even if not communicated to the father, must be capable itself of constituting an act of wrongful retention."

64. Mr Devereux's response on behalf of the father is that the concept of 'anticipatory breach' is mere sophistry. He has taken me to the decision of the United States Court of Appeals for the First Circuit in *Toren v Toren* 191 F. 3d 23 (1st Cir 1999) No 98-2332. In that case, there was an agreement between the parents following their divorce in Israel in 1996 that the children would be permitted to live with their mother in Massachusetts for a period of two years but not beyond July 2000 when they would return to Israel for the 2000/2001 school year. A year into the agreement, the mother issued proceedings in the local Massachusetts family court seeking a variation of the agreement. The father alleged that the mother's proceedings amounted to a wrongful retention by her of the children within the meaning of Art 3 of the Hague Convention. He sought their immediate return to Israel. The court at first instance found that the children were, by then, habitually resident in the United States and thus there was no 'wrongful retention' which engaged either Art 3 or Art 12 of the Convention. Further, because the father had not brought his application within one year of the alleged wrongful retention, Art 12 did not apply in any event.

65. The father's appeal against this decision to the Court of Appeals for the First Circuit was dismissed. Whilst accepting that the mother's filing of an application for custody in the local Massachusetts court may have violated the terms of the parental agreement, the court rejected the father's argument that it was somehow linked to a wrongful retention of the children. Specifically, the court held that:

> "To the extent that the father's argument is based on the mother's future intent, the father is seeking a judicial remedy for an anticipatory violation of the Hague Convention. But the Hague Convention only provides a cause of action to petitioners who can establish actual retention. …. Therefore, we do not see how a petitioner like the father, alleging only an anticipatory retention, can invoke the protections of the Hague Convention."

66. In further support of his argument, Mr Devereux relies upon the decision of the Court of Appeal of New Zealand in *Punter v Secretary for Justice as the New Zealand Central Authority* [2003] NZCA 306; [2004] 2 NZLR 28. In that case the father, an Australian citizen, had agreed with the children's mother that, whilst each would continue to have joint parental responsibility, the children would be permitted to relocate with the mother to New Zealand for a period of two years. At the end of that period, the mother agreed that they should be returned to Australia in order to maintain a full relationship with their father. The agreement was recorded in a statutory declaration. The children arrived in New Zealand in February 2002. Five months later, in July 2002, the mother applied for full custody of the children in her local New Zealand court. She disclosed the terms of the agreement to the court but contended nevertheless that she was beginning a new life in New Zealand and believed that her children should have the security of knowing that their lives would not be disrupted by a return to Australia in two years' time. That application provoked a response from the New Zealand Central Authority on the father's behalf seeking a return of the children to Australia on the basis of a wrongful retention by the mother in that jurisdiction.

67. Blanchard J dealt with the issue of "retention"; Glazebrook J as the second member of the appellate tribunal agreed with both his decision and his reasons. In terms of his analysis in relation to 'retention', which the court recognised as involving a question of law, Blanchard J said that the issue which had to be determined was whether, when the parties concluded their agreement that their children would reside with their mother in New Zealand for a certain fixed period and then return to Australia, the making by the mother of an application to a New Zealand court, whilst the "New Zealand period" was still current, could amount to a retention in breach of the father's rights of custody. The judge concluded that there had been nothing wrongful in the removal of the children in 2002. All that had occurred five months into the agreed two year period was an application by the mother who had asked the local court to assume jurisdiction in terms of its ability subsequently to make orders in relation to giving her an order for custody in order that she might retain them in New Zealand. That might have been in breach of her agreement with the father but, unless and until *either* the court did assume jurisdiction by making the order sought (i.e. an order extending beyond the agreed period of two years) *or* the two year period elapsed and the children were not returned, there would not, in any ordinary sense, be a retention of the children.

68. Moreover, Blanchard J concluded that by putting herself in the hands of the local family court, the mother was, by implication, agreeing to accept its decision. Because she had alerted the court to the existence of the agreement with the father, it was in any event doubtful that the court would have made a custody order in her favour without giving the father the opportunity to invoke the terms of the Hague Convention and without first dealing with any application he might have made under Art 12.

69. The court in *Punter* relied in support of its conclusion on the Scottish case of *Watson v Jamieson* [1998] SLT 180 and distinguished the decision of Wall J in *Re S (Minors) (Abduction: Wrongful Retention)*. As I have already said, in that (earlier) English case, Wall J had indicated that, in the absence of authority, he might well have concluded that a mere statement by a parent of an intention not to return a child did not amount to a wrongful retention as at the date when that intention was communicated to the other parent in circumstances where the period of entitlement for the children to remain with the other parent had not yet expired. However, in my judgment and for the purposes of reaching any conclusion in relation to this case and to the wrongful retention which is alleged in relation to J and C, little reliance (if any) can be placed on *Re S* since the earlier decision of the Court of Appeal in *Re AZ (A Minor)(Abduction: Acquiescence)* [1993] 1 FLR 682 ultimately led Wall J to a different conclusion which turned on the issue of acquiescence. Butler-Sloss LJ gave no reason for saying that there had been a wrongful retention; Nicholls LJ did not address the point; and Sir Michael Kerr (the third member of the appellate court) commented that it seemed odd that an otherwise lawful and open (in the terms of 'unconcealed') application to a court could constitute a wrongful retention for the purposes of the Convention.

70. In terms of the development of English law on this issue, these cases were further considered by Macur J (as she then was) in *RS v KS (Abduction: Wrongful Retention)* [2009] EWHC 1494 (Fam), [2009] 2 FLR 1231. In that case, a father consented to a Lithuanian mother taking their two year old child to England for a three week holiday. Unbeknown to the father, the mother had already consulted lawyers about the state of their marriage and, during her 'holiday' in England, she issued divorce proceedings in Lithuania. In the context of those proceedings, she was granted residence of the child, although she remained in England. The father successfully appealed the residence order and sought help from the Lithuanian authorities to recover the child from England. After a number of false starts, Hague Convention proceedings were issued one year and four days after the child left Lithuania. By the time the case was finally heard, the child was four years old and had been in England for over two years. The father's application for summary return was dismissed. Macur J found that the mother's wrongful removal of the child had been subsumed within a wrongful retention. She found as a fact that, when the child had been removed from Lithuania, the mother had no intention of returning in accordance with the agreement she had reached with the father whose consent had been obtained by means of a deception. This case involved a determination of whether or not the father's Convention application had been issued within the 12 month 'limitation' period. For these purposes, Macur J held that an intention wrongfully to retain a child had to be communicated to the left behind parent either by word or by deed because, without such notice, a potential applicant would be penalised in that the limitation period would start to run before he became aware that his rights had been breached. The relevant date for the purposes of assessing whether the father had commenced proceedings outside of the 12 month period was therefore the date upon which the child should have been returned to Lithuania under the terms of the 'agreement'. The case ultimately turned on the mother's successful defence of 'settlement' but, in terms of crystallising the wrongful retention of the child, Macur J decided quite clearly that this had occurred at the point at which the agreement between the parties expired.

71. On behalf of the mother, Miss Amiraftabi seeks to rely on the judgment of Macur J in *Re RS v KS* in support of her proposition that the English court has not ruled out the possibility of a finding that, in appropriate circumstances, there may be a wrongful retention on the basis of an anticipatory breach.

72. In my judgment *RS v KS* is not inconsistent with the international approach which has informed the authorities, to which I have already referred. Whilst I accept that various dicta in previous authorities, including those referred to by Black LJ in *Re H* (above), suggest that it may be possible to treat as wrongful an earlier act of retention in order to stop an abducting parent establishing habitual residence as a defence to a Convention application, each case has to be decided on its own facts. In any event, I am not persuaded that those dicta are sufficient to establish any binding legal principle in relation to 'anticipatory breach'. In my judgment, the reasoning of the courts in *Toren* and *Punter*, together with the statement of principle enunciated by Macur J in *RS v KS* (albeit in the context of establishing a limitation period) persuade me that the date of 'wrongful retention' in this case is 26 August 2015 and not 14 January 2015.

73. It is clear that the father sought to engage the jurisdiction of the English court in relation to the future arrangements for these children in mid-December 2014. Further, I am prepared to find as a fact that he did indeed communicate to the mother in January 2015 that he was unwilling to return the children and that she should consider relocating back to England. At that point in time, the "English" period of the mother's agreement was still current. She had specifically agreed to an extended period of 12 months because of the uncertainties surrounding the prognosis in relation to her health and the time it might take her to achieve a full recovery from her alcohol dependency. There was no reliable medical evidence in December 2014 or January 2015 that she had achieved a healthy state of permanent sobriety and it is difficult to see how, in these circumstances, the father's continuing care for these children could amount to a breach of the mother's rights of custody. His attempt to secure jurisdiction in the English court might have constituted a breach of the agreement, or, alternatively, a breach of the mother's trust in sending the children to England, but those proceedings were stayed by order of the English court. The father had specifically alerted the English court to the limited nature of the permission which the mother had given in terms of the children's residence in England. He had provided the court with a detailed chronology of events and a copy of the statutory declaration which she had signed. It seems to me that unless and until the court had made an order giving the father residence (and thereby extending his parental rights over and above the extent of the permission given by the mother), there cannot be said to have been any diminution or breach of her parental rights of custody. It is highly unlikely, if not inconceivable, that an English court would have made a final welfare determination in relation to these children's futures without first inviting the mother to participate in those proceedings. It was not possible to state with any certainty at that point of time what the coming months might hold in terms of the prospects for the

mother's recovery. She herself must, in my judgment, be taken to have accepted that, whilst she was undergoing treatment and until her health was fully restored, the children should be with their father. At the time of her agreement that they should leave Australia, the assumption on which she and the family were working was that her full recovery would be achieved within a period of a year. The initial suggestion of nine months was extended because of the uncertainties of the prognosis in the very early stages. In January 2015, that uncertainty remained although the mother was making progress. It is not impossible that, whatever his then concerns, as the months of 2015 rolled on, the father might have been persuaded that she was well enough to resume care of the children in Australia. The period for which she had given permission for the children's removal was still current. He retained the children at the end of that period because he was still unconvinced that her recovery provided a sufficiently stable platform for their return and because he believed that the children had by this point acquired habitual residence in this jurisdiction. In these circumstances, any breach of the August 2014 agreement cannot, in my judgment, be said to have occurred until he failed to return the children at the end of the twelve month period during which she agreed they might be permitted to live in this country. Only at that point was there an effective retention by the father in this jurisdiction against the mother's wishes.

74. I should also say at this point that I am by no means persuaded that these parents were ever *ad idem* as to the specific terms on which the children were brought to this jurisdiction. Certainly, from the mother's perspective, she intended that they should only remain here for up to a year. I accept that and find as a fact that this was the limited nature of the permission she was giving in relation to their removal at that time. However, in my judgment the evidence does not support a positive finding of an acceptance by the father that he, too, had agreed in August 2014 that he would return them after a year, come what may. As I have said, he was then responding to a situation of family crisis. He says, and I accept, that when he was approached by JM, the children's maternal uncle, he knew very little about the mother's health or the children's lives in the months leading up to her hospitalisation. He had received his own mother's reports that all was not well following her visit to the children in April 2013. That had prompted his email to the mother on 6 May 2013 suggesting possible options for the children's care. However, the exchange of emails between the father, the mother and JM in July and August 2014 demonstrates conclusively, in my view, that he was indeed marginalised from these events as they unfolded through the summer of 2014.

75. The mother had plainly presented her move from Sydney to Queensland to the father as a unilateral *fait accompli*. That is what it was. He had been consulted neither in relation to the move nor the practical implications of the change of arrangements for the children. His email to her of 21 July 2014 is clear evidence (which the mother does not dispute) that he had been unable to speak to the children for over two weeks and that she had failed to respond to his numerous telephone calls. He had sent an email on the same date to the mother's family recording his shock at being told by her that day that the children were moving without any prior discussion with him. When

JM did write to the father on 22 July 2014 to send him a photograph of the children's first day at their new school in Queensland, he said no more than this:

> "[*name of the children's mother*] arrived yesterday but didn't look crash hot. Long story short, she has been admitted to hospital and we are waiting on test results and doctors etc. Hopefully everything will be back to normal shortly. I'll keep you posted."

That email contained no hint or suggestion of the gravity of the mother's situation or the children's predicament. When he gave his oral evidence by means of the video link from Sydney, JM accepted as much. He also accepted that the mother represented a risk to the children when she was not sober and said he could understand the father's concerns. Were she to regress, he would not support the children remaining in her care (as he put it, "all bets would be off") but he had been impressed by the extent of her progress to date and described her as a different person from the person she was in the summer of 2014.

76. On 1 August 2014, JM emailed again with slightly more information but referred to J and C as being "very settled enjoying their little adventure". It was not until the father's email of 5 August 2014 that it became clear that he was being asked to take on a "direct parenting role" in relation to J and C. Three days later, on 8 August 2014, JM wrote to the father confirming that the mother had agreed to a six to nine month stay in England. The statutory declaration confirming the extended period of up to 12 months was sent to him ten days later on 18 August 2014 but, as the father's email on the same day makes plain, he said no more than that he would "revert … as to its suitability". I do not in any sense seek to criticise the father for any deliberate or duplicitous intent to deceive the mother at that stage. I accept the limited nature of the permission which she was giving but the evidence, taken as a whole, does not persuade me that the finite period of one year was a term to which the father was explicitly agreeing. During the course of his oral evidence, the father told me that he had never agreed to any specific period of time, at the end of which he would return the children, precisely because he had previous direct experience of her attending rehabilitation and failing to achieve permanent sobriety. During his exchanges with JM, he had specifically asked for some amendment to the statutory declaration in relation to both the period of time during which he was to be the children's sole carer and the type of medical evidence which she would need to produce in order to establish that it was safe for the children to return to her sole care. JM had told him that she was very unlikely to agree to any further changes and his (JM's) anxiety at the time was to get both children into a settled environment. For these reasons, the father simply abandoned any further attempt to include further elaboration in the document. He told me that, when the children travelled to England, he had every intention of honouring the date stipulated for return if the mother was by then well and fully recovered. When, later, she had telephoned him and told him that her health was not relevant to the children's return, he responded by telling her that it went to the

very heart of the issue in that he was being asked to sanction a return in circumstances where he had no knowledge about, or insight into, her circumstances nor any insight into the situation to which the children would be returning. He told me that he had not made any decision by mid-December 2014 that the children were not going back to Australia. Rather, his focus was upon ensuring that any future return took place in conditions which would not expose the children to risk. He volunteered to make funds available to the mother at that stage to enable her to travel to England and find a home close to the children. He was not challenged about that evidence. Nevertheless, I understand the mother's undoubted commitment to the lengthy programme of rehabilitation upon which she had embarked in Australia, a programme which she has only recently completed.

77. Having carefully reviewed all the available evidence, my finding in relation to his agreement to become the children's sole carer was that it was a response to a family crisis and, by December 2014, he was not persuaded that the mother's recovery was sufficient to return these children safely to her sole care in Australia. Those concerns persisted into 2015 with the result that he did not feel able to consent to her subsequent application for a summary return of these children. I have no doubt that, if I were to so order, this father would comply with that order and would undertake whatever arrangements might be necessary with the objective of making the transition as smooth and stress-free as it could possibly be for the children. Nonetheless, I accept that nothing I say in this judgment will persuade him that this is a safe option for these children at the present time despite the various undertakings which the mother is prepared to give in relation to regular hair strand testing, liaison with the Australian social services and the like.

Acquiescence

78. In terms of the inter-relationship between habitual residence and wrongful retention, I shall need to deal with the evidence of Mr Power, the CAFCASS officer, before setting out my findings. However, before leaving the law, I need to deal with acquiescence.

79. It is accepted that any question of the mother's acquiescence only becomes relevant if I were to find that these children were wrongfully retained in January 2015. In that event, it would have been open to Mr Devereux on behalf of the father to seek to rely on the mother's acquiescence in the period of time between January 2015 and the point at which she issued her Hague Convention proceedings. Because I have found that these children were not "retained" until the later point on the continuum (i.e. August 2015), the issue of acquiescence does not arise for consideration as a matter of law. As *In re H (Minors) (Abduction: Acquiescence)* [1988] AC 72 a 90E to G makes plain, the subjective intention of the wronged parent is a question of fact which I

would otherwise have had to determine in all the circumstances of the case. Whilst that exercise in no long necessary, I would have found that at no point was this mother acquiescent in the retention of these children beyond the point of her recovery. I accept that she was told that she could not issue proceedings prior to August 2015 and that, rightly or wrongly, she relied on that information.

The Evidence of Mr Power

80. Mr Power produced his report on 4 December 2015 having interviewed the children some three days earlier. The four issues which he was asked to address were these:-

    (i) the children's wishes and feelings;
    (ii) whether they object to a summary return to Australia,
    (iii) whether they wish to meet the judge;
    (iv) whether they should be joined as parties.

81. He interviewed the children together at their request.

82. J told Mr Power that he retained his memories of England whilst he was living in Australia. He understood that he had come back to England because his mother was not well and that the plan was for the children to stay here until she was better. He knew that her health problems were alcohol-related because he had observed her drinking both during the day and at night. He recalled being in the car when she was stopped by the police and breathalysed. He recalled being scared when his mother was drinking but stoically told Mr Power "but that's reality and you have to deal with it". (Mr Power described J as a "wonderfully pragmatic" child.) In his *'How It Looks To Me'* workbook, he had responded to the question about "what happens when your family feel sad, worried or angry ?" by writing, "They get over it".

83. J thought that his mother was now better and confirmed that she had regular Skype sessions on a Saturday morning. Both he and C acknowledged that their mother scored "10 out of 10" except when she was drinking. When asked what they missed about Australia, C mentioned a soft toy she had to leave behind. J missed Australian snakes and kangaroos but was also able to point to missing aspects of his life in England were he to have to return to Australia. Both children appeared to miss the weather and beaches and their family and friends in Sydney. It seems that they were both able to talk quite freely about aspects of their life in Australia and in England. J was clear that he did not want to return to Australia and scored his resistance to a

return as "7/10". He was worried about leaving the friends he had made in England. He was also able to articulate the fact that a return to Australia would not, in any event, be a return to their former life in Sydney but a return to a new life in Queensland. In response to a direct question from Mr Power as to where he wanted to live, J said that he wanted to remain in England because he had a life here now and had made many friends since coming to England. He was also concerned that he might have to repeat a year if he returned to the Australian educational system[6]. Both the children wrote out for Mr Power a list of their friends in England and each confirmed that they regularly attended parties and sleepovers.

84. In relation to the conclusions which he reached after interviewing the children, Mr Power observed that J wanted to remain in the United Kingdom but C was more "developmentally pliable" and wanted to live with both her mother and her father. That had been her "number one" wish. Mr Power's initial conclusion was that C did not mind where she lived provided that she was able to share a home with both her mother and her father. J, on the other hand, preferred his life in England. That was a preference which Mr Power described as "both gendered and developmental". In his "workbook", J had written about how well he was doing at school. In answer to a question about what upset him about his life at that moment, J had answered, "I don't have my braces YET". When asked what made him feel safe, he responded "my family". In answer to the question, "Is there a big decision you'd like the Family Court to make for you ?", C had answered "no". Despite the fact that both children had been clear that they originally came to England on a temporary basis, J felt settled in this country. Nevertheless, Mr Power's view of their world (which he said "spanned two continents") was that their "innate sense of where they are from and why they came here" would allow them to contemplate a return to Australia if that were the course taken by the court.

85. In terms of specific recommendations, Mr Power's written report concludes with these words:-

> "The Court will need to determine if what the children have said to me amounts to objections. I have found that they are palpably affirmative about Australia and whilst they have benefited from the bubble of what they say was agreed respite, in so doing, they have discovered their father; a relationship that needs to be preserved and cultivated alongside their relationship with their mother who appears now to be in a much better place to meet the children's needs. I hope she will listen to what the children have said to me."

[6] It is the mother's case that neither child would have to repeat a year were they to return to Australia. There was no evidence before me one way or the other and I do not regard that factor in isolation as having any bearing on my decision in the context of these Hague Convention proceedings save possibly in relation to the defence of "child's objections" to which I shall come in due course.

86. That approach was the subject of direct challenge by Mr Devereux who maintained that Mr Power's approach to the case was flawed. Instead of looking at this as an application for summary return under the Hague Convention, he had approached it as a public law care case. Having placed these children in his own mind in a 'bubble of respite', he was treating this as a straightforward case of a mother who had been obliged to pass the children into the protective care of their father but who was now recovered and asking for the children to be returned to their care. Mr Power made no concession in cross-examination that there was an element of that thought process in his initial approach.

87. I heard Mr Power's oral evidence on day one of this hearing. He told me that he regarded J as "bedded in" in this jurisdiction in the sense that he is clearly settled here. When asked if he felt J was objecting in Convention terms to a return to Australia, he told me that he felt he did object if one was not putting any gloss on that word, albeit that his objection was at the "shallow end" of the scale. Because he had established his life in England, he felt that his view was more appropriately described as an "objection" rather than as a "preference". He discounted any overt influence or manipulation by the father and believed that J's views were freely held.

88. Mr Power was then asked about a Facebook message which J had sent to his mother in Australia on 31 July 2015 at a time when he had been in this country for almost a full year. That message formed part of an exhibit to the mother's statement dated 12 November 2015. It was one of several exhibits which ran to ten in all. In response to a message from his mother asking if she could call him, J had written the following:

> "Can't call anymore the signal is too bad. Don't tell Dad but no matter what anyone says (including me) get me back to Australia. Don't tell any of this to dad. He wants me to talk in front of a judge. And most importantly don't tell him this. He wants to apply for full custody. Don't tell dad that I told you any of that act like you don't know."

89. Because the mother has exhibited this page of her Facebook account as a single entry, there is nothing to assist me with the context of that exchange. I was also supplied with a number of printouts of various text messages which J and his father exchanged subsequently which reveal quite clearly the strength and depth of his attachment to and love for his father. They are easy, comfortable and loving exchanges and many reflect a spontaneous sense of fun and humour.

90. Mr Power admitted that he had overlooked the exchange between J and his mother on 31 July 2015. Whilst he had read the mother's statement carefully, this aspect of the exhibit bundle had slipped his attention, as he candidly admitted. He was also asked

about an exchange between J and his mother reflected in an earlier text message in May 2015 in which J had expressed concern about his father's reaction to his having broken a washing line fitting at the family home. He had sent his father a text on that occasion asking him not to "yell" and expressing the fact that he was scared of his father's reaction.

91. Mr Power said that he had seen nothing to suggest there might be tension between J and his father during his interview with the children and, on the contrary, had found him to be comfortable and relaxed talking about his relationship with his father. He agreed that the July Facebook entry might suggest that J was feeling unsettled at that point in time and said this was something which he would wish to explore further with J. He said that he found it difficult to reconcile the Facebook message with the child he had met on 1 December 2015. His clear impression at the time was that both children were well integrated into their lives in England.

92. When he was cross-examined by Mr Devereux on behalf of F, Mr Power accepted that his decision to interview both children together and J's stronger personality had somewhat eclipsed his opportunity to get a clear sense of C's wishes and feelings.

93. In the circumstances, and very reluctantly, I agreed to counsel's request (supported by Mr Power) that he should be allowed to speak to the children again.

94. Because the children had expressed a view to meet the judge who would be dealing with their case (a course supported by both their parents), it was agreed that their paternal grandmother would accompany them to court on the second day of the hearing when arrangements would be made for them to see Mr Power again and to meet me. My short meeting with the children took place in my chambers in the presence of Mr Power. As I told the parents afterwards, it was an easy and relaxed occasion and neither child expressed any anxiety about the proceedings or their outcome. C had brought a picture for me which she had coloured during her earlier meeting with Mr Power. J told me proudly about his braces and the orthodontic treatment he was having. Both children voluntarily expressed pleasure about the time they had been able to spend with their mother in the few days she had spent in England in advance of the hearing. As I told the parents, they are both delightful children and a credit to each of their parents.

95. Mr Power went back into the witness box after his second meeting with the children to report what had transpired that afternoon. On that occasion he had interviewed the children separately. J had said that he knew Mr Power wanted to talk to him about the Facebook message because his father had said that "you guys seem a bit confused". J

told Mr Power that he written that message to his mother because he thought that the judge had said in July 2015 that, because his mother had "taken Dad to court", he had to make a decision as to whether to stay or go. He told Mr Power that he was now "100% certain" that he wanted to stay here. The reason he had sent his mother the message was because, at the time, he had wanted to be with both of them but he realised now that that could not happen. In relation to the incident with the washing line, he had been worried about his father's reaction because he felt "anybody would have been cross" but he was anxious to show Mr Power several long text dialogues on his mobile phone which he had with his father at the time and subsequently.

96. Mr Power read out to me the run of texts between J and his father at around the time when his father learned from the mother's statement that this particular Facebook message had been sent to her by J. He accepted that there was an element of pressure from the father who referred to his disappointment that J appeared to have lied to him about wanting to stay in England and wanting his father to fight for him to be allowed to remain. He said that J had told him that he did not mean it when he had asked his mother to get him back to Australia; he was, in Mr Power's view, merely demonstrating his loyalty to her in the face of the ongoing dispute between his parents. Mr Power told me that, despite J's confidence in his mother's ability to sustain her recovery, he did not want to return to Australia. He was happy to visit his mother there for holiday periods. Whilst he would ideally want to be with both his parents, he realises that this is not an option and his pragmatism and maturity were evidenced by his remark that he did not feel that he had to please either of his parents any more but only himself. He told Mr Power that his father had reassured him that he was "fine" with any decision which J made if he wanted to return to Australia but reiterated that he felt very strongly about leaving his friends here and was worried by the prospect of moving to a new area and changing schools again.

97. Mr Power saw C on her own on this occasion. In terms of her demeanour, Mr Power said that C had been "incredibly upbeat" and came willingly to see him. She told him that, whilst she originally thought she would be here for only six months, she now felt settled. Her mother had brought for her from Australia the soft toy she had to leave behind. Mr Power could detect no distinction between C's views about the nanny and babysitter who now look after her and her mother. She was clearly attached to all three. She was very close to her paternal grandparents and worried that her grandmother's husband (Grandpa Michael) might not be able to visit if she went back to Australia because of his heart condition.

98. Mr Power's views by the conclusion of his second meeting with the children were that both were clearly settled here despite their knowledge of these proceedings. Whilst C was the more ambivalent of the siblings, J's views were clear. He objected to a return. When he was cross-examined by Miss Amiraftabi on behalf of the mother, Mr Power accepted that J's explanation in relation to the Facebook message sent in July 2015 lacked coherence and that there was an element of pressure in the exchange of

texts he subsequently had with his father about it. However, he felt that, whilst that exchange captured an episode in their relationship, it did not necessarily characterise it. Mr Power accepted that what reads as an almost "visceral" call to his mother in July 2015 might well have indicated that he was not entirely settled here some seven months ago. Nevertheless, J was clear in his wish to distance himself from that position now and "over the piece", Mr Power's view was that he was now settled and content in his life in England. If the court decided that the children should return to Australia, he felt that J would be very upset but he was also mature enough to know it was a possibility.

99. When the father gave oral evidence on the final day of the hearing, he was asked about his reaction to J having posted the Facebook message to his mother. He told me that he had never pressed the children himself about their individual wishes and feelings although he had told them that there might come a time when a judge might want to know what their wishes and feelings were. He had not told the children in July 2015 that their mother was asking about the arrangements for their return to Australia and the children had not been with him during that period since they spent a good part of their summer holidays in the South of France with his parents. He himself had observed nothing in J's behaviour as he set off for his holiday which might have suggested he was not happy or settled in his father's care in England. He told me that, as a family, they are comfortably off financially but their means are not infinite. He had spent a significant sum on the cost of these proceedings because of his wish to ensure that the children were not returned to their mother's care in Australia until she was able to demonstrate that she was able to care for them safely. If their wish had been to return, he would have been prepared to dedicate those financial resources to making sure that the children were safe and protected in Australia. He told me, "I would have made it happen". He accepted that he should not have sent the texts to J on discovering the Facebook message but should have sat down quietly with him at home. He acknowledged that his response would have put J under emotional pressure and he regretted that because it had gone against all he had been trying to do in terms of providing these children with a safe and secure environment. He said that he himself was still not sure exactly what they wanted because he had felt it important that they were not coerced or influenced in any way. He had declined their requests to get a pet because he did not wish this to be seen as some form of emotional pressure to stay.

100. As I listened to the father's evidence, it was very clear to me that he had real and genuine concerns about the mother's ability to sustain her abstinence from alcohol going forward. I remind myself that these proceedings do not provide either party with a platform for ventilating their concerns for the children's welfare in terms of the arrangements which will need to be made for their longer term care. That enquiry does not lie at the heart of my function where the issue is the summary return of the children to Australia.

101. However, it is not without significance that the father paid tribute to the mother in terms of her care for the children in the past when she had been sober. He looked directly at her from the witness box to tell her that he believed in her as a mother and gave her "the credit for making J and C the children they were" before life spiralled into the chaotic existence it became over the months leading up to her complete collapse in the summer of 2015.

102. For her part, the mother struck me as a woman who had sought to confront head on her longstanding issues with alcohol abuse. She has now left her semi-residential placement in Queensland and has been living independently in a one bedroom flat for the past three months. At present, she has not had the experience of dealing with the general pressures and vicissitudes of life in the context of holding down a job and caring for two children on a full-time basis. She herself accepts as much and fully embraces more or less every painful detail of the disintegration of her personal situation and her health as those details have unfolded over the course of this litigation. That is much to her credit as is the insight she managed to draw upon even in a time of extreme crisis. She knew that she could not care for these children whilst she recovered and she was prepared to sanction their placement with their father despite the fact that she will have been aware that the direct contact she was likely to have with them over a significant period would necessarily be limited. To that extent, she has demonstrated to the court, to the father and – more importantly – to the children that she was willing to put their interests above her own.

103. This judgment does not seek to address these wider issues. At this juncture, I am not concerned with the mother's ability to sustain her sobriety. I am satisfied that, if the children were to return to Australia in advance of a full welfare enquiry, sufficient protective measures for these children could be put in place in the short term to address the father's immediate concerns. The mother accepts that the evidence in this case and my judgment at its conclusion should be made available to the local social or children's services and she has given me an assurance that she would co-operate with those authorities in whatever manner was deemed appropriate. My focus now must be on issues of "forum" and it is to my conclusions on those substantive issues that I now turn.

Conclusions : my findings on the substantive issues

Habitual residence

104. As I have said, habitual residence is an issue of fact for me to determine. These children have dual nationality and hold British and Australian passports. I now know

a considerable amount about these children's lives both before and after their journey to England. There is no issue about their habitual residence in the years leading up to their journey to this jurisdiction. They had been living with their mother in Sydney in a rented flat which had been their home for some considerable time. They had extended family living close by in Sydney and were attending local schools. They were settled in that environment save for the emotional disruption to their wellbeing which the mother's illness undoubtedly caused. Whilst that settled existence was to change in August 2014 when she removed them from their home and schools to travel the six hundred or so miles to Queensland, they remained habitually resident in Australia. As a matter of fact, that residence did not change when they arrived in this country on 26 August 2014. I have already accepted that the scope of the permission or consent which the mother gave was strictly time-limited but her consent is only one of the matters which I have to consider in terms of the holistic overview of these children's lives which I am charged to take.

105. In the weeks before they flew to England with their grandmother, I accept that nearly every element of their settled life in Australia had changed. They had lost their home; they were separated from their school friends; they had been sent to live with relatives without their mother who was admitted to hospital immediately on her arrival in Queensland some twenty-four hours later. It is absolutely clear to me (and there is no serious challenge from the mother) that these children's lives had been turned upside down by these precipitating events.

106. They came to England to live in the full-time care of their father. That was a wholly new situation since their contact with him whilst they had been living in Australia had necessarily been limited. J told Mr Powell that he remembered much about family life in England throughout the time he lived in Australia. To that extent he, at least, did not embark on what was to become his "English life" on the basis of a blank sheet of paper.

107. In this context I bear in mind that the children's original move to Australia was not a planned or consensual transition from one country to another. When they left England for a holiday in Sydney with the mother's family, they expected to be returning. They only remained in Australia at the conclusion of that trip because the mother was admitted to a detoxification unit and the father was prepared to sanction the new arrangements so as to allow her to live in close proximity to her family thereafter.

108. I accept that the father moved swiftly to put in place arrangements which were designed to give these children a "soft landing" in this country. He recognised, above all, that they needed security, certainty and reassurance at that point in time. His life at that stage was fully integrated in this jurisdiction. Although he had lived and worked

overseas from time to time during the marriage, by August 2014 he was based exclusively in Surrey from where he commuted, as necessary, to London. His activities as a self-employed consultant probably gave him greater flexibility than he might otherwise have had to become the children's full-time carer. He quickly enlisted the services of a nanny/childminder who covered the periods when he was not available to look after the children. Both were at school full-time and thus the nanny's role was limited to caring for the children in the periods before and after school during weekdays. There has been no interruption in that pattern of care over the ensuing eighteen months since the nanny has been in post throughout. She has two children of her own, the elder of whom attends the same school as C. The father also enlisted help from another local babysitter who covers from time to time in the evenings if he has to attend client meetings. She, too, has remained a constant feature over the time they have spent in England. Mr Power was aware of the presence in the children's lives of these two ladies and observed in his evidence that the children did not appear to make any distinction in the care which was provided for them as between their mother and these (now) long-term carers.

109. The children's natural resilience as observed by Mr Power appears to be borne out by the fact they adjusted relatively quickly to life in their father's household. I have no doubt at all that they missed their mother and were concerned about her. However, the evidence points to a relatively swift period of initial adjustment. The children were enrolled in local schools at the start of the next academic term which began some two to three weeks after their arrival. They have completed a full academic year in their schools and are now halfway through a second. They have a 100% attendance record since their enrolment in their schools. Their school reports speak of rapid progress both socially and academically as they integrated into those new schools. J is now in secondary school where, absent a return to Australia, he will stay for the next four years of his education at least. C attends a local primary school and has a further two years or thereabouts before a further move to secondary school. Both the children told Mr Power that their English friends were an important aspect of their lives in this country, although J remembered his friends in Australia. When they first visited his offices in London, both the children had written out lists of the names of all their friends and had recounted to Mr Power regular parties and sleepovers with them. I collected an impression of their enjoyment of these occasions from the evidence which Mr Power gave me.

110. They have been free to develop their individual interests in social activities and clubs. I read about J's membership of his school's film club and his interest in Taekwondo. They regularly attend activities organised by the local church which involve games, crafts and regular supper events. Their friends are drawn both from school and from the local community of which the father contends they are very much a part. Whilst they have recently moved into a new home, it is in the same locality (about eight minutes' walk from C's primary school) and I am told that, in terms of their routine and environment, life for them has remained exactly the same as it has been for the past eighteen months. They have their own bedrooms which they have

decorated as they have wished. The father endeavours to work from home on one or two days each week and he is fully involved in their activities and social lives.

111. Both children are registered with local doctors and dentists who have been caring for them, as required, since their arrival in August 2014. J is currently under the care of a paediatrician who is managing his ADHD. He has been well without his Ritalin since July 2015. He is also undergoing a course of orthodontic treatment, about which he was very anxious to tell me when I met him. Rather than being a cause of concern for him, he is delighted that his progress with his new braces has been so swift.

112. Standing back and surveying this body of evidence in the round, I ask myself whether the children's residence in this jurisdiction has the necessary quality of stability such that they can be said to have acquired habitual residence here. I accept that they came with an understanding that their stay would last only so long as their mother was unwell, but the picture which emerges from everything I have read and heard is one of children living in a happy and settled environment where they are now deeply integrated into their domestic, social and educational environment. They have a settled home with their father and, but for the absence of their mother, they are surrounded by adults whom they love and who, in turn, love and care for them. I acknowledge the close bond of affection which both children have with their paternal grandmother and her husband. They are plainly very close and an integral part of the children's experience of life both in England and in France. I have no doubt that these children have enjoyed happy summer and other holidays in the company of their grandparents (for such I shall call them) in their home in the South of France and that routine will inevitably have assisted in the process of introducing further stability and routine into their lives.

113. Looked at purely from the perspective of this overview, I would have been wholly persuaded that the children had indeed reached a point by the end of August 2015 where they could be said to have completely disengaged from their former life in Australia and established a life in England. Whilst I accept that they were fully integrated into their former lives in Sydney and might therefore have been expected to take time to integrate fully into a new life in England, it is important, in my judgment, to factor into this process the complete upheaval which their lives underwent in the summer of 2014. I accept that the mother's actions in removing them from their home and schools in Sydney might not have been the actions of a healthy rational mother since she was clearly seriously unwell by that stage. However, these children did not make their transition to England from the foot of a happy and settled existence in Sydney. As is accepted in this case, their move was part of the overall crisis management which was ongoing at that period of time. In my judgment, their father's home and the arrangements he put in place for them provided a degree of stability which was a much needed counter-balance to their circumstances in Queensland. I am persuaded that that platform of comfort and reassurance enabled them to adjust

relatively quickly to their new situation given the turbulence which had characterised their lives in the months leading up to their mother's decision to leave Sydney. There is much evidence in the papers of J's distress as his mother's health deteriorated and C was an observer throughout. Both left behind the comfort and support which the members of the mother's family had been providing but they moved straight into an environment where they were cared for by their father and where they continued to spend time with their grandparents who had been a feature of their lives in Australia.

114. Whilst it is not necessary for me to pinpoint precisely when habitual residence might have been established in this jurisdiction, I would have been wholly persuaded that the "see-saw" identified by Lord Wilson in *Re B* had come to rest firmly on the side of established roots in England by the time the mother's permission for them to reside in this jurisdiction expired in August 2015.

115. However, that provisional view has to be considered in the light of J's Facebook message to his mother in July 2015. Taken at face value, it appears to send a strong message to the reader that all was not well in J's world and that he wanted to be reunited with his mother in Australia. Mr Power took the view that it was a sufficient reason for seeing the children a second time. He subsequently told me that it might well be an indicator that J was not entirely settled at that point in time.

116. I do not place any particular weight on the concerns which J had earlier expressed about breaking the washing line. Certainly J himself did not attach any significance at all to this episode when he saw Mr Power and he would not be the first child to express concern at a parent's response to this sort of everyday incident. The father told me that together they had made a special trip to purchase the equipment which they needed to put up the washing line. They had bought an electric drill and had made it something of a small project which they did together. In these circumstances I can well see why J anticipated that his father might be cross or disappointed to learn that he had broken it.

117. It seems to me that the Facebook message has to be looked at in a different light. Does it reflect J's genuine wish to return to Australia and, if so, what does that tell me about the stability of his life in England at that time?

118. In my judgment it is a factor but only one factor in the overarching panoply of all the evidence I have heard and read. When J saw Mr Power on 1 December 2015 some three months after sending the message to his mother, there was nothing in his delivery or demeanour to suggest to Mr Power that he was anything other than the happy, settled child he observed on that occasion. That was what Mr Power told me

when the contents of the Facebook message were first brought to his attention. When J saw Mr Power on the second occasion, he knew that his message had some significance for the purposes of this hearing and he was very keen to show Mr Power all the exchanges he had had with his father after the end of July 2015. I have copies of some of those exchanges which cover the period from early to mid-November 2015. They convey to me a clear sense of J experiencing a very close, loving and affectionate relationship with his father and a sense of ease in their day to day communications over the routine minutiae of J's daily life. They share jokes and interact in an entirely appropriate way over domestic arrangements such as J's orthodontic appointment (*'Awesome thanks dad yo[u] are a legend'*), reminders about picking up shopping for supper, and a television programme J has enjoyed watching. Until he was challenged by his father about the Facebook message, there is nothing in that run of messages to suggest that there was anything untoward which might have displaced the picture of settled family life as I have described it in the preceding paragraphs. If anything, those exchanges simply reinforce that picture.

119. The father has accepted very candidly that he was wrong to confront J in the way he did. However, his reaction has clearly left no lasting impression on J. He continues to emphasise to Mr Power what his wishes are and he is adamant that he does not want to leave England. Mr Power's oral evidence conveyed to me a very real impression of where the children are now in terms of the emotional journey they have made since arriving in England. He used phrases to describe their everyday lives such as "bedded in", "clearly settled", "well integrated into their lives in England" and, in relation specifically to J, "established in [his] life in England". He spoke, too, of the children "having made a life here now", a phrase which accords very much with my own view of their present situation. It seems to me that these children had a sufficient appreciation of their situation when they came to this country to have made a personal investment in settling into their new lives despite their initial understanding that they would only be here for a few months or as long as it took for their mother to recover her health. As time has gone on, the roots they began to put down have grown deeper to the extent that they now feel perfectly at ease discussing their situation with Mr Power in the context of knowing that a judge will decide what is to happen in terms of the outcome of these proceedings.

120. In my judgment, the Facebook message has to be seen in the context of all the other evidence in this case. It has to be weighed and considered alongside the totality of that evidence and as part of the continuum of the children's lives in England over the eighteen months they have now spent here and, in particular, as their lives were as August 2015 drew to a close. I have no particular context in which to place that message in terms of how J was feeling on that particular day. The mother has only exhibited two pages from that exchange. J records that he misses his Australian friends. The mother responds, *"Hang in there sweetie. When you come home here we will spend some time in Sydney so you can see all your friends"*. Mr Power's view was that J may very well have been trying to "hold the ring" between his parents on that occasion and demonstrate his loyalty to his mother. He had told Mr Power that he wanted to be with both his parents but realised that there was "nothing we can do

about that". He described J as an "insightful little boy" because he recognised pragmatically that this outcome was no longer feasible.

121. On balance, and having carefully weighed and considered the totality of the evidence which is before me, I have reached the clear conclusion, and I find as a specific fact, that these children were indeed habitually resident in the jurisdiction of England and Wales on 26 August 2015. In these circumstances, the retention of the children by the father beyond that date in this jurisdiction cannot be considered to have been a 'wrongful retention' for the purposes of engaging Article 12 of the Hague Convention. On that basis alone, the mother's application for the summary return of these children to Australia will be dismissed.

122. Whilst it is not necessary for me to consider the potential defences raised by the father in relation to Article 13(b) and/or the children's objections, I would say only this. Both parents were quite clear in their evidence to me that neither was prepared to sanction the separation of these siblings. I remind myself about the very helpful guidance given by Black LJ in *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal)* [2015] EWCA Civ 26, [2015] 2 FLR 1074. At para 69 of her judgment, Black LJ said this:-

> "In the light of all of this, the position should now be, in my view, that the gateway stage is confined to a straightforward and fairly robust examination of whether the simple terms of the Hague Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. Subtests and technicality of all sorts should be avoided. In particular, the *Re T*[7] approach to the gateway stage should be abandoned."

123. Had it been necessary, I would have found on balance and on the basis of the evidence that by the time of his second meeting with Mr Power, J was objecting in clear terms to a return to Australia and I am left in no doubt that he has attained an age and degree of maturity at which it would have been appropriate to take account of those views. Whilst he would most likely have been accepting of any decision I made in favour of a return to Australia, such a return would not have been in accordance with the clear expression of his wish to remain in England. In these circumstances, had I reached a different conclusion about his habitual residence in England, I would have been minded to exercise my discretion so as to refuse a summary return to Australia. C's views cannot be said to be as palpably clear and obvious as her brother's expressed wishes. She was ambivalent about a return although expressed her contentment with her life in her father's household in England. She is younger and less mature and her wishes appear to involve the reunion of her parents and a

[7] *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192

return to the sort of family life she experienced whilst they were still together. I am not persuaded that the evidence establishes a clear objection to a return on her part but neither parent is prepared to allow C to be separated from J and it is not necessary for me to say anything further about C's objections.

124. For the sake of completeness, had I reached a different conclusion in relation to the children's habitual residence, I would not have found the father's Article 13(b) defence to be made out. I have decided that the mother's application must fail but, in other circumstances, I would have been persuaded that it would have been possible to put in place short term measures so as to ensure the children's safety whilst the local Australian social services and/or Family Court became involved in ensuring that there were adequate protective measures in place for these children to protect them from the consequences of any future relapse in the mother's health.

125. That disposes of the current Hague Convention proceedings but, as Mr Devereux on behalf of the father acknowledges, that is not necessarily the end of the matter. The mother has the right to make an application to the English court for the return of the children to Australia on the basis of a fully reasoned 'welfare' case. I have no wish to see these children (or, indeed, their parents) exposed to continuing litigation and uncertainty. The mother and father will need time to reflect upon my judgment before considering the options. In the event that the mother decides to make a further application, there is no reason why I cannot swiftly give further directions for the filing of evidence and provide for the early listing of a final hearing. I would be prepared to reserve the case to myself if necessary in order to eliminate much of the reading time which another judge is likely to require.

126. I shall leave it to the parties and their advisers to consider the way forward. I know not whether the mother will have travelled back to Australia by now but it is self-evident that I would expect her contact with the children to be maintained in whatever manner may be appropriate. These children need, and are entitled, to continue to enjoy the obviously close and loving relationship they have recently restored with their mother.

Order accordingly