Case No: FD13P00122

Neutral Citation Number: [2014] EWFC 8 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice

Date: 16/05/2014

Before :

MR JUSTICE RODERIC WOOD

(In Private)

- -

Between :

LC	**Applicant**
- and -	
RRL & ORS	**Respondent**

- -
- -

Mr H Setright QC and Mr E Devereux (instructed by **Dawson Cornwell**) appeared on behalf of Appellant
Mr F Feehan QC and Mr C Hames (instructed by **Goodman Ray**) appeared on behalf of Respondent
Mr D Williams QC and Miss J Renton (instructed by **The International Family Law Group LLP**) appeared on behalf of T
Mr S Kearney appeared on behalf of the Guardian

Hearing dates: **12 and 13 May 2014**

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Judgment

MR. JUSTICE WOOD:

The Proceedings

1 These protracted proceedings are brought on behalf of a mother of four children under the Child Abduction and Custody Act 1985, and Schedule 1 to that Act, The Convention on the Civil Aspects of International Child Abduction, herein after called "The Convention", and Council Regulation (EC) No. 2201/2003, herein after referred to as "The Regulation."

The Parties: Representation

2 The applicant mother seeks return orders The Kingdom of Spain ("Spain") in respect of all four of the subject children pursuant to Article 12 of the Convention and Articles 10 and 11(8) of the Regulation. However, as appears below she says (at times) that she will not enforce the order against her daughter T. I shall refer again to the mother's position in respect of T. She, that is the mother, is represented by Mr. Henry Setright QC and Mr. Devereux.

3 The first respondent is the father of all four children. He opposes return orders in respect of all four. He is represented by Mr. Frank Feehan QC and Mr. Christopher Hames. The three youngest children (all boys) are the second, third and fourth respondents, represented by their Guardian, Miss Sarah Vivian. Counsel instructed to argue their case is Mr. Kearney. The solicitor for the boys is Miss Logan of CAFCASS Legal. All the boys oppose return orders.

4 T has her own legal team. Her solicitor/guardian is Miss Helen Blackburn. She instructs on T's behalf Mr. David Williams QC, and Miss Jacqueline Renton. T, likewise opposes a return order.

Background Agreed Facts

5 As will appear below in more detail, this case has previously been before Mr. Justice Cobb in May 2013. His judgment is reported at *2013 EWHC 1383 (Fam)*. It has been before the Court of Appeal in August of last year. The reference for that judgment is *2013 EWCA Civ. 1058*. Finally, the United Kingdom Supreme Court heard argument on the matter in November of last year, and gave their judgment in January of this year. The reference for their judgment is *2014 UKSC1*.

6 For the purposes of the Supreme Court the parties prepared a statement of agreed facts and issues. In it, amongst other material, is a forensic chronology split into three parts. The hearings, and the outcome of them, before Mr. Justice Cobb are summarised in paragraphs 11 to 22. The subsequent proceedings and their outcome in the Court of Appeal are summarised in paragraphs 23 to 33. The preliminary steps in the application to the Supreme Court and the advocates' outline submissions as to the issues for that court's determination are set out in summary form in paragraphs 36 to 41.

7 I shall not take up time by repeating that material, instead, for ease of reference and for a bare outline I attach it to this judgment marked "Schedule".

8 The Supreme Court handed down its judgments on 15th January this year. They remitted to this court for further consideration a question to add to the question previously remitted by the Court of Appeal.

The Questions

9 Those questions are, in chronological order:

(i) The Court of Appeal: in the light of their order discharging Cobb J's return order in respect of T, would there be a grave risk that the return of the boys to Spain would expose them to physical or psychological harm or

otherwise place them in an intolerable position by virtue of their separation from T?

(ii) The Supreme Court: were all, or any, of the children habitually resident in Spain on the relevant date, namely, 5th January 2013, and what order should be made in the Convention proceedings in respect of the three boys, who are the three youngest children, L, A and N.

10 It is logically more appropriate to consider the Supreme Court's question first for if the children, or any of them, were not habitually resident in Spain at the relevant date (namely, 5th January last year when the Father retained them in this country at the conclusion of an agreed Christmas holiday) there would be no jurisdiction to make a return order in respect of that child (see Article 4 of the Convention). If this court were to find that habitual residence had not been established in Spain, that has the further consequence that a Spanish court could not make an order under Article 11(8) of the Regulation, or, at least, if made, preclude its enforcement here [see paragraph. 22 of Lord Wilson's judgment in the Supreme Court, and further see paragraphs 72 to 80 below for the current position in the Spanish proceedings].

Habitual Residence: The Law: Summary

11 Although counsel in their different skeleton arguments prepared for the start of this hearing have each quoted extensively from the relevant recent Domestic and Strasbourg Jurisprudence, there is effectively agreement amongst them as to the test this court now has to adopt in considering whether or not habitual residence has been established. Their differences, such as they are, relate to the emphasis to be applied to different parts of the test in relation to the facts they ask me to find in this case, or which are agreed.

12 Let me therefore attempt a summary of the current tests drawn primarily, but not exclusively, from three authorities:

(i) *A v. A (Child: Habitual Residence), 2013 UKSC 60;*
(ii) *Re: KL (Abduction: Habitual Residence: Inherent Jurisdiction) 2013 UKSC 75;* and,
(iii) *This case in the Supreme Court Re: LC (Abduction: Habitual Residence: State of Mind) 2014 UKSC 1.*

13 Habitual residence is a question of fact to be considered specifically on all the facts of the case. It is not a term of art, and there should be no formulaic approach when determining it.

14 It is the "place which reflects some degree of integration by the child in a social and familial environment." Relevant considerations include, but are not limited to, "the duration, regularity, conditions and reasons for the stay on the territory of a Member State, and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge, and the family and social relationships of the child in that State."

15 The intentions of the parent in assessing the habitual residence of a child is one factor amongst many, although it may well, along with the social and family environment of the parent, and that parent's level of integration in that environment, be of greater significance in the case of a young child or infant.

16 Usually an "appreciable period of time" will be needed to establish a new habitual residence.

17 The judgments of the Supreme Court in this case (see *Re: LC* cited above) have for the first time in any focused way considered the relevance and weight to be attached to the state of mind of an adolescent child in determining habitual

residence (the majority – comprising Lords Wilson, Toulson and Hodge) and also of L and A (the minority – comprising Lady Hale and Lord Sumption). Ancillary questions also arise (see below). I have approached my findings by adopting and applying the minority view, although I emphasise for the avoidance of doubt that I would have come to the same conclusions had I applied only the majority approach.

18 Before turning to the facts, it is necessary to look in greater detail at the judgments in *Re: LC*.

19 Having set out the essential background, Lord Wilson answered the question of whether or not the state of mind of an adolescent should be considered (summarised in paragraph 17 above), giving the answer "yes", and gave his reasons for so doing in paragraph 37, which reads as follows:

> "Where a child of any age goes lawfully to reside with a parent in a state in which that parent is habitually resident, it will no doubt be highly unusual for that child not to acquire habitual residence there too. The same may be said of a situation in which, perhaps after living with a member of the wider family, a child goes to reside there with both parents. But in highly unusual cases there must be room for a different conclusion, and the requirement of some integration creates room for it perfectly. No different conclusion will be reached in the case of a young child. But, where the child is older, in particular one who is an adolescent or who should be treated as an adolescent because she (or he) has the maturity of an adolescent, and perhaps also where (to take the facts of this case) the older child's residence with the parent proves to be of short duration, the inquiry into her integration in the new environment must encompass more than the surface features of her life there. I see no justification for a refusal even to consider evidence of her own state of mind during the period of her residence there. Her mind may - possibly – have been in a state of rebellious turmoil about the home chosen for her which would be inconsistent with any significant degree of integration on her part. In the debate in this court about the occasional relevance of this dimension,

> references have been made to the "wishes" "views" "intentions" and "decisions" of the child. But, in my opinion, none of those words is apt. What can occasionally be relevant to whether an older child shares her parent's habitual residence is her *state of mind* during the period of her residence with that parent. In the *Nilish Shah* case, cited above, in which he propounded the test recently abandoned, Lord Scarman observed at p.344 that proof of ordinary (or habitual) residence was "ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind." Nowadays some might not accept that evidence of state of mind was not susceptible of objective proof, but, in so far as Lord Scarman's observation might be taken to exclude the relevance of a person's state of mind to her habitual residence, I suggest that this court should consign it to legal history, along with the test which he propounded."

20 He added, in paragraph 39 the following:

> "In the light of her age and of Ms. Vivian's assessment of her maturity, T's assertions to Ms. Vivian about her state of mind during her residence in Spain in 2012, set out in para 26 above, have at least some relevance to a determination whether her residence there was habitual. For they are relevant to whether she was integrated to some degree in a social and family environment there. But not even when, rather as a cross-check against his earlier conclusion Cobb J turned to consider T's integration (and that of the boys) in Spain did he address her assertions to Ms. Vivian. Indeed when, in a later section of his judgment, he addressed her assertions, his focus was on her hostility at that time, namely in 2013, towards a return to Spain. Nowhere did he give separate – or any – attention to what she had said about her state of mind when in Spain in 2012. The Court of Appeal was impressed by the fact that in refusing to grant permission to the father to appeal, Cobb J observed that, "The stated wishes of the three older children to be in England now…did not affect their integration in Spain at the time." Cobb J's observation was correct. But what might have affected the integration at any rate of T was not her wishes when in England in 2013 but what she said about her state of mind when in Spain in 2012."

21 In determining that the Supreme Court was not in a position, having decided the principle, to substitute its own conclusion as to T's habitual residence, Lord Wilson set out six specific matters to explain why not. They are:

i) T's various assertions to Ms. Vivian about her state of mind when in Spain were incidental to an inquiry of which the focus was different.

ii) T's assertions were made after she had left Spain and *may* not deserve the weight which might attach, for example, to any e-mails or letters which she might have sent, or to any statements which she might have made on social networking sites, while she was there.

iii) Indeed T's primary purpose was to communicate to Ms. Vivian her strong objection to returning to Spain and her purpose *may* have coloured her descriptions of her state of mind when there.

iv) Cobb J has already rejected as inaccurate T's identification to Ms. Vivian of the time when she realised that the family's stay in Spain was intended to be indefinite.

v) Since it is only in the proceedings in this court that the searchlight has directly shone on T's statements to Ms. Vivian about her state of mind when in Spain, the mother has had no opportunity to give evidence in response to them or, by counsel, to make detailed submissions about them.

vi) T's statements in that regard require to be weighed against the written and oral evidence which led Cobb J to find that T had achieved some degree of integration in Spain. In relation to her integration, the mother placed before the Judge a substantial amount of evidence, including statements not only by herself but also by her mother, her sister and her two brothers and by T's school in Spain, to which in these appeals no specific reference has been made, and in relation to it the mother also gave oral evidence, of which this court does not even have a transcript."

22 But that was by no means the end of the matter for the majority went on to consider whether or not to set aside Cobb J's findings as to the habitual residence of the three boys, and remit it to this court. The reasoning is set out at paragraph 43 of the report of *Re: LC*, which I quote in full:

"If the issue of T's habitual residence in Spain is therefore to be remitted for determination in the High Court, should Cobb J's conclusion that the three boys were habitually resident there also be set aside so that that issue be likewise determined in the High Court? In my view this is the most difficult question posed by these appeals. When they were in Spain, none

> of the boys was an adolescent or had the maturity of an adolescent. It will be clear from my formulation of the question in para 1 above that in my view it is, in principle, the state of mind of *adolescent* children during their residence in a place that may affect whether it was habitual. Thus, although when considering the alleged objections of L and A to returning to Spain, Cobb J concluded that they had at least attained an age and a degree of maturity at which it was appropriate to take account of their views and although they made comments to Ms. Vivian indicative of lack of integration on their part in Spain, I find it hard to imagine that a judge's exploration of their state of mine could, on its own, alter the conclusion about their integration in Spain reached by Cobb J be reference to the other evidence before him. But there is another feature in play; it is the presence of their older sister, T, in the daily life of all three of the boys. Ms. Vivian described the four children as a very close sibling group. There was a solidarity in the presentation of the three older children to her. When Cobb J addressed the integration of the children in Spain, he did so compendiously in relation to all four of them. In the fuller, more focused, inquiry into T's habitual residence, the High Court will no doubt receive evidence about the integration in Spain of the four children as a whole. Were it to conclude that T never lost her English habitual residence, the court would need at any rate to consider whether its conclusion could sit easily alongside a conclusion that, by contrast, the three boys acquired a habitual residence in Spain. In relation to their habitual residence, might T's habitual residence in England (if such it was) be a counterweight to the obvious significance of the mother's habitual residence in Spain? It can be inconvenient for a judge at a remitted hearing to have to note that all options have not been left open to him. By a narrow margin, I find myself persuaded that the proper course is to set aside the finding of habitual residence in respect also of the three boys so that the issue can be reconsidered in relation to all four children."

The minority also agreed that the earlier orders should be set aside.

23 As is evident, Lord Wilson found it difficult to imagine (though he did not rule it out absolutely as a possibility as I read that paragraph) that the state of mind "on its own" (in so far as it may be possible to glean it) of the boys of the age of L and A, could alter, in this case, Cobb J's findings as to their habitual

residence. In this respect the judgment of the minority differed. (See paragraph. 25 below).

24 However, as is also evidenced from the concluding part of paragraph 43 quoted above, the issue of the impact (if any) of T's habitual residence being found to be England at the relevant time (if so established) upon the question of the three boys' habitual residence has been left for me to determine.

25 Lady Hale, in addressing the view of the minority as to the relevance of the state of mind of the younger children L and A, set out her reasoning at paragraphs 58 to 64, which I set out in full, for these passages also contain observations on what

a Judge may or may not find (dependent upon the facts of the case) to be relevant considerations in determining this factual question of habitual residence.

> "58. In my view, the answer to the question of principle has to be the same for all three children; their state of mind is relevant to whether or not they have acquired a habitual residence in the place where they are living. The logic which makes an adolescent's state of mind relevant applies equally to the younger children, although of course the answer to the factual question may be difference in their case. The logic flows from the principles adopted by the Court of Justice of the European Union in *Proceedings brought by A* (Case C-523 07) and *Mercredi v. Chaffe* (Case C- 497 IOPPU) and how adopted by this Court in the recent cases of *A v A [2013] UKSC 60, [2013] 3 WLR 761* and *In re L (A Child) (Habitual Residence) 2013 UKSC 75; [2013] 3 WLR 1597.*
>
> 59. The first principle is that habitual residence is a question of fact; has the residence of a particular person in a particular place acquired

the necessary degree of stability (permanent is the word used in the English versions of the two CJEU judgments) to become habitual? It is not a matter of intention: one does not acquire a habitual residence merely by intending to do so; nor does one fail to acquire one merely by not intending to do so. An illegal immigrant may desperately want to become habitually resident in this country, but that does not mean that he does so. A tax exile may desperately want to lose his habitual residence here, but that does not mean that he does so. Hence, although much was made of it in argument, the question of whether or not a child is "Gillick-competent" is not the point.

60. In the case of these three children, as of others, the question is the quality of their residence in which all sorts of factors may be relevant. Some of these are objective: how long were they there, what were their living conditions while there, were they at school or at work, and so on? But subjective factors are also relevant: what was the reason for their being there, and what were their perceptions about being there? I agree with Lord Wilson (paragraph 37) that "wishes", "views", "intentions" and "decisions" are not the right words, whether we are considering the habitual residence of a child or indeed an adult. It is better to think in terms of the reasons why a person is in a particular place and his or her perception of the situation while there – their state of mind. All of these factors feed into the essential question, which is whether the child has achieved a sufficient degree of integration into a social and family environment in the country in question for his or her residence there to be termed "habitual".

61. It would be wrong to overlay these essentially factual questions with a rule that the perceptions of younger children are irrelevant, just as it was to overlay them with a rule (rejected in *A v A*) that a child automatically shares the habitual residence of the parent with whom he is living. The age of the child is of course relevant to the factual question being asked. As the CJEC pointed out in *Mercredi v. Chaffe*, at paragraph 53:

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

62. Clearly, therefore, this is a child-centred approach. It is the child's habitual residence which is in question. It is the child's integration which is under consideration. Each child is an individual with his own experiences and his own perceptions. These are not necessarily determined by the decisions of his parents, although sometimes these will leave him with no choice but to buckle down and get on with it. The tiny baby whose mother took him back to her home country in *Mercredi v Chaffe* was in a very different situation from any of the three children with whom we are concerned. The environment of an infant or very young child is (one hopes) a family environment and so determined by reference to the person with whom he lives. But once a child leaves the family environment and goes to school, his social world widens and there are more factors to be taken into account. Furthermore, where parents are separated, there may well be two possible homes in which the children can live and the children will be well aware of this. This may well affect the degree of their integration in a new environment.

63. The quality of a child's stay in a new environment, in which he has only recently arrived, cannot be assessed without reference to the past. Some habitual residences may be harder to lose than others and others may be harder to gain. If a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly. If a person leaves his home country for a temporary purpose or in ambiguous circumstances, he may not lose his habitual residence there for some time, if at all, and correspondingly he will not acquire a new habitual residence until then or even later. Of course there are many permutations in between, where a person may lose one habitual residence without gaining another.

64. I agree with Lord Wilson that Cobb J did not approach the question in the way in which he no doubt would have done had he had the benefit of this Court's decisions in *A v A* and *In re L*. He approached it very much from the point of view of parental rights. Under English law, the mother alone has parental responsibility for the two older children (only because the change in the law giving parental responsibility to all fathers named on the birth certificate only came into force later; we have no evidence as to what the position is under Spanish law). She could therefore change their habitual residence. The

> father does have parental responsibility for the two younger children, but Cobb J held that he had (albeit reluctantly) consented to their change in habitual residence. But it is not a question of the parents' determining the habitual residence of their children. It is a question of the impact of the parental decisions about where they and the children will live upon the factual question of where the children habitually reside."

26 The minority agreed with the majority that N's habitual residence should also be reconsidered (see paragraph 24 above).

Article 13(b) of the Convention: Relevant to Question 1

27 In considering the question posed by the Court of Appeal (see paragraph 9(i) above) this Article is in play. I am not required to make a return order (Article 12 of the Convention) if a Convention defence is established. In the case of Article 13(b) of the Convention I would have to find that there is a grave risk that the child's return would expose it to physical or psychological harm or otherwise place it in an intolerable situation.

28 In paragraph 11 of their skeleton argument for the start of this hearing, Mr. Setright and Mr. Devereux have summarised the important principles derived from the following authorities; *In Re: E (Child) (Abduction: Custody Appeal) 2011 UKSC 27*, and *In Re: S (A child) (Abduction: Rights of Custody) UKSC 10*. I can do no better than set it out as an accurate distillation:

> "11.From *In re E*, a number of principles can be distilled:
>
> (i) while the Article will naturally be *applied* restrictively because of the nature of the defence set out, its wording should not be *construed* restrictively – the words of the Article are plain and do not require any "gloss" (paras 30 – 31);

(ii) the burden is on the parent (or other person) who is opposing the child's return to the state of habitual residence to produce evidence which substantiates the defence (though since it will be unusual for a court to hear oral evidence in Hague Convention proceedings, it needs to be borne in mind that neither the evidence nor any rebuttal will usually have been tested in cross-examination) (paragraph 32);

(iii) the risk to the child must be "grave", which is greater than the "real" risk which courts sometimes consider in other contexts (paragraph 33);

(iv) it is the *risk* which must be grave, not the harm (though there is a link between the two) (paragraph 33);

(v) the word "intolerable" is a strong word, but in the context of a child means "*a situation which this particular child in these particular circumstances should not be expected to tolerate*" (paragraph 34, quoting *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, paragraph 52);

(vi) however, "*Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up*" (paragraph 34);

(vii) if there is a grave risk of harm, the source of that risk is irrelevant (paragraph 34);

(viii) the question of grave risk is forward-looking (though not restricted to the immediate future), and "the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home" (paragraph 35);

(ix) where there are disputed issues of fact about domestic violence or similar concerns, the court

> should start by making an assessment of whether, *assuming the allegations are true*, they would amount to an intolerable situation and, if so, whether effective protective measures could be put in place; only if the answer is 'no' need the court embark on any attempt to resolve the disputed issues (paragraph 36).

Further Factual Background

29 The full background facts, available up to and including the hearing in the Supreme Court, are fully set out in the three judgments in this case cited above, and the schedule attached hereto. I do not repeat them. The questions for me to determine will involve, it is submitted on behalf of all the children, a reconsideration of Cobb J's findings on integration to establish whether or not fresh material has led them, or any of them, to be no longer tenable, or requiring them to be differently nuanced. Before I consider whether or not I can, or should, do so, I set out what material is now available.

Materials

30 I have had the advantage of material filed since the hearing in early May of last year and since the judgment on 23rd May 2013. The new material comprises:

> (i) Three statements from the mother (25th May 2013, 5th November 2013 and 6th May 2014). There are substantial exhibits attached to those documents.
>
> (ii) Four statements from the father (7th May 2013, 21st October 2013, 9th April 2014, and 12th May 2014). Likewise there are substantial exhibits attached to those documents.
>
> (iii)Two statements of Ms. Chadha, a solicitor instructed by L & A following the decision of Cobb J, L and A wishing her to

represent them in their applications within the continuing appellate proceedings. Those two statements are dated 26th June 2013 and 11th September 2013.

(iv) Two statements of Ms. Blackburn, dated 28th June 2013 and 4th April 2014.

(v) School reports on T, 4th February 2014 and 14th February 2014.

(vi) Ms. Vivian's third report of 8th May 2014

(vii) The schedule to this judgment as earlier noted.

(viii) Miscellaneous documents including photographs, e-mails, Facebook entries, et cetera.

(ix)Some documents from the Spanish proceedings instituted by the mother on 30th April 2013.

(x) Oral evidence from both of the parents.

(xi) Oral evidence from Ms. Vivian.

As already noted, I have not had the transcripts of the oral evidence of the mother, nor indeed of the father, when they gave evidence before Cobb J, but I have had the transcript of Ms. Vivian's evidence to him.

Cobb J's Findings: Habitual Residence: Summary

31 In paragraph 21 of his judgment he says this on the facts which he finds support "integration" of the children in Spain.

> "21. Once in Spain, the mother and children moved in with the maternal grandmother; the maternal uncle arranged (this appears to be accepted) for the children's rooms to be re-decorated and furnished to their taste and needs. The mother made arrangements for the children to commence school, telling me that the parents had earlier agreed to the children attending bi-lingual schools: accordingly, T joined the Instituto, while the boys attended a Collegio Publico. Over the following weeks, unsurprisingly, the children made friends (at least this is what T told Ms

Vivian, a point acknowledged by the father). I note that at the end of term, T was reported to have had "*a good school performance and always showed a perfect adaptation to the course and the Academy*", she "*can be described as an excellent student, very participative and has always shown a great interest in the different subjects*". The father accepts that the children did "*reasonably well*" in their Spanish schools."

32 As to the Christmas holiday and the period up to 5th January 2013, he says this as to its unsettling nature:

> "28. The mother says that she spoke to the children during this holiday with the father, and they talked to her "*very normally*". However, it was predictable that it would be upsetting for the children, and for the father, for the children to return to B for Christmas. I suspect that the father had not prepared himself adequately for the children's emotional reactions, and as the holiday drew to its close he allowed the children's reasonable upset to govern his own rational thinking."

33 In later passages of the judgment he makes wide-ranging findings, but I shall only set out those which I consider relevant to the re-focused enquiry required by the judgments of the Court of Appeal and the Supreme Court, whilst bearing the whole judgment in mind as to their context.

34 At paragraph 40 he finds:

> "(vi) Simultaneous with the ending of the parents' relationship in the spring of 2012, both the mother and the father were individually deeply concerned about T's unhappiness at P School; both were aware that she was being bullied; both were aware of her upset on the return from the school trip in April; her misery was apparent to both;
>
> ……
>
> (viii) When it was apparent to the mother that T was genuinely unhappy at school, it eradicated one of the last few potential reasons for remaining in England; T's unhappiness at school endured to the end of the summer term, and her reluctance to be in school for the last few days of the summer term only served to confirm to the mother that her decision was the right one;

…….

xii) That the mother and father did tell L at least about a month before he left (i.e. towards the end of June) that he would be leaving permanently to live in Spain (as L told Ms. Vivian);

…….

xiii) From a date no less than one week before the departure, T knew that she was leaving England and P school; this was not a secret; it was readily accessible information on her Facebook page; and

xiv) The mother organised a party for T; it was essentially a farewell party for her."

35 As for the period from 24th July 2012 (after they left for Spain) he makes a number of relevant findings about the children set out in his paragraph 42 consistent with those already encapsulated in his paragraph 21 (for which see paragraph 31 above):

"42. In relation to the period after 24 July, I further find that:

a. The children settled in reasonably well to the maternal grandmother's flat in Madrid; T had her own room; the boys shared a room; over the weeks following their arrival, the rooms were decorated and furnished appropriate to their tastes and needs;

b. The children settled into full-time education in their new schools in Madrid; they appeared to enjoy them, and did reasonably well in them; L came top of his class (according to mother – cross-examination);

c. The children made friends in Spain – certainly T and L;

d. The children are – to a greater or lesser extent – bilingual, and would not have experienced any material difficulties with the language;

And this must be seen in the context that:

e. The children are Spanish Nationals, with a Spanish mother, and Spanish extended family.

And further that:

f. The father accepted the position of the children living in Spain, albeit perhaps (albeit privately) resentfully at times."

36 As to the father's position in the period 24th July 2012 to 5th January 2013, and how it impacted on the question of the acquisition of habitual residence in Spain (as he found it to be), he said this at paragraph 65:

> "65. On the facts of this case, I am satisfied that the father's agreement to the younger children's move to Spain was clear, and unconditional, and was in that sense effective to facilitate a change of habitual residence. It was a true bilateral agreement; the agreement was to their stay being indefinite. In that sense it is less important for me to look at the 'integration' argument."

37 He summarises his finding about the acquisition of habitual residence in Spain by all four children in paras 67 – 69. He considers these matters to be a relevant "nexus" between the children and their new home State (see paragraph 67) and at paras 68 and 69 he says this in relation to the move from England, and the effect of the November 2012 contact:

> "68. The move to Spain was plainly not an easy one for the children, undertaken against a backdrop of months (probably years) of bitterness and rancour between their parents (and an associated unpleasant family atmosphere in the B home); significantly, they separated from their father for the first time and early contact between the father and the children was difficult to achieve. Inevitably a move, particularly one involving a move

of country, created a hiatus in the children's lives, and I have to view 'integration' in that context.

69. In November they had contact with their father; this in my judgment served to unsettle them, not because he did anything deliberate to unsettle them, but because it brought home to them how much they missed him. Overall, however, once in Spain, I am satisfied, for the reasons set out in §42 above, that they did achieve a significant degree of integration into their new social and family environment."

Cobb J's Findings: Children's Objections/Wishes: Summary

38 Having set out the law on this issue such as he thought necessary, he deals, in paragraphs 82 – 92, 95, 97, 98(i) – (iii), (vi) and (viii) and paragraphs 99 – 100 with the position of T. In paragraphs 93 – 94, parts of 95, 98, (iv) and (v), 99, in part, and 101, he considers the position of L and A.

39 I do not consider it needful to set out again the whole of the extensive material to which he there refers in coming to his conclusions that T was of sufficient age and maturity for her views to be taken into account, and that she had genuine Convention objections to a return to Spain (in May 2013) "in particular based on her view that the quality of education is inferior" in Spain. These matters are not the subject of an attack.

40 What is useful, however, is to remind myself of a limited number of passages from the above citations. In paragraph 82 he summarised what Ms. Vivian says of T:

"82. Her first interview was with T; she found T to be 'a confident, intelligent young girl whose maturity seemed to me to be beyond her years. I think her mature presentation is a reflection of her innate intelligence and personality rather than something that she has prematurely had to acquire

as a coping strategy and out of necessity because of her own life experiences'."

41 Having said that, he records that Ms. Vivian found T to be "clear and robust" in setting out her objections to a return to Spain (see paragraph 83 of the judgment). T is reported as objecting on the basis of the matters set out in paragraph 84, which seems to me also to be relevant to the question of her integration in relation to habitual residence as well as to her objections to a return. Para 84 reads as follows:

> "84. It appeared that T had a rather dismissive attitude to educational standards in Spain, a matter of importance to her; she was also, separately, highly critical of her mother's conduct in removing the children (as she described it in interview) peremptorily in July 2012, and failing to prioritise their needs since that time. When asked if she would go to Spain if a return order was made, T is reported to have said, "*No, I would do everything I could I would not go, not pack and not get in the car*.""

42 As for L, Cobb J refers to Ms. Vivian's assessment "a bright and thoughtful child; he had carefully considered his situation and his views were expressed from the position of some maturity." She spoke of his "preferences" for living in England (see paragraph 85) but with his parents reconciled.

43 As for A, Ms. Vivian described him as "thoughtful, quieter and less outwardly confident than T or L, and quite insightful for his young years."

44 Cobb J accepted these assessments of Ms. Vivian, whom I note to be a very experienced member of the Specialist High Court Team, well used to interviewing children of all ages and of determining issues such as their

maturity. She has also had the very unusual, but in this case invaluable, opportunity to see the children over the best part of eighteen months on a number of occasions.

45 I also note Cobb J accepted her assessment that the children had not been overtly influenced to hold a particular line by their father, nor had he sought to recruit them to his own point of view (see paragraph 87 of his judgment). I too, having heard from the witnesses and read all of the material, and in particular heard Ms. Vivian in evidence, have come to the same conclusion as her, as adopted by Cobb J, she, even twelve months on, detecting no such sign. This finding seems to me also to go to the reliability of the children when they are talking about their level of integration in Spain.

46 Further support for the view that the children's accounts of their time in Spain are their own and not the false fruit of parental recruitment to that parent's view, is that these three older children long for a restored relationship with their mother, and speak to her often a number of times a day by telephone or more rarely by Skype. They have at times betrayed by their language some deep sense of conflict they have in articulating to their mother, or indeed to Ms. Vivian, their views about not wanting to be in Spain, but that conflict is clearly not (I find) evidence, as the mother would have it, that they have been influenced to such an extent that they are prepared to lie so as to align themselves with their father (see also paragraph 45 above).

47 Nor do I consider that these children, or any of them, are putting forward false views so as to take advantage of the "bubble of respite that the abducting parent will have created" (see paragraph 78 of Cobb J where he considers the point made in *Re: K (Abduction: Case Management) 2011 1 FLR, 1268*).

48 I accept the caution of Lady Hale (see paragraph 67 of the Supreme Court judgment) that contemporaneous evidence about their time in Spain perhaps carries more weight than later evidence which may have been crafted for all sorts of reasons. Nevertheless, there is a passage in Ms. Vivian's latest report in which she considers the comments to her of L and A over a long period (albeit those comments relate to their views about England) which illustrates their consistency as historians, and to my mind the authenticity of what they say. The passage is:

> "43. I would expect that, given the passage of time and their different ages and stages of development, the children's views might have changed or hardened particularly as the legal proceedings have been ongoing. However, the children remain consistent in their views and report their feelings about England in a similar vein that they did to me many months ago, although I think L and A now speak with greater strength, conviction and rationality. Their views have been formed over a period of months and not been made on the spur of the moment. This consistency is, I think, an indication that their views are not contrived simply for the purposes of these proceedings, but that they are in fact authentic, their own, genuinely and strongly held, and a proper reflection of their own truth, feelings, emotions and experiences. As L said: 'most of the stuff is hard to describe, it's something I have inside'. A year on from my last report, England for these children continues to be where their day to day routine is, their base of reference, where their connections are and their security lies. These things are important to all children, not least these particular children, if they are to thrive and develop happily and healthily. None of this is any surprise given that they have spent their entire lives in this country other than the five months when they were in Spain."

With all of those matters in mind let me look now at Cobb J's findings.

Cobb J's Findings: Revisited

49 Has the evidence I have heard (and unusually in Hague proceedings heard tested in cross-examination, as had Cobb J on the then body of information before him) undermined those findings, or led me to make additional ones relevant to the focus of the questions set by the Court of Appeal and the Supreme Court?

50 The prior question, however, is can I revisit those findings at all, or should I respect them as they stand? For the following reasons I consider that it is open to me to revisit them, and record where and why I depart from them, if indeed I do.

(i) Cobb J was considering the question of habitual residence with the approved but soon to be modified and/or abandoned test, largely, if not exclusively, focused on parental intentions and not the children's integration from the child's perspective. It is not possible to carry out the enquiry envisaged by the Supreme Court without, in my view, revisiting those findings.

(ii) Each child now has party status, which has led to a large body of new information and a quite different approach to that material and the evidence proffered on their behalf; and the way in which cross-

examination of the parents has been carried out (again from the perspective of the child).

(iii) The range of child-focused new evidence has been illuminating, as has been the response of each parent to factual challenges to it. Both points (i) and (ii) above have led me to conclude that some important aspects of the evidence before Cobb J on integration cannot survive, as I shall further consider below (see paragraph 55).

51 As the Supreme Court observed, it is not surprising that Cobb J's enquiry had not considered T's state of mind, nor indeed that of L and A (the subjective element referred to by Lady Hale at paragraph 60 of Re: LC) nor, in a different context, had the impact (if any) of a separation of the sibling group, as was illustrated when Ms. Vivian made it clear to Cobb J that the issue played no part in the type of enquiry she had been engaged in before her change in status (much later) to guardian, as opposed to her previous role as interviewing officer (initially carrying out at the court's request a brief interview to ascertain the child's objections, if any, to a return order following the classic pattern in Hague cases where that issue arises).

52 At the time of the departure to Spain in July 2012, T was rising twelve, L was nine, A was seven, and N was three.

53 As Lady Hale points out at paragraph 75 of LC:

> "75. The objective evidence records an extraordinary state of affairs. The mother left it until the very last day of term to withdraw her daughter from school. T was clearly not too happy about her friends knowing that she was leaving. This is consistent, both with the judge's finding that by then, very late in the day, she knew her mother's plan was that they should move, and with her own account to Ms Vivian that she was not sure what the real situation was, partly because her mother had made similar threats before and partly because she herself did not really accept it."

54 Cobb J does not consider at any length, or at all, the impact on the children, and on their respective states of mind, of the huge change to their lives.

55 The new evidence illuminates it, and I find that:

(i) Whether T knew about the move one month or less before it took place, there was no discussion with her, let alone the many discussions which the mother asserted to me had taken place.

(ii) Contrary to the mother's evidence, although there had been one (or at the most two) occasions of brief duration when T was bullied at her High School, she was not miserable there, without friends, and failing. The most potent objective evidence that established that she was thriving and happy is contained in her school report for the year ending July 2012. Across the board from all her teachers she gets the highest praise, and her own assessments of her progress, and her real enjoyment of the subjects and of the school, shines through, not just as described by the teachers, but evidenced in all of her own detailed responses to their observations (see Section C 451d – u).

(iii) She had wanted to go to Oxford University since the age of eight and had a bursary to her High School which she lost by the mother's peremptory removal of her, thus derailing T's first class education without any form of consultation with her daughter.

(iv) She was not clear if she would be going to Spain permanently or returning.

(v) The older of the three boys, L and A, were removed from their schools with limited or no warning.

(xi) There was no opportunity to say their farewells to their schools and to their friends at their schools. I do not accept the mother's evidence that they had no friends.

(vii) There were no substantive discussions with them about the move and all it entailed, both in social terms or educational, and particularly in terms of contact with their father.

(viii) The extra-curricular activities (for example cornet lessons for L and Cubs) were cancelled peremptorily, as Cobb J noted.

(ix) They took little with them, either by way of clothes or toys, books, et cetera. They left behind almost everything to which they were attached. I do not accept the mother's evidence that the children had no real attachment to these material things and did not mind abandoning them (for example, T's books of which she is inordinately proud).

(x) The plan of the mother on departure was to rent a new home, but to go to her mother's home temporarily before so doing. This soon changed to a plan of living permanently at the grandmother's. This of itself led T and the older boys to experience their time there (before entering their new schools in mid-September) as having the air of a holiday spent at their grandmother's, which they had enjoyed in Spain annually over many years.

(xi) There were many arguments between the maternal aunt and the mother (I emphasise, contrary to the mother's evidence about this) on the subject of the occupation by the mother and children of parts of the grandmother's flat and the strain it was putting on the grandmother, arguments of which the children were very well aware.

(xii) There was no real research by the mother about schools – certainly none in advance of the move, and even on the mother's evidence to me, which I reject, her case is at its highest that the children were all very familiar with the schools on offer because their cousins or "friends" went to them. In other words, the mother's case appears to be that the schools were chosen on the basis of anecdotage. Certainly none of the children had visited the schools, which were chosen by the mother on the basis of their physical proximity to the grandmother's flat. T in particular values her education highly, as, given both her intelligence and application, she is entitled to do. She found herself in a school with a limited syllabus, focused on IT, totally at odds with all that she valued and excelled at

(arts/drama-related subjects, et cetera). Though she did reasonably well at her new school, the perfunctory school reports provided by them suggest she was doing rather less work than at her English school, and on a very much reduced syllabus. She very soon let her father know that she was bored by her school (see the e-mail of 14th September 2012 at C451.b).

(xiii) There was the unsettling visit of the father in November 2012, as referred to by Cobb J.

(xiv) Both T and L talk of having "friends" at their new school. It is always a puzzle to me that the English language, so rich in its range and nuances has so few ways of describing personal relationships. I have often puzzled at the ease with which people in contemporary society use the word "friendship" or "friends" to describe relationships of little significance, or indeed barely of acquaintanceship. Leaving that personal observation to one side, there is no evidence to suggest that those "friendships" have survived the return to England (with the sole possible exception of one in T's case), thus illustrating to me the very limited impact in the lives of each child of these purported "friends".

(xv) A clearly had not settled in his school in Spain, it being recorded at C358 that he did not like "the learning", nor indeed the strict teachers; and also he was bullied. I accept the evidence that A was bullied. He spoke to Ms. Chadha about that bullying and he was clearly distressed for a while at the recollection when so doing. L corroborated his younger brother's

account, stating that he had taken A under his wing in the playground to protect him. I also accept the evidence that A told his mother of this bullying, and she promised to do something about it, but she ignored the complaint. I reject the mother's evidence that there is no bullying in Spain. She clearly has not listened to her sons, L and A, or is frankly simply lying when she so asserts. Equally I reject her evidence that A was badly bullied in his English school.

(xvi) I accept the evidence of T and L in particular that they were frequently neglected by their mother, who was preoccupied with establishing for herself a new life, her own life, using the computer frequently (for business or pleasure matters little) and at length, coincidentally thwarting the children from free electronic communication with their father.

(xvii) As a further illustration of her neglect, I accept the evidence that on two occasions two of the boys were put out of the house by the mother late of an evening and found themselves running around un-invigilated in the local small town centre square until rescued and returned to the mother by their Uncle Pablo.

(xviii) By 9th December T was telling her father, "I wanna go home" followed by one of the little "sad" faces which appear on digital screens. By 12th December she was asking her father to get her a school in England (see Volume C 451(b).)

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(xix) The mother was clearly determined, after years of unhappiness in England, to have a new life of her own. She was significantly unavailable to the three oldest children, who, I find, were telling her of their unhappiness and their wish to go home to England. She ignored them.

(xx) The three oldest children have all made it abundantly clear over many months that England was, and remains, home, and that Spain was in effect unreal, with no sense that they belonged there, or were at home there. See in this context the three reports of Ms. Vivian where their thoughts are set out, and the earlier passages of this judgment where I consider Cobb J's, and my, views about the reliability of those expressions (paragraphs 45 – 50 above).

(xxi) In that context see by way of further illustration L's remarks to Ms. Vivian in her third report at paragraph 30 (clearly relating to the period in question) at D76:

> "30. He told us it was quite stressful being asked questions. He talks to his mum the same amount as before, stating that often she is not at home, but if she is she calls regularly to talk. They talk for a long time, but he can't see her as she does not use Skype much. L said that living in Spain was 'pretty hectic' adding 'I really really want to stay here. If we lose I want to stay'. I put a scenario to L asking him to imagine how he would react if I were to come to collect him to say I had to return him to Spain [I reiterated this scenario was make-believe and would not happen in real life.] He said he would run away and would try to 'make it not happen which wouldn't involve me going to Spain'. He thinks 'everyone's really nice here; it's where I am originally from. I want to stay here, its home, when I am older I will live here', adding

> ‘you know where you are, everyone’s really nice’. L went on to say he felt ‘awkward in Spain’ he did not ‘feel how I felt in England. Everyone’s different there, the atmosphere is different. I didn’t want change half way through my life’.”

See also the observations A made to Ms. Vivian in that report about, in particular, his school life recorded at D78, paragraph 36, where he uses the term “wasted” of his life if he had to return to Spain, clearly reflecting his view of it in the same period.

(xxii) Ms. Vivian has considered the possible influence of T on L and A, but says unequivocally at paragraph 36 of her second report of 7th May of last year:

> “36. If the judge said he had to return to Spain A said ‘we would just be shocked, what else can we say about it? Our lives would be gone and wasted’. ‘Last time when we lived in Spain she put us in school it was really bad, I had no friends there, school was really horrible’. A went on to talk about his views of England. He likes it here as ‘everybody knows everybody’ and everyone in school knows one another, ‘you can have really good friends’. He thinks there is a higher level of education which is important to him. On returning to Spain he said he would not ‘let that happen’, he would say ‘why do you do this. Would just make it worse’, I asked what he meant by worse, he said ‘the family, N is only 5, he won’t remember his father or sister’. For him he would ‘not be with some of my family any more, not nice to have a split family; I suggested that his family was split now, he added ‘not really, we can Skype mum every day. She’s our family still. In some other ways it’s like she’s not in our family’. He regards T as part of the family, ‘she’s part of my family, is always nice, very helpful. We’ve had T for a long time. We won’t be able to Skype her or whatever.’”

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56 As is clear, I find the mother to be a woefully unreliable witness about so many issues concerning this period of July 2012 to January 2013. I have given myself a 'Lucas' warning when considering her evidence. In large measure I find her to be deliberately lying in order to establish/support her case that the children were integrated in Spain, and were in fact failing in this country before relocating to Spain.

I also unhappily have come to the clear conclusion that in that period (and subsequently) she did not, and even now does not, listen to them. Perhaps the most obvious illustration of this was her challenge to the authorship of an e-mail written by T to Ms. Vivian, dated 20th February 2013 (see D18/19), a document which Ms. Vivian and Cobb J had no trouble in concluding was her own work and an expression of genuine feeling. This lack of credibility in her account, and lack of sensitivity to T, impacts heavily on my consideration of her evidence about the integration of the three oldest children. For the avoidance of doubt I share the view of Ms. Vivian and Cobb J in respect of that e-mail.

57 In assessing the question of some degree of integration I must consider it in the context of what had gone before, for as Lady Hale observed at paragraph 63 of LC, "some habitual residences may be harder to lose than others, and others may be harder to gain." The third report of Ms. Vivian and the statements of Ms. Chadha and Miss Blackburn all emphasise the value the children place on their earlier lives in England, the rich texture of it and the deep roots they had and

have in England. See, for example, A to

Miss Chadha at C386, which reads:

> "13. A and his siblings have been in England living with their father in the family home in B since Christmas 2012. A said "*I want to stay here, this is where my family and friends are, you cannot take away your relationships with other people.*" He has resumed lifelong friendships since going back to S M school in B. His best friend is J. A told me that Spain, "*it is not the same place as where I normally live and where my life is*". A went on to say "*I do not feel like myself in Spain, I feel like I am in someone else's country not mine*". A went on to describe that he feels like they were living in a "*haunted city….no one can see us in that country we are there but no one can actually sees us in that country*". I asked him what he meant when he said that "*the people in Spain cannot see me,*" that he feels "*invisible*" but "*I don't feel like that here in England*". I asked A whether there was anything about living in Spain that he liked, he said "*no*"."

See also T to Miss Blackburn at C429:

> "13. Whilst at primary school T undertook a lot of extracurricular activities. She recalled having a club or class to attend most nights of the week (cookery club, Brownies, swimming, netball etc.). T told me that she had also been selected by S M for the Gifted and Talented Course. I am told that there was no fixed quota for the school and only she and a boy called D P had been selected from her year. Having been selected T attended various courses (maths, French, Latin etc.) and competitions. In Year 5 (i.e. the penultimate year of primary school) T had also joined "The Da Vinci Group", an online learning platform for gifted young students which, she tells me, is a collaboration between Warwick University and Brasenose College, Oxford. It offered T the opportunity to interact with other students and develop skills in communication, philosophical thinking, debating etc. T has told me that she really enjoyed the Da Vinci Group, "it was challenging, I fed off it, I enjoyed using my brain, I am competitive and I was up against 14 year olds". T told me how she had competed against 14 years in a debate and won a scholarship. Although she had not been able to attend the resulting course that she was competing for (as the scholarship only covered 90% of the fees) she described it as "great to win though"."

58 It should not be thought that I have ignored, in considering all of this material,

and the arguments put forward as contra-indicators to the case put by the

children, the wider evidence not otherwise referred to in great detail. See by way of illustration passages in paragraph 69 of Lady Hale's judgment (factors relevant to all four children). See by way of further illustration what L told Ms. Chadha in June 2013, recorded at C348(13), which suggests that he at least was happy at school in Spain. Paradoxically that he should offer that information, though it may be said to undermine his overall case, adds to the weight to be attached to his broader criticism of life in Spain in that period, for he is very clearly capable of discriminating between good and bad experiences (however limited the former category may be).

Habitual Residence: Discussion

59 It is impossible to do full justice to the texture, which I have earlier described as a rich one, of all the material which has been supplied to me. I have attempted to give a flavour of it but it requires detailed attention.

60 I shall turn in a moment to the issue remitted by the Court of Appeal, but at this point (not too reductively) simply state that this sibling group is a very close one, with multiple pleasures in their relationships with each other, and a high degree of mutual emotional dependency – they simply cannot conceive of being separated from each other. This strength of attachment is not newly forged but clearly long-standing, and the events of the last two years have enhanced its importance. The feuding between these two parents has left the children conflicted, unwilling to choose between them, indeed at very great pains not to do so, a responsibility they should not have to bear. These acute and unresolved

problems between the adults have most obviously affected T, who, in the opinion of Ms. Vivian, which I accept, based firmly as it is in the evidence, wants to restore her relationship with her mother (an aim the mother is by her behaviour thwarting) – see as but one example of this paragraph 95 below, and the wider observations of the children as a group summarised by me in paragraphs 81 – 102.

T

61 I have come to the clear conclusion on the facts as now established, going considerably beyond those found by Cobb J on the limited information then available to him, and then not approached from the perspective now required of the court, that T never lost her habitual residence in England in July 2012. Her state of mind as illustrated by her history prior to that date in the very brief period from that date to 5th January 2013, and in what she has said subsequently to further illuminate her views (consistent as they have been) leaves me in no doubt. There was no "sufficient integration."

L

62 He has made remarks about his school in Spain, which I reported earlier, and those remarks were of a positive nature. But even there he (willingly) had to adopt the responsibility of looking after the welfare of his brother A in the absence of the mother doing so. As for his life outside school in the relevant period, and taking account, as I did with T, and shall do with A when I come to

consider him, of the history before the relevant period, and what he has said about this issue subsequently, I have come also to the view that he never lost his habitual residence in England. Expressions such as "having a go" and "making the wrong choice" in respect of his time in Spain do not undermine this finding. Objectively, on the basis of my factual findings, and subjectively as gleaned from his words and behaviour, this is established. It is a finding supported also in my view by the totality of the experiences of all four children together, and because of the deeply committed relationships which bind them together.

63 These children have shared their experiences with each other and have clearly discussed them with each other, considered the impact of those experiences upon the way they were living, and their individual and collective responses to those matters. It seems to me that whilst I must consider the facts relating to each child separately, for the facts and their responses to those facts will vary, I also, as Lord Wilson and Lady Hale made plain, have to consider them as they plough their furrow together, there being
a "solidarity in the presentation of the three older children" as described by Ms. Vivian. [B198, paragraph 43]

A

64 For the same reasons as apply to L, I do not consider A to have lost his English habitual residence. There has been insufficient integration.

65 In coming to these conclusions I have weighed in the balance, amongst many other factors referred to above, the fact of the continued existence of their previous home, and that their father continued to live there, as well as the strength of their ties, and the duration of those ties, in England. In counterpoise I have also considered the very clear abandonment by the mother of her habitual residence in England, and her almost immediate establishment of a new habitual residence in Spain with all of her rich ties to that country, linguistic, social, familial, and furthermore that the father, albeit with reluctance, consented to the move; but the children did not.

66 Should I be thought wrong in my above recorded conclusions in relation to T and/or L and/or A, I consider it more likely than not that each of these children would at <u>the least</u> have lost their English habitual residence but not acquired one in Spain by 5th January 2013.

<u>N</u>

67 I have found N's position the most difficult to resolve for obvious reasons. His comments on the subject of living in Spain, whilst negative, do not have the same range nor the same weight as those of his older siblings. Not only is there a paucity of observation by him, but his age and level of maturity merely suggests to me that I should record his views without in any way regarding them as overly influential. In this respect see Ms. Vivian's third report at D74 (paragraph 19) to D75 (paragraph 26) inclusive, and in particular on this issue paragraph 24 which reads as follows:

> "24. I talked to N about his feelings about Spain. He said he is 'trying my best to say I don't want to go to Spain because we have been here all our lives and because my mum puts us out in the night and she lets us go to school on our own'. I asked what he meant by 'puts us out at night'. He said she says 'go to your friends and I don't know where my friends lived. My dad was there, but I did not know he was there. I asked whether he meant he was in his mother's house. He said he was, 'it's my grand-mother's house'. He added, in relation to living in the UK, 'we've been here all our lives….since we were babies…' "

68 Whilst it is clear that that there is no rule of law that a child takes its parent's habitual residence, it is clearly recognised that a factual analysis may lead to such a conclusion (see, for example, paragraphs 61 and 62 of Lady Hale's judgment).

69 Given the factual circumstances of his life in that period (bearing in mind that there is much less evidence about him) I have reminded myself of the words of Lady Hale in paragraph 60 when she says:

> "All of these factors feed into the essential question which is whether the child has achieved a sufficient degree of integration into a social and family environment in the country in question for his or her residence there to be termed 'habitual'."

70 Overall, bearing in mind as the context that N was living in the same place, and sharing many of the same experiences as those encountered by his siblings, including all the deficiencies of care identified by them, including also the destabilising effect of the absence of any real texture to their contact with the father, and having considered that the oldest three had not acquired habitual residence, it is open to me to conclude that he had not either. He is very much a

part of this tightly bound sibling group. Whilst I recognise that his position by virtue of his age is less clear-cut than the position of the oldest three, I find on balance that he too did not lose his English habitual residence, or, if he did, he did not by 5th January 2013 acquire a Spanish one. His remarks at paragraph 24 of Ms. Vivian's third report support such a view as to an insufficiency of integration having been established, as does his comment reported in paragraph 25 that his mother took him to Spain without dad, "I felt sad", showing is this one example alone the strong pull in the opposite direction. I do recognise, though, that I should not over-interpret these remarks, for of all the four children he may well be the most susceptible to influence from his siblings, or be simply repeating what he has heard from another, rather than recalling events from his own experience, as Ms. Vivian suspects.

71 I have in so concluding given weight to the assessment of Ms. Vivian, recorded in summary form in Mr. Kearney's closing submissions at paras 19 and 20, which read:

> "19. The Guardian emphasizes the unity of the sibling group and the court is able to consider this sibling unit – as apart from their permanently disputatious parents – when considering the habitual residence of its constituent members.
>
> 20. The Guardian's 3rd report highlights the closeness of the siblings and N's position within the group. Although observed in England under the primary care of their father, on balance it is likely that the same sibling dynamic obtained in Spain under the primary care of their mother.
>
> > "51. T, L, A and N present as a close, interdependent and highly functioning sibling group who have always lived together and who have gone through difficult experiences

> which in all probability have brought them even more together. They have each reported above on how they view their siblings and I will not repeat what they have said, as I think their comments speak for themselves. They report mutual respect for each other; they engage with each other in play and learning and seem to me to operate as a 'team'; they care for each other and love each other. Significantly, despite holding their own individual views and feelings that they acknowledge and accept, they have made clear through their actions in these proceedings that they wish to remain as a sibling unit in this country. For them, to be separated from each other across jurisdictions is not an option they can countenance. I would say on their behalf they find the prospect intolerable.
>
> 52. It seems to me that, as is usual, these siblings have affinities, alliances and sub-groupings. T and L, being closer in age, engage in 'grown up' activities together such as listening to music [almost certainly the younger ones will benefit from this older sibling knowledge in the future]. L, A and N play a lot together, A and L share mutual school friends, it seems that L has done and continues to take the shyer A 'under his wing';
> A 'plays and chills' with his friends at school, he said A did not have school friends in Spain and he would 'come and hang out with me and my friends'. All of the siblings interact with N and 'look after' him; T reads with him, A helps dresses him and from my observations A and N are particularly close. The head teacher at the boys' school confirms the closeness between the boys.""

I agree with those paragraphs, mirroring the findings made above (paragraph 70) as to their shared experiences as a group and the impact that has on integration.

The Spanish Proceedings

72 Before I turn to the question posed by the Court of Appeal, it is relevant to say a little here about the proceedings instituted by the mother in Spain in April last

year. Those proceedings have post-dated the father's proceedings issued by him under Part II of the Children Act 1989 in the County Court seeking relief under s.8 of that Act by way of "protective orders". Those proceedings were issued by father on 10th January of last year. He notified the mother of them orally the same day when he telephoned. I am told that those proceedings have been stayed but cannot find any relevant order in the papers before me. I simply have to assume that to be the case for these purposes.

73 In the carefully crafted and detailed statements filed by her Spanish lawyer on her instructions in the Spanish proceedings, there is no mention of those English proceedings.

74 Recently, on 28th February 2014, the Spanish court gave a lengthy ruling granting the mother relief in relation to the children, and in particular the care of all four children, with both parents sharing parental responsibility, and granting the father contact rights as follows: one-half of the Christmas, Easter and summer school vacations; alternate weekends in Spain when he can make the journey, and that the father can take the children from Spain but only with the mother's written consent.

75 The lengthy judgment of the Spanish court makes no reference to the County Court proceedings, though it does refer to the Hague Convention proceedings. Jurisdiction in the Spanish courts is ruled appropriate within that judgment,

which says this (in this context):

> "The proceedings in England as well as the ones in Spain have been commenced by the mother. There are no records that the father has commenced any proceedings in Spain or England. The purpose of the proceedings commenced by the mother in England under The Hague Convention is for protective measures to be taken in relation to the return of the children."

And later:

> "On the other hand, the judgment delivered by the English courts does not have any *res judicata* effects due to the special and summary nature of the referred proceedings of protective measures given the current proceedings, which are proceedings of entire judicial cognisance that have *res judicata*."

It is noteworthy that the mother and her Spanish lawyer attended that hearing, and indeed the mother gave evidence along with other witnesses. It is further clear that they made no reference to any English proceedings in the course of so doing.

76 It thus follows that the mother misled the Spanish court. What is equally clear is that she made no reference to the appeal to the Court of Appeal in England and its outcome, nor to the Supreme Court judgment, nor to the hearing directed by both of those courts, which has taken place before me. Indeed, the case was set down for some three days in March of this year, but was not reached because no Judge was available. There is no reference to that abortive hearing either, although the mother well knew of it. Thus, it appears to have proceeded on an entirely erroneous basis as to jurisdiction. I leave aside whether or not the mother was in breach of her undertaking to Cobb J on 23rd May 2014, not to

bring an "*ex parte*" application within the Spanish proceedings concerning the return of the children to that jurisdiction.

77 What was very clear from the mother's oral evidence to me was that she regards the order of the Spanish court as a trump card entitling her to do whatever she wants in relation to all four children. One of the consequences of this is that she assured me that she will not seek to inhibit T from coming and going to and from Spain by deploying the order of 28th February of the Spanish court, but moments later in her evidence she reversed this position and said she would enforce it. Thus T is, as she has been for some considerable time, left in the invidious position that she might find herself as at high risk of being kept in Spain against her will if she went there to see her mother, or the three boys, if they are returned in proceedings under The Convention and the Regulation.

78 As to the father seeing the boys for contact in England if they were to be returned to Spain, she was clear in one part of her evidence, that she would permit the boys to come and go to and from England for contact purposes, but that in no circumstances would she consent to a variation of the order of 28th February 2014.

79 She has in consequence of some entries in one of the father's most recent statements (which I need not set out) concluded (although the father denies it) that he has, to use contemporary parlance, "hacked" into her telephone or

computer. She has accordingly made a criminal complaint about this in Spain and enquiries by the Civil Guard are ongoing. Thus potentially the father, if he sought to enter Spain, might well find himself arrested and contact thwarted, and his liberty impeded. Certainly L thinks that to be a real risk (see paragraph 92 below).

80 The mother sought to persuade me that all these potentially highly unattractive consequences for the father, and consequently the children, would not occur because she would take no action to enforce them. I am sorry to say I did not believe her. Her rage at the father burned brightly throughout her evidence. She is, I find, more likely than not to do whatever she can to thwart him. She considers the Spanish order gives her the authority to do what she likes with each of these four children.

The Question Posed by the Court of Appeal

81 I have earlier set it out at paragraph 9(i) above. If I am right as to my findings on the question of habitual residence of the four children, I need not of course go on to consider this matter. But in the event that I am thought to be wrong as to habitual residence, I have decided to give my views upon it.

82 The question assumes that return orders might be made in respect of the boys, and that the mother does not seek to enforce a return of T to Spain under the Regulation, thus bringing about a separation between the four children.

83 In passing, I note that the mother, at those points in her evidence when she stated she would not enforce T's return to Spain, said that if the boys came to her in Spain under return orders, T would soon follow on voluntarily. I consider her, having read and heard her evidence, and that of T, to be profoundly wrong in that assumption. It does, however, by a side-wind, illustrate that she recognises the power of the siblings' attachment to each other.

84 What would be the view of the children if there were to be such a separation?

85 It is worthwhile looking at the boys' and T's current statements, for although in one way or another this question has hovered over them all, it has become the subject of sharply focused enquiry since August of last year at the latest, and has been brought painfully into play as this hearing approaches, and in particular, as Ms. Vivian (entirely appropriately) came to interview the children for the third time.

86 The place of those recent interviews was their home. When seen together the boys "sat closely on the couch together and touched and inter-reacted with each other affectionately. A, in particular, was affectionately watchful over N." There was later, as Ms. Vivian interviewed T on her own, evidence of "a lot of fun and games in the rooms above", suggesting to me that even in these strained circumstances as they waited to be seen themselves there was a real and deep

attachment between each of them, and they supported each other in this fashion. But that vignette does by no means stand alone, and would provide but a slender thread if it were standing alone.

87 T summarises her position at paragraph 15 of Ms. Vivian's third report, which reads as follows [D73]:

> "15. T describes her relationship with the boys as 'very normal'. She is very close to L, although they have a lot of arguments as well. We discussed their differences in music, he likes rap, she likes Indie. She was interested in my music choices. She said L is a lot like her; 'more outgoing, we speak our minds a lot, more confident. We have a close relationship but means we fight more; I'm close to his friends too. [We are] the duo of humour, tricksters', she went on to tell me about an April fool's joke they played on their father. N, she thinks is 'quite independent, he has learnt to read already…it makes us closer because I'm like that as well, we read together in bed'. She added 'we noticed how incredible he is'. She would miss him the most if he had to return to Spain; 'we are really close, he is so sweet….there are times when we're upset, he makes us feel better, he's really caring , he has a sense, if he knows something's serious he goes over and holds hands. He has had it ever since he was little'. She thinks L and A are more like her father, 'very capable, they just don't love it [reading] like I do'. T explained A is 'very different' to the rest of us, a 'different person, more shy, less outgoing. He has a clever sense of reason and justice.'"

T later said that she "thinks that she would be 'OK' staying if she knew the boys wanted to return". NB, this position is dependent on the boys going voluntarily, not being coerced against their will, as is quite clear from her phrasing.

88 Miss Blackburn addressed this issue in her second statement of 4th April of this year at paragraph 46. She says this at page C438:

> "46. I believe that T finds the idea of her brothers being forced to return to Spain and being separated from her almost too painful to comprehend. I recall that she grimaced when we talk about it. This issue will be addressed by Ms Vivian in her report when she meets with all four children later this month and I do not seek to say anything substantive

regarding this issue save to record that even though T readily recognises that it would be "horrible" she would chose to stay in England rather than accompany her brothers back to Spain. She has told me that it would be all the more painful because (a) she knows how intensely they [T's brothers] don't want to return and/or live in Spain ; (b) she would be where she wants to be and she would know that they were not where they wanted to be; (c) she knew that not having her with them in Spain would make matters worse for them in Spain, "they would be lost" ; and (d) she would be forced to make a decision even though she knows what her decision will be."

89 N was not really asked about separation directly, as is entirely understandable.

90 L, considers Ms. Vivian, has a "certain vulnerability" and had difficulty "processing his emotions", though is honest and clear when he does speak. I accept her judgment in this matter. L's view on separation is recorded in paragraph 32 of Ms. Vivian's recent report. It reads at D77:

> "32. He talked on and said 'most of the stuff is hard to describe, it's something I have inside', adding 'if I go to Spain nothing will forgive her making us go there, even a million pounds will not make me forget she took us from the country we want to live in'. I asked him who he meant as 'we'; he said me, brothers, basically family'. I asked how it would be if T stayed in England as his comment had referred to himself and his brothers returning to Spain. He said 'that's worse than going to Spain, if we all go it's awful, can't describe, it's so bad, but separately as well I can't describe how horrible it is and split us apart so we can't see each other'. He went on to say they would not be a 'full' family, it would be 'awful, even if we go to see her in holidays'. We discussed separation from T further; he said 'it is not just T, anyone in the family.' I asked if he meant his father, he said 'yeah' but explained that he is used to not being with one or other of his parents. Interestingly the point he was making was about what he regards as his family i.e. his siblings. He explained 'it is awful to be separated from another parent, but I am used to it, but siblings is different'."

91 A said on this occasion that if the Judge orders a return "we would just be shocked, what else can we say about it? Our lives would be gone and wasted."

This rather dramatic phrasing nevertheless reveals the strength of his views. At paragraph 36 of Ms. Vivian's report he is recorded as saying this at D78:

> "36. ……. On returning to Spain he said he would not 'let that happen', he would say 'why do you do this. Would just make it worse', I asked what he meant by worse, he said 'the family, N is only 5, he won't remember his father or sister'. For him he would 'not be with some of my family any more, not nice to have a split family; I suggested that his family was split now, he added 'not really, we can Skype mum every day. She's our family still. In some other ways it's like she's not in our family'. He regards T as part of the family, 'she's part of my family, is always nice, very helpful. We've had T for a long time. We won't be able to Skype her or whatever.'"

92 A had last summer said to Ms. Chadha that if he were to be separated from T and L "This will mark us for life and we will never forget this moment." (C361 paragraph 28). Neither he nor L have changed their position on this subject of separation over many months.

93 L expresses a fear that one way or another, if there is a return to Spain, his mother will either, through the courts or otherwise, stop contact with his father. I think regrettably that he is perhaps right about that as a likely outcome. I have commented earlier on the mother's anger at the father. She had nothing but bad things to say about him in her oral evidence, and she purports to regard him as a deeply malign figure, manipulative, domineering and dangerously influential over the children.

94 The mother was wholly dismissive of this fear of L's and her immediate response was to draw attention to the fact that the current arrangement meant

that she was separated from the children herself, thus illustrating issues of separation were not a one-way street. The children speak very regularly and frequently with her (as noted earlier, sometimes as much as five times a day); they dearly miss her, and clearly miss her; they feel conflicted in their loyalties in stating that they want to be in England, and are profoundly puzzled and frankly distressed that for no good reason they are aware of she has only seen them face to face three times since the proceedings began. I regret to say that I too fail to understand why she has not seen them more frequently. It has not been because of the father's influence, as she alleges, nor their unwillingness to see her, for they positively long to, and she has, through solicitors, been requested more than once to make arrangements so to do.

95 On this important subject Ms. Vivian says at paras 47 and 48 of her third report:

> "47. All of the children, including T, have reported their wish to have and to continue to have a relationship with their mother; she is an important person in their lives. Despite reporting that she has failed and still fails to understand their past and present wishes about living in Spain and feeling that she has prioritised her own life over theirs, all four children very much want to see their mother, in England. I consider their actions in speaking to her on a regular basis evidence of a determined effort on their part to maintain their relationship with her. All of this indicates that, from their side, their relationship(s) with their mother are potentially enduring; however I do think that their relationship(s) with her, to differing degrees, have been damaged and are in jeopardy. Further enforcement of her current position is likely to cause further damage, perhaps irreparable."
>
> 48. These particular children, given what they have been through in their short lives, [extended parental disharmony in the family home, parental separation, a move to another jurisdiction, in excess of 12 months of 'summary' legal proceedings including the anticipation of a return order which breaks the sibling group], are very likely to have difficulty renewing their bond with their mother, especially as I cannot but share their

> uncertainty about her ability to meet their emotional needs. They would be thrust into a situation having not spent any 'real' time with her since they left Spain. Whatever the outcome of these proceedings work towards repairing their relationship with their mother will need to be undertaken with and for these children and I cannot be confident about the mother's capacity to do this."

96 I regret to say I agree. A good example of her approach was a phone call she had with T on 8th May this year. In her oral evidence the mother told me about this, and she agreed that (having just read Ms. Vivian's third report) she had said to T that she, T, had got what she wanted; that she, the mother, would never see T again; that "it" (ambit unclear) was all T's fault, and that T would realise what she had done when she was older, and that T would feel guilty. She was clearly very angry with her daughter. Further comment on this call and its emotional impact on T is superfluous.

97 Ms. Vivian assumes, rightly as I have earlier found, that it would not be possible for the father (certainly for the foreseeable future) to go to Spain to be with the children. She says:

> "In the absence of any concrete evidence about the mother's ability to meet the children's needs on an emotional level, I think they (L & A) would be put in a situation which would be intolerable for them and there would be a real risk of harm to their emotional development."

(See paragraph 49 of her latest report). I agree.

98 By way of analogy, Ms. Vivian has quoted some of the principles set out by the British Association for Adoption and Fostering about sibling relationships,

including the enduring nature of them, their value and importance to the siblings involved, their powerfully supportive nature, et cetera. (See D83, paragraph 50). They are a useful cross-reference when considering what these children mean to each other.

99 In a number of paragraphs she refers in greater detail than hitherto to what these children mean to each other, how they play, how they support each other, and many other facets of their behaviour which combine to make these relationships particularly strong. (See D84, paragraph 52). She also reports in more detail what the children have said on the subject (see paragraphs 53 and 54).

100 I am conscious of having quoted throughout this judgment many lengthy passages from the statements and reports available to me. I do so again from Ms. Vivian's third report, for to attempt a summary of it would be too crude. The language and content of Ms. Vivian's paragraphs speak for themselves. At paragraph 40 is says this:

> "40. The day to day lives of these children have been unsettled and uncertain for almost 2 years. Such highly charged, emotive, and protracted proceedings which directly involve children to the degree that they have in this case are very likely to have had a major impact on their own individual development, their physical, psychological and emotional wellbeing. This should not be underestimated and I would urge all of the adults involved to have this consideration uppermost in mind."

101 At paragraph 51 she says:

> "51. T, L, A and N present as a close, interdependent and highly functioning sibling group who have always lived together and who have

gone through difficult experiences which in all probability have brought them even more together. They have each reported above on how they view their siblings and I will not repeat what they have said, as I think their comments speak for themselves. They report mutual respect for each other; they engage with each other in play and learning and seem to me to operate as a 'team'; they care for each other and love each other. Significantly, despite holding their own individual views and feelings that they acknowledge and accept, they have made clear through their actions in these proceedings that they wish to remain as a sibling unit in this country. For them, to be separated from each other across jurisdictions is not an option they can countenance. I would say on their behalf they find the prospect intolerable."

102 And at paragraph 55 this:

> "55. Splitting this particular sibling group in their particular circumstances would be intolerable and harmful for them, not only because of the distress at day to day separation but also the knock-on consequences. Individually, given their different personalities and ages and stages of development, the emotional toll would be great for all of them. The boys and T would experience loss which I think would manifest itself differently in each child and the experience for them, I think, would be akin to experiencing a traumatic event, the recovery from which would be slow and unlikely to be complete. As I have suggested, the experiences of the children to date already makes them already emotionally vulnerable. The sibling group is the one significant, lifelong and stable factor in their lives. Furthermore I am in little doubt that the loss experienced by splitting the sibling group would made all the more profound ['Our lives would be gone and wasted', A] by what would bring it about, namely their removal from their secure base and being taken to live in Spain where they were unable to settle in 2012 to live with their mother with whom [to differing degrees], I can only assess, they have a fractured relationship. "

103 "The children remain in limbo and the risk of emotional harm is now a real and present danger for these four children." [Part of Ms. Vivian's conclusions in paragraph 56]. I agree with all of these observations and have no doubt that if these three children are separated from T and returned to Spain there would be a

grave risk of psychological harm to each and a grave risk that each would be placed in an intolerable situation. Thus this defence is made out. The risks identified are not susceptible in my view to the establishment of protective measures in Spain. The problems are more fundamental.

Children's Objections: Jurisdiction to Reconsider

104 I begin this section by acknowledging that neither the Court or Appeal nor the Supreme Court overturned the findings of Cobb J on the question of whether or not in Convention terms the children had objected to a return to the requesting State. Nor did they remit the issue for further consideration. I understand, however, that the point was probably not argued in either forum as to whether or not there could or should be a second opportunity to consider this defence. I remind myself in this context both the Court of Appeal and the Supreme Court were imagining a very early return of this case to court for evaluation and conclusion, a goal long since missed.

105 I also acknowledge Mr. Setright's point made in his closing submissions that were I to consider the question again (which in any event he submits I cannot) it would be wholly unnecessary to do so if I had decided the issue of habitual residence of the four children in the way that I have. For the same reasons that I went on to consider the question posed by the Court of Appeal, I have gone on to consider this issue also.

106 Proceedings under the Convention and the Regulation are usually "summary", and the time frame for them in countries where the Regulation operates has been agreed by those countries to be, ideally, six weeks.

107 Whilst there is nothing of which I am aware in the Convention or Regulation to permit a second look at the children's objections (if any), nor is there any provision to prevent it. That is no doubt, as I have made clear already, perhaps because of the intended summary nature of such proceedings, and that accordingly circumstances, including the lapse of time encountered here, are most unlikely to occur which would give rise to matters not already considered within that anticipated narrow period before resolution.

108 But it seems to me an affront to the subject children if circumstances beyond their control have conspired to cause this egregious delay, during which period their views have, in the light of their experiences, changed, or, as is argued here, remained the same as before but are now so firm as to translate from what were found by Cobb J to be preferences to become, as defined in the Convention and the relevant case law, objections.

109 I can well see that to permit a second look at this issue might play into the hands of a manipulative parent who had been engineering delays in the litigation, providing time to work on the children so as to distort their views. There might well be other influences at work as suggested by the mother. But it will be

recalled that these "snapshot" interviews of children the subject of such proceedings and proffering their objections by way of defence, are carried out by a cadre of highly-trained and very experienced practitioners in the CAFCASS High Court Team, astute at spotting such influences at work.

110 Happily, very few cases under the Convention or Regulation have, for whatever reason, a similar duration, or anything like. Thus, a change in circumstances permitting a second opportunity to argue objections is unlikely to arise with any degree of frequency,

111 Lastly, I am reminded that the Convention refers to the child who objects (present tense) and who is considered to have attained an age and degree of maturity at which it is appropriate to take account of its views. The passage of fourteen months since the first interviews, and twelve since the second, permits of the argument that it is unfair (I do not apply any adjective to the word) to the children not to permit the re-enquiry.

112 I emphasise that there would have to be a change of circumstances to justify this exercise. In this case the lapse of time argument is not the only relevant one, for, to list but one further matter by way of example, there has been the problematic history of, and future of, contact (real in the case of the mother, and potential in the case of the father) which the children have clearly been contemplating and will have factored into their views.

113 Even though the issue does not arise for consideration given my findings on habitual residence, I have as earlier noted decided to give my views on the subject and record my findings, for the reasons set out in paragraphs 106 – 112, and in order to avoid yet further hearings in the event that I am considered to be wrong in respect of habitual residence, or the 13(b) defence. I have, of course, considered it as a legally separate issue from the ones referred to in paragraph 9 above, although some of the evidence already set out in relation to both habitual residence and the Article 13 defence of "intolerability" is germane to the answer I give.

114 I remind myself that the objection has to be to a return to Spain, but that I can also consider, where for the child the question of a return to Spain is so inter-twined with a question of a return to the "left-behind parent", that aspect of the evidence.

Child's Objections: Discussion

115 In the course of this judgment I have set out much material which supports the conclusion that the children L and A object.

116 The themes include, but are by no means limited to, their views on:

(i) the deficiencies in the education they received or are likely to receive in Spain;

(ii) the real possibility that their father could not return there for contact without considerable risk;

(iii) thus they would be returned to their mother whose care of them is discussed above; and

(iv) who, in their view (and mine), will seek to interfere in the contact between them and their father; and

(v) the separation from T.

The factual basis underpinning those statements is clearly established. These are not fanciful considerations entertained by the children, but are rooted in reality.

117 L and A are now respectively11.4 and 9.4, old enough, and, demonstrably on the evidence of Ms. Vivian, mature enough to have their views taken into account. The combination of their innate characters, intelligence and experiences establishes this without question in my view.

118 Ms. Vivian has seen them now three times over a long period and has had the opportunity to see them grow (in every sense) and to observe any mutations in their stated views and the strength of them. I accept her evidence that had she been aware that this issue might resurface at this hearing, she would have asked different questions and structured the interviews differently. I do not consider, however, that that disables this further enquiry, especially given the wealth of material over a very long time in the lives of each of these children.

119 These are demonstrably not mere statements of whims, nor are they simple statements of wishes and feelings.

120 I have earlier found that L and A have not been influenced by their father or by T to any significant extent. They have been consistent in their views. They are well-founded on objective evidence. It is accordingly appropriate to consider them.

121 Having done so and taking account of the totality of the material available to me, and in particular Ms. Vivian's observations as to the strength of the boys' feelings in the light of their age and maturity (again I emphasise not a determination reached within the classical framework of such an interview) I find that these two boys do object (in Convention terms) to a return to Spain.

Discretion

122 Discretion is "at large". I, like Cobb J, have followed the guidance of the House of Lords in *Re: M (Abduction: Zimbabwe) 2007 UKHL 55*, especially at paragraphs 43- 46 taken from the judgment of Lady Hale:

> "43. My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare.
> I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in paragraph 32 above, save for the word "overriding" if it suggests that the

Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not.

44. That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.

45. By way of illustration only, as this House pointed out in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51; [2007] 1 AC 619, paragraph 55, "it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate." It was not the policy of the Convention that children should be put at serious risk of harm or placed in intolerable situations. In consent or acquiescence cases, on the other hand, general considerations of comity and confidence, particular considerations relating to the speed of legal proceedings and approach to relocation in the home country, and individual considerations relating to the particular child might point to a speedy return so that her future can be decided in her home country.

46. In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the

general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances."

123 Given my findings on "intolerability" and "psychological harm" (see paragraph 103 above) and the observations of Lady Hale in paragraph 45 of *Re: M*, I do not need to consider discretion in this context further for the probability of any court returning a child to circumstances such as that is nil.

124 As to the defence of the children's objections I would have exercised my discretion, had I had to exercise it, against a return to Spain. In so doing I would have taken account of the following:

(i) The underlying "purpose [of the Convention] is to protect the interests of children by securing the swift return of those who have been wrongly removed or retained." (See *Re: M* above, paragraph 44). The fundamental purpose has been thwarted in this case beyond question by its duration alone, and thus this factor is significantly reduced in importance.

(ii) The Spanish proceedings have only been considered in this court in passing, but on the face of it it appears that the English County Court proceedings may well have taken precedence over the Spanish ones. Irrespective of that point, the hearing before the Spanish Court in February was one-sided in that the father was not able to attend. Furthermore, the mother appears to have misled that court, and now makes it abundantly clear that she will attempt to uphold its order, come what may. In addition on the face of it the children did not have their voice heard in those proceedings. It seems therefore to me that although the Spanish court has given a judgment and made a consequential order, those proceedings are susceptible to challenge, and this court is able to find that there is at the very least an arguable case for saying that the relevant issues should be tried in this country, and/or that the Spanish order will not be enforced in this jurisdiction.

(iii) I have already referred to my findings in paragraphs 117 – 120, and do not need to repeat them, though they are all relevant to the question of discretion in the case of each boy.

(iv) They coincide with other considerations relevant to each boy's welfare for reasons too obvious to require further elaboration.

Those are my reasons.

SCHEDULE

STATEMENT OF FACTS AND ISSUES (Agreed between all Appellants and the Respondents)

Introduction

1 The parents will be referred to throughout as "the Mother" and "the Father" while the children will be referred to by the initial of their first Christian name.

Factual Background

2 The Father was born in the UK on 9th July 1966. He is now 47. The Mother was born in Spain on 1st August 1967. She is now 46. The parties met in O in May 1995 and soon started cohabiting. The Father, although English, lived for a large part of his childhood in Spain and attended British schools there. The couple never married. The Father is a professional flamenco musician. The Mother is a law graduate.

3 All 4 children were born in England: T on 27th August 2000, so at the date of appeal she will be 13 years, 2 months old; L on 4th December 2002, so he will be 10 years, 11 months old; A on 2nd November 2004, so he will be 9 years old and N on 29th December 2008, so he will be 4 years, 10 months old. The Father has parental responsibility for L and N but not T or L.

4 The children lived in B and attended local schools. It is common ground that the children were habitually resident in England and Wales for all of their lives

until at least 24th July 2012. The children would regularly fly to Spain with the Mother for holidays during the summer. T started her secondary education at O H S in September 2011, having secured a scholarship. Her place there was terminated by the Mother on the last day of the summer term 2012. I and A attended a local state RC school.

5 The parties' relationship had completely broken down by summer 2012.

6 The children flew to Madrid with the Mother, but not the father, on 24th July 2012 (the Father having driven the Mother and the children to the airport that day). Mr. Justice Cobb found that the Father was aware of and had agreed to the Mother and the children's relocation to Spain. He further found that the Father had similarly accepted that they would then reside in that jurisdiction for an indefinite period.

7 Upon arrival in Spain they stayed at the address of their maternal grandmother. They were enrolled by the Mother in local schools in Spain shortly before the beginning of term in September 2012.

8 The Father flew out to Spain for contact with the children on 1st November 2012 – in time for L's first birthday on 2nd November. He departed for England, alone, after a few days.

9 The parties agreed that the children would spend Christmas with the Father. He flew to Spain on 21st December and flew back to England on 23rd December. It was agreed that the children would return to Spain with the Father on 5th January 2013. They did not. L & A hid their own passports. They refused to return and asked their father to allow them to remain in England.

10 On 10th January 2013, the Father attended Oxford County Court and applied for a residence order. The proceedings were listed for a 30 minute hearing on 27th February 2013. No orders were made.

Hague Convention Proceedings

11 The Mother issued proceedings under the *Hague Convention on the Civil Aspects of International Child Abduction 1980 ("Hague Convention 1980") / Council Regulation (EC) No.2201 2003 (Brussels II Revised Regulation 2003) ("Brussels II Revised Regulation 2003")* on 22nd January 2013 having the previous day obtained without notice relief including a location order. The location order was executed on 22nd January 2013 and the case returned to court for directions on 29th January 2013. The Father filed an Answer on 4th February 2013 raising issues of habitual residence, child's objections and grave risk of harm intolerability. A report from the CAFCASS High Court Team was commissioned in respect of the eldest three children's wishes and feelings and Ms. Sarah Vivian of CAFCASS filed a report on 28th February 2013. The report when filed appended a lengthy e-mail from T to Sarah Vivian setting out her wishes and feelings and also containing information about the children's lives in Spain and their feelings of being unhappy with the regime in that country. The Mother later suggested that the e-mail had been dictated if not drafted by the father. The Judge accepted that T had written it herself when he later heard from Ms. Vivian.

12 The final hearing was listed for 5th March 2013 but no Judge was available. A further final hearing was listed for 13th May 2013 for 3 days with a pre-hearing review on 12th April 2013. The Judge for both hearings was Mr. Justice Cobb.

Pre-hearing review

13 At the pre-hearing review the Father made an application for T to be joined as a party to be represented by Sarah Vivian. His arguments centred on the dispute about the provenance of the e-mail appended to Ms. Vivian's first report and the difficulties the Father would have, in the light of the parental conflict, in representing T's views. He also suggested that T and her legal advisers may wish to consider whether or not she was able to form her own habitual residence independently of her parents. The application was refused, although Ms. Vivian was directed to file a second report which she did on 7th May 2013.

Spanish proceedings

14 On 30th April 2013 the Mother made an application to her local Spanish court seeking residence of all four children and orders restricting their contact with the Father in England. Those proceedings have been adjourned pending the outcome of the English proceedings.

Final hearing in the High Court

15 At the first hearing on 13th May Mr. Justice Cobb heard oral evidence from Ms. Vivian, the Mother and the Father. The evidence and submissions concerned mainly the issues of habitual residence and the child's objections. Both parents were seeking outcomes that kept all four children together. The hearing of evidence and submissions took three days and judgment was reserved until 23rd May 2013 to enable the Mother to have contact with the children prior to delivery of the judgment.

16 The Mother argued that all four children had become habitually resident in Spain by the relevant date (immediately before the retention on 5th January 2013) and that issues of parental consent, particularly given that the Father did not have parental responsibility for the two elder children, were not determinative but one of the factors. In any event, she argued that the Father

had consented to a permanent removal to Spain and or had acquiesced to them remaining in Spain prior to their return to England.

17 The Father argued that he had neither consented nor acquiesced to the children moving to or remaining in Spain. He contended that the children had not settled into their new environment in Spain and still considered England to be their home. He argued that when considering the children's habitual residence, the sibling group should be treated as one unit and the incidence of parental responsibility should not determine what was essentially a factual issue. He did not specifically argue that any of the children could form their own habitual residence independently of the parents' intentions or that their views on their 'home' were relevant to the determination of the habitual residence.

18 The Father and the Mother disputed the issue of whether the three older children's wishes and feelings amounted to an objection to a return to Spain. The Father contended that a return would expose the children to a grave risk of harm or otherwise place them in an intolerable position. He also contended that it would be intolerable to return the youngest child, N, if objections were upheld in respect of his elder siblings.

19 Mr. Justice Cobb reserved judgment. He handed down a written judgment on 23rd May 2013. He made orders for the summary return for all four children.

20 He made findings that the Father had agreed to the children living in Spain and had accepted these new arrangements. He found that the children had settled in reasonably well to their new life in Spain. He applied both English and European interpretations of the applicable test in relation to habitual residence, finding that there was no material difference in their application. He found that the children had lost their habitual residence in England on or shortly after

24th July 2012 and had acquired a habitual residence in Spain during the autumn of 2012.

21 He found that T objected to a return to Spain and was of an age and maturity for her objection to be taken into account. He found that L and A did not object to a return. He found that their views taken overall revealed an ambivalence about the current situation and that their answers taken together showed internal inconsistency and some confusion. He also found that both L and A had been to some extent influenced by T, who, as he found, holds some considerable authority in the sibling group. He exercised his discretion in respect of T to order her return. That discretionary exercise was reversed by the Court of Appeal (see below).

22 He rejected the Father's arguments on grave risk of harm and intolerability; he did not need to consider the separate argument in respect of N.

Proceedings in the Court of Appeal

23 The Father sought permission to appeal from Mr. Justice Cobb: this was rejected. Having been granted a short extension of time by another Judge of the Division, he applied for permission from the Court of Appeal on 13th June. He challenged (1) the (factual) findings on habitual residence in respect of all four children: (2) the exercise of discretion in respect of T: and (3) the findings that L and A had not objected to a return. On 18th June 2013, Lady Justice Black directed that a hearing of that application, with appeal to follow if granted, be listed with a one day time estimate and with expedition. A hearing date was obtained for 10th July 2013.

24 On 22nd May 2013, T contacted Sarah Vivian by e-mail to ask what she could do about the outcome. Sarah Vivian said T would have to return unless the Father

successfully appealed the order. T consulted solicitors and on 1st July 2013 she made an application for permission to appeal the order to return her to Spain.

25 L and A consulted their own solicitors and on 26th June 2013 they made a limited application to the Court of Appeal for permission to view the papers.

26 The applications of the children were rejected on paper by Lord Justice Thorpe on the basis that to admit the children "on some level…would risk the court's timetable…" and the learned Judge went on to direct that the Mother should attend the appeal hearing on 10th July 2013 and that consideration should be given to arranging a family mediation meeting on 9th July 2013.

27 T sought an oral hearing on her application, and on 9th July 2013 Lord Justice Ryder ordered T to have party status as a respondent to the appeal and adjourned her applications for permission to the full hearing the following day.

28 On 10th July the fully constituted Court of Appeal (Thorpe, Moses and Sullivan LJJ) adjourned the applications for permission to 1st August to enable family mediation to take place. T was present in court but L and A were not.

29 Both parents and the children (T, A and L) attended at the offices of the joint mediators on 15th July 2013 but the mediation was not successful.

30 The legal representatives for L and A renewed their application at an oral hearing (in the absence of other parties) before Lord Justice Ryder on 25th July 2013. He joined L and A as respondents to the Father's appeal. He granted them permission to appeal on the ground that they should have been granted party status and or further or better representation in the first instance proceedings. He granted T the same permission notwithstanding that T's legal

representatives were not present at the hearing. He directed that their other applications for permission to appeal be heard at the hearing on 1st August 2013.

31 On 1st August 2013, a differently constituted Court of Appeal (Hallett, Black and Gloster LJJ) heard from leading counsel representing all four parties (the Father, T, L and A and the Mother). T was present in court but L and A were not.

32 Judgment was reserved. Draft judgments were sent out and an order was made on 15th August 2013. The finalised and corrected judgment was not made available until 2nd October 2013.

33 The Court of Appeal granted the Father's permission to appeal on all the grounds of appeal. His appeal was however allowed in respect of one ground only: the discretion to order T's return. All orders in respect of T were therefore set aside/discharged. The rest of the Father's appeals were dismissed. All outstanding applications for permission to appeal by T, L and A were refused, and their outstanding appeals were dismissed.

Remitted High Court proceedings

34 The Court of Appeal stayed the return orders in respect of L, A and N and remitted the proceedings to the High Court for consideration of whether summary return orders should be made. Lady Justice Black indicated that the issue for the High Court was whether there would be a grave risk that their return would expose them to physical or psychological harm or otherwise place them in an intolerable position if they were to be separated from T. Due to lack of evidence, particularly from Ms. Vivian, the Court of Appeal felt unable to determine the issues themselves. Issues of the role of the children in the remitted proceedings were to be considered by the High Court.

35 At the adjourned directions hearing in the High Court on 17th September 2013, His Honour Judge Wallwork sitting as a Deputy High Court Judge, joined L, A and N to the proceedings and appointed Ms. Vivian to act as their Guardian. Prior to the hearing the Mother had stated that she intended to seek the return of T pursuant to the provisions of Article 11(6-8) of the Council Regulation (EC) 2201/2003 ("Brussels II revised") and T applied for party status in the remitted hearing. HHJ Wallwork dismissed T's application for party status. He directed the parties to exchange witness statements and for Ms. Vivian to file a further report. A 3-day hearing has been listed for 27th November 2013.

Appeal to the Supreme Court

36 The Father had his public funding extended to pursue an application for permission to appeal to the Supreme Court on 12th September 2013.

37 The Court of Appeal office informed the Father's and T's representatives that no application for permission to appeal could be entertained by the Court of Appeal until 1st October 2013. On that day both Father and T made paper applications to the Court of Appeal for permission to appeal to the Supreme Court. On 2nd October 2013 the Father's application was lodged in the Supreme Court office. T's followed on 4th October 2013.

38 The Supreme Court decided to consider the Father's application for permission notwithstanding that the Court of Appeal appears not to have determined his application for permission itself. On 9th October 2013 the Court of Appeal refused T's application for permission to appeal to the Supreme Court.

39 On 17th October the Supreme Court gave permission to the Father to appeal on the issue of habitual residency and to T to appeal on both joinder and habitual residence. The matter has been listed for a one day hearing on 11th November 2013.

Issues

40 In granting permission to appeal to the Father and T from the decision of the Court of Appeal, this court identified two issues for its consideration: (1) habitual residence; and (2) the joinder of T.

41 Those broad issues give rise to a number of particular issues:

a. How should a court determine a child's habitual residence in a case concerned with the 1980 *Hague Convention* as complemented by *Brussels II Revised?;*

b. Having regard to (a) did Cobb J and the Court of Appeal fall into error in their approach to this issue?;

c. How should a court approach an application for the joinder in 1980 *Hague Convention* proceedings of a child such as T?;

d. Having regard to (c) did Cobb J and the Court of Appeal fall into error in their approach to this issue?