



Neutral Citation Number: [2019] EWCA Civ 1956

Case No: B4/2019/1888

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT FAMILY DIVISION
DEPUTY HIGH COURT JUDGE GEEKIE QC
FD19P00319

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2019

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE ARNOLD

**Re I-L (Children) (1996 Hague Child Protection
Convention:Inherent Jurisdiction**

**Miss D Fottrell QC and Miss E Jones (instructed by Rayden Solicitors) for the Appellant
Father**

**Miss S King QC and Miss J Renton (instructed by Payne Hicks Beach Solicitors) for the
Respondent Mother**

Hearing date: 15th October 2019

Approved Judgment

<p>If this Judgment has been emailed to you it is to be treated as ‘read-only’. You should send any suggested amendments as a separate Word document</p>

Lord Justice Moylan:

Introduction

1. The father appeals from the order made on 16th July 2019 by Mr Geekie QC sitting as a Deputy High Court Judge. The judge dismissed the mother’s application under the 1980 Child Abduction Convention (“the 1980 Convention”) but made an order under the inherent jurisdiction requiring the parties’ two children to be returned to Russia.
2. In dismissing the application under the 1980 Convention, the judge decided that the children were habitually resident in Russia at the relevant date but that the father had not acted in a way which amounted to a repudiatory and wrongful retention as asserted by the mother. There had, therefore, been no effective breach of the mother’s rights of custody.
3. As initially framed, the father’s appeal contended that the judge’s determination in respect of habitual residence was flawed and that his decision to make an order under the inherent jurisdiction was insufficiently welfare based. The mother cross-appealed the judge’s decision in respect of wrongful retention.
4. Prior to the hearing of the appeal, the parties were informed that they would additionally need to address the relationship between the 1996 Hague Child Protection Convention (“the 1996 Convention”) and the inherent jurisdiction having regard to the decision of *In re J (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 1291. These were not matters which had been drawn to the attention of the judge below although they impacted on his decision to make an order under the inherent jurisdiction. The issue, simply expressed, was whether it was appropriate for the court to exercise the inherent jurisdiction having regard to the effect of the provisions of the 1996 Convention in the circumstances of this case.
5. At this hearing the father was represented Ms Fottrell QC (who did not appear below) and Ms Jones and the mother was represented by Ms King QC and Ms J Renton (neither of whom appeared below).
6. At the conclusion of the hearing we informed the parties of our decision, namely that the appeal and cross-appeal respectively against the habitual residence and the repudiatory retention determinations would be dismissed but that the judge’s order under the inherent jurisdiction would be set aside. These are my reasons for agreeing with that decision.

Background

7. The mother is a Russian national. The father is British. They married in 2013 and initially lived in England. They have two children born in early 2015 and late 2016.

8. As set out in the judgment below, until the birth of the younger child, the elder child “spent his time living between Russia and England” either with both parents or with each parent alone. Between January and September 2016, he lived in England, at times with both parents and at times with the father alone. Following the birth of the younger child, both children lived with the mother in Russia with the father visiting on frequent occasions and with the children also frequently spending time with the father in England.
9. In August 2016, the mother purchased a property in England.
10. In May 2017, the mother issued divorce proceedings in Russia. Despite this step, the parents were able, sensibly, quickly to reach an agreement about the future arrangements for the children. The agreement was formalised in accordance with the provisions of the Russian Civil Code. It provided that the children would live with the mother and that the father would have extensive contact in both Russia and England. By way of example, in 2018 the children spent 73 days with the father in England.
11. Everything, it would appear, proceeded largely smoothly until the end of 2018. Russian lawyers acting for the mother then informed the father that the mother intended to spend three months with the children in the USA. The father did not agree to this so the mother travelled on her own to the USA on 10th January 2019, leaving the children in Russia. While in the USA the mother gave birth to a child by a new relationship.
12. The mother returned to Russia on 20th March 2019. While she had been in the USA, the father had been unable to have direct contact with the children, either in Russia or in England, pursuant to the previous agreement. On 13th April 2019 the children went to the USA with the mother on an agreed holiday.
13. In May 2019 the parties communicated extensively about their proposals for the future. The mother proposed that the children should be with the father in England from 9th to 31st May and that from 1st June to 1st October 2019 they would be with her, also in England. Meanwhile, the mother rented out her home in Russia until the beginning of September 2019. She also asked the father to look at a nursery she had identified in England and to see what availability they had for the spring and summer terms. The father responded by asking what the mother was “thinking from 1 October”.
14. During the course of her messages to the father and others, the mother said: that what happened after October 2019 would “depend on what is available in the UK right now”; that she was “not living and working where I lived anymore. I am living with my new husband in the USA”; that a particular nursery proposed by the father would provide “good transition in case the boys spend the rest of time not in UK”; that she was in “transition” and that Russia was “out of scope”.
15. The judge summarised the position as follows:

“The words (of an exchange between the parents on 19th May 2019) have a plain meaning. The mother is in transition. She is likely to be in the UK until October. She wishes to live in the USA. She does not wish to return to Russia. She uses the words “out of scope”. When the father replies using slightly different words (“not an option”) she does not challenge his understanding of her words. I will consider the mother’s written and oral evidence about this below, but note at this stage, that, without more, the meaning of her words and the message they conveyed to F are plain.”

16. On 21st May the mother’s Russian lawyer wrote to the father saying that from October 2019 the mother planned to live with the children in the USA. In response to concerns raised by the father, the mother said that he was “right” about the USA not being convenient for contact and that the boys “need (their) father”. She then asked him to look at a specific school in England and suggested that they visit together.
17. The parties appear to have been, albeit somewhat chaotically, exploring options and trying to see whether they could agree what would be best for the children. As will be seen, these discussions came to an end following the commencement of proceedings in England.
18. I now turn to deal with the progress of legal proceedings in Russia and in England.

Proceedings in Russia and England

19. On 17th January 2019, the mother filed an application in the court in Russia seeking to amend the 2017 agreement. In February 2019, the father filed his own application in the Russian court, being unaware at that stage of the mother’s application. On 14th March 2019 the respective claims were consolidated. On 2nd April 2019 a report from social services was ordered. On 24th April 2019 there was an ineffective hearing in Russia.
20. On 31st May 2019 the father commenced proceedings in England under the Children Act 1989 and made a without notice application to a family court. The judge refused to make any orders without notice to the mother and adjourned the proceedings to 12th June.
21. On 4th June the Russian court allowed the father to withdraw his application.
22. On 10th June 2019 the mother commenced proceedings in England under the 1980 Convention. The judgment takes the relevant date as 12th June as this appears to have been how the case was argued before him. There is no material difference between the two dates and I will use 12th June to be consistent with the judgment below. It was the mother’s case that there had been a repudiatory retention by the father when he commenced proceedings in England.

23. On 12th June, these proceedings and the father's proceedings came before Newton J. He gave directions in the former, including listing it for hearing on 8th and 9th July 2019, and stayed the Children Act proceedings until the conclusion of the 1980 Convention proceedings.
24. On 24th June 2019 the Russian court made an order requiring the father to return the children to the mother. On 25th June the father appealed against this order.
25. On 2nd July 2019 District Judge Gibson registered the Russian court's order of 24th June 2019 and gave permission for it to be enforced although the time for appealing had not expired.
26. On 3rd July 2019 the mother's English solicitors informed the father's solicitors that, if no order was made under the 1980 Convention, an order for the summary return of the children would be sought alternatively under the inherent jurisdiction.
27. Following a hearing on 8th and 9th July, the judge provided his judgment to the parties on 15th July. By his order of 16th July 2019, he dismissed the application under the 1980 Convention and made an order under the inherent jurisdiction for the children to be returned to Russia by 19th August 2019. The order also provided for the dismissal of the father's Children Act proceedings upon the return of the children to Russia.
28. On 2nd August 2019 the father appealed from DJ Gibson's order of 2nd July 2019. On 5th August, Cohen J stayed that order until the determination of the respective appeals in Russia and England.
29. On 6th August 2019 the father lodged his application for permission to appeal the order of 16th July. I granted a stay of that order on 9th August and gave permission to appeal on 19th August.
30. On 13th August 2019 the Russian first instance court determined the mother's application and made an order for contact. The order included other provisions.
31. On 4th September 2019 the father's appeal from the order of 24th June 2019 was dismissed by the Russian court.
32. On 16th September 2019 the mother appealed out of time from an aspect of the Russian court's order of 13th August.
33. On 30th September 2019, the mother applied for the stay effected by Cohen J's order of 5th August to be lifted. On 7th October 2019, Cohen J refused to list this application for determination prior to the Court of Appeal determining the father's appeal from the order of 16th July 2019. An application by the mother for permission to appeal this order was sensibly withdrawn after this court had informed the parties of its decision at the hearing of this appeal on 15th October 2019.

The Judgment

34. The mother's case, as referred to above, was that the father had wrongfully retained the children by commencing proceedings in England on 31st May. This was said to be a repudiatory retention.
35. The father challenged this contention and also argued that the children were habitually resident in England as at the relevant date, being either 31st May or 12th June 2019. It was accepted on his behalf that the children had been habitually resident in Russia as at 13th May.
36. At the hearing, the judge heard oral evidence from the mother only. This was on the issue of "her intentions".
37. The judgment contains a summary of the relevant provisions of the 1980 Convention. It sets out passages from *In re C and another (Children) (International Centre for Family Law, Policy and Practice intervening)* [2019] AC 1 on the issue of repudiatory retention and from *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 606 on the issue of habitual residence. There is also a brief reference to *In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] AC 1017 dealing with the exercise by the court of its inherent jurisdiction.
38. The judge analyses the history and the evidence in detail during the course of which he made a number of observations. These included that "as at March 2019, I consider that, from birth, (the children) experienced a significant lack of stability". The early weeks of 2019 would "have been particularly destabilising for them" as they were not with either parent. He also makes clear that he found the mother to be an unsatisfactory witness.
39. The judge concluded, in paragraph 59 of his judgment, that as at 21st May 2019:
 - "a) There was broad agreement that the children would be in England until October 2019;
 - b) M was actively interested in living in the USA in the future;
 - c) M was prepared to contemplate living in England beyond October;
 - d) F, with M's approval, was researching longer term plans for the children in England;
 - e) Nobody was talking about a return to Russia"
40. On the issue of habitual residence, the judge, using the see-saw analogy from *In re B*, analysed whether the children had lost their habitual residence in Russia and become habitually resident in England by either 31st May or 12th June. His conclusions were as follows:

“[69] The children experienced a lengthy period of separation from both parents in January, February and March 2019. This will have affected their security and stability and rendered fragile their integration to what was their home state – tugging at their roots. After a month in the USA, they arrived in England on 13.5.19 with both parents having in mind that the stay would be for several months. The father’s home in England is a very familiar environment to the children where they would quickly and easily achieve stability. They had started to attend football coaching and swimming classes. Both parents began to research options for a longer stay in England. The mother was considering a further move (to the USA). The mother had begun to sever her ties in Russia by letting out her house, albeit for a period which would have permitted re-admission in September 2019. As set out above, the mother was actively considering plans away from Russia and had ceased speaking about a return to Russia. I bear in mind that my focus must be on stability not permanence and that the assessment is qualitative not quantitative. I should look for some degree of integration, not full integration.

[70] Giving appropriate weight to all of these matters I have to look at the lives of the children between 13.5.19 and 31.5.19. Viewed from their perspective, there was little taking place in their lives that was any different from other holidays that they had spent with their father. I do not regard football coaching and swimming classes as being significant changes. The parental plans being made for schools and home were far from being agreed between the parents and had not begun to impact on the lives of the children. I do not consider that they had formed the roots necessary to establish habitual residence. The see-saw had not swung. I take the same view of the period between 13.5.19 and 12.6.19. The children remained habitually resident in Russia.”

41. On the issue of repudiatory retention, the judge decided that the father’s actions did not amount to a repudiatory retention. The commencement of proceedings in England by the father had been “reactive” principally to the proposal from the mother’s Russian lawyers that the mother planned to move with the children to the USA. The judge concluded, incorporating quotes from *In re C*, as follows:

“I consider that the fact of his application to his local family court evinces a desire to prevent sudden change in the lives of the children, to achieve stability via a legal process. He was not “insisting on unilaterally deciding where the child will live”. He was not demonstrating a wish not to honour “the temporary nature of the stay abroad”. He was not setting “about making [the temporary stay] indefinite, often putting down the child’s

roots in the destination State with a view to making it impossible to move him home". He was not acting in order to prevent a return to Russia. He had just been informed, by inference, that M had no wish to return to Russia."

The judge expressly considered the point emphasised on behalf of the mother, that the father's application sought not only a prohibited steps order but also a "lives with order". He also paid "close attention" to the father's statement as he had been invited to do by counsel for the father.

42. Taking all these matters into account, the judge decided that the father's actions did not amount to a repudiation of the mother's rights of custody but that, as referred to above, the application to court had been "reactive" and without the intention of denying or repudiating the mother's rights. Accordingly, the judge decided that the 1980 Convention did not apply.
43. The judge next decided that, pursuant to Article 5 of the 1996 Convention, it was the courts in Russia which had substantive jurisdiction. He decided that Article 13 applied because the measures requested by the mother in the proceedings in Russia were "corresponding measures" to those sought by the father in England and were "still under consideration". Accordingly, he "must abstain from exercising jurisdiction".
44. The judge finally turned to the mother's application for an order under the inherent jurisdiction. He analysed the position briefly:

"Not merely is the existence of a foreign order a "relevant factor" (*Re L*) but, in this case, the Russian courts are the courts of competent jurisdiction seised of welfare decisions in relation to these children. As I have found, the courts of England and Wales do not have jurisdiction."

45. He then rejected the father's submission that a more extensive welfare investigation was required. It was in the children's interests that the dispute between the parents should be "settled as quickly as possible". The Russian court was "seised of the welfare dispute" and Russia was "the right, best and quickest place for the matter to be considered". It was in their welfare interests for an order to be made that "they should return to Russia".

Legal Framework.

46. The issue of habitual residence has been extensively analysed in a number of authorities. I propose to refer only, briefly, to *In re B*. Lord Wilson, giving the majority judgment, repeated that it is an issue of fact which is focused on the situation of the child. It depends on the child having "the requisite degree of integration" in the relevant State, at [39] which is determined by an analysis of all the relevant circumstances. Lord Wilson also quoted, at [38], what Lady Hale had said, at [54(v)],

in *A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2014] AC 1, namely that “the purposes and intentions of the parents (are) merely one of the relevant factors”. He also made clear, at [39], that habitual residence could be acquired “quickly” and noted that Lady Hale in *A v A* [2014] had “declined to accept that it was impossible to become habitually resident in a single day”.

47. After a review, principally of domestic and CJEU authorities, Lord Wilson concluded as follows:

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

[46] One of the well-judged submissions of Mr Tyler QC on behalf of the respondent is that, were it minded to remove any gloss from the domestic concept of habitual residence (such as, I interpolate, Lord Brandon's third preliminary point in the *J* case [1990] 2 AC 562), the court should strive not to introduce others. A gloss is a purported sub-rule which distorts application of the rule. The identification of a child's habitual residence is overwhelmingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him:

- (a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;
- (b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and
- (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it.”

48. The concept of “repudiatory retention” was established by and analysed extensively in *In re C*. The key paragraphs in Lord Hughes’ judgment, which were set out by the judge, are between [38] and [51]. As summarised in [51], in the context of a “travelling parent” and a “left-behind parent”, the “question is whether the travelling parent has manifested a denial or repudiation of the rights of the left-behind parent”. The focus is on the actions and intentions of the parent alleged to have acted in a way which breaches the rights of custody of the other parent. Lord Hughes observed, at [48], that “it will often be critical to establish what the terms were of any arrangement under which the child travelled”.
49. Lord Hughes identified “some markers”, at [51], which would guide the determination of whether a parent has acted in a way which amounts to a repudiatory retention. These included that it was “difficult if not impossible to imagine a repudiatory retention which does not involve a subjective intention on the part of the travelling parent not to return the child (or not to honour some other fundamental part of the arrangement)”, at [51(i)]. There must be “some objectively identifiable act or statement, or combination of such, which manifests the denial, or repudiation”, at [51(iv)].
50. It is not necessary in the circumstances of this case to consider the proper classification under the Family Law Act 1986 of an order for the summary return to the children to Russia other than under the 1980 Convention, an issue addressed in *A v A* [2014] at [25] – [28]. This is because a summary return order would clearly be within the scope of the 1996 Convention which applies by Article 3 to measures dealing with:
- “(a) “the attribution, exercise, termination or restriction of parental responsibility ...
 - (b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence ...”.
51. As referred to by the judge, Article 5 provides that it is the “authorities of the Contracting State of the habitual residence of the child (which) have jurisdiction to take measures” within the scope of the 1996 Convention. The other Articles (6 to 10) which deal with substantive jurisdiction are not relevant in this case. However, I would just mention that Article 6(2) gives jurisdiction to the State in which the child is present when that child’s “habitual residence cannot be established”. This is to the same effect as Article 14 of Brussels IIa (Council Regulation (EC) No 2201/2003) (BIIa) which was considered in *A v A* [2014].
52. The judge also referred to Article 13, the *lis pendens* provision, which applies if more than one State has jurisdiction under Articles 5 to 10. Effectively, the State seised second “must abstain from exercising” its jurisdiction while the requested “corresponding measures” are “still under consideration” in the State seised first.

53. The judge was not referred to Article 11. This provides:

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

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

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

54. Article 11 was considered by the Supreme Court in *In re J* [2016]. However, that case has broader relevance to the present case because of the consideration given to the English court’s jurisdiction to make an order, especially by the Court of Appeal.

55. In *In re J* an order had been made by Wood J for the return of a child to Morocco. The appeal from this order to the Court of Appeal and the Supreme Court focused on the issue of jurisdiction, an issue which had not featured at first instance. The Court of Appeal, *Re J (A Child) (1996 Hague Convention) (Morocco)* [2015] 2 FLR 513, considered this issue in detail. In the course of her judgment, Black LJ (as she then was) explained the relevance of BIIa and the 1996 Convention to the issue of jurisdiction and, in particular, to the use of the inherent jurisdiction:

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

[34] Insofar as the submissions to us suggested that the inherent jurisdiction of the English courts was unaffected by these

instruments, and remained there in the background awaiting the call, it is not a suggestion I can accept. Where one or the other instrument applies, recourse can only be had to the inherent jurisdiction if that is permitted by the jurisdictional code that that instrument establishes. The decision of the Supreme Court in *A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening)* [2013] UKSC 60, [2014] AC 1, [2013] 3 WLR 761, sub nom *Re A (Jurisdiction: Return of Child)* [2014] 1 FLR 111 (*A v A*) demonstrates this in relation to BIIA and I see no reason why matters should be different in relation to the 1996 Hague Convention.

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

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

56. Black LJ went on to decide that BIIA did not apply because she proceeded “on the basis” that the child had not been habitually resident in England at any relevant date, at [30]. In contrast, she decided that the 1996 Convention did apply because the order sought was within Article 3 and because the provisions of Article 7 applied, at [53]. The child had been habitually resident in Morocco immediately before his wrongful removal and jurisdiction had not passed to England under the provisions of Article 7.
57. This meant that the English court’s jurisdiction was confined to Article 11, at [53]. Black LJ decided that Article 11 could be used to make a return order, when such an order was urgent and necessary. However, in her view that case was not one of sufficient urgency to justify making such an order, at [71]-[73]. Substantial time had passed and it was apparent that “a speedy application to the courts with jurisdiction (i.e. Morocco) under Art 5 was entirely possible and there had been no explanation as to why (the father) did not apply in Morocco for a return order”, at [72]. The court, therefore, did not have jurisdiction to make a return order under Article 11, at [73]. Further, there was no alternative jurisdiction available including the inherent jurisdiction. This latter conclusion was explained as follows:

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

I would just mention that, in the next paragraph, Black LJ went on to say that she was not suggesting that “the courts can never have recourse to the inherent jurisdiction in order to make an order for the return of a child to another country”; “it can be both a basis for exercising jurisdiction and the source of the power to make orders”. This has very recently been confirmed by the Supreme Court in *In re NY (A Child)* [2019] UKSC 49.

58. In the sole judgment given by Lady Hale in the Supreme Court in *In re J*, she focused on Article 11. Importantly, she did not question the broader analysis as to jurisdiction undertaken by Black LJ. The particular question addressed by Lady Hale was whether Article 11 *could* be used in that case to make a summary return order to Morocco.
59. When referring to the scope of Article 11, Lady Hale said that “it must be borne in mind that art 11 confers jurisdiction on the presence country in all situations to which its terms apply. It is not limited to cases of wrongful removal or retention covered by art 7”, at [30]. In particular, there was “no pre-condition to jurisdiction under art 11 that it be impossible or impracticable for the courts of the country of habitual residence to exercise jurisdiction”, at [33].
60. As made clear by Article 11 itself, it required “a case of urgency” and that “measures of protection be necessary”, at [33]. Lady Hale considered that it was “obviously consistent with the overall purposes of the Convention that measures of protection which the child needs now should not be delayed while the jurisdiction of the country of habitual residence is invoked”, at [34]. However, she added that Article 11 was a “secondary ... jurisdiction”, at [34], which should only be used to “support the home country” and not “to interfere in issues that are more properly dealt with in the home country”, at [34].
61. In answer to the question of whether Article 11 could be used to make a summary return order, Lady Hale said: “It would be extraordinary if, in a case to which the 1980 Convention did not apply, the question of whether to order the summary return of an abducted child were not a case of ‘urgency’ even if it was ultimately determined that it was not ‘necessary’ to order the return of the child”, at [39]. Her concluding observations were as follows:

“[39] While I would not, therefore, go so far as to say that such a case is invariably one of “urgency”, I find it difficult to envisage a case in which the court should not consider it to be so, and then go on to consider whether it is appropriate to exercise the article 11 jurisdiction. It would obviously not be appropriate where the home country was already seized of the case and in a position to make effective orders to protect the child. However, as Lord Wilson pointed out in the course of argument, the courts of the country where the child is are often better placed to make orders about the child's return. Those courts can take steps to locate the child, as proved necessary in this case, and are likely to be better placed to discover the child's current circumstances. Those courts can exert their coercive powers directly upon the parent who is here and indeed if necessary upon the child. The machinery of going back to the home country to get orders and then enforcing them in the presence country may be cumbersome and slow. Getting information from the home country may also be difficult. The child's interests may indeed be compromised if the country where

the child is present is not able to take effective action in support of the child's return to the country of his or her habitual residence.”

62. Accordingly, the Court of Appeal had been wrong to decide that there was no jurisdiction to make a return order under Article 11. The case was, therefore, remitted to Wood J for him to decide “whether he can exercise the jurisdiction provided for in art 11 of the Convention and, if so, in what way”, at [44].
63. I would highlight the passage, at [39], which is of particular relevance to the present case, in which Lady Hale stated that it “would obviously not be appropriate” for the English court to exercise the Article 11 jurisdiction “where the home country was already seized of the case and in a position to make effective orders to protect the child”.
64. Finally in respect of the 1996 Convention, I would refer to Article 23 which sets out the specific grounds on which recognition and enforcement of an order can be refused. I do not propose to set them out but they are carefully delineated both to define and to limit the grounds on which enforcement can be refused.

Submissions

65. I am grateful to counsel for their submissions. In particular, they quickly recognised the effect of the 1996 Convention on the order made by the judge under the inherent jurisdiction.
66. Ms Fottrell submitted that the judge’s conclusion that the children were habitually resident in Russia at the relevant date(s) was unsupportable on the basis of his underlying findings. She then took us through the judgment highlighting the findings on which she particularly relied.
67. These included that the children had “experienced a significant lack of stability” in the period up to March 2019 which “rendered fragile their integration to what was their home state”. Added to this, the judge rejected the mother’s case that the children had only come to England for a holiday. Accordingly, Ms Fottrell submitted, they must have come to England for something which was qualitatively different from a holiday, namely to live here either temporarily or permanently. This connected with the judge’s findings that the parties, and in particular the mother, were “engaged in a more long-term consideration of the future” which included the mother having “indicated that she did not wish or intend to go back to Russia”.
68. Ms Fottrell did not challenge the way the judge set out the “test” nor the factual matters he identified. She also accepted that the judge had been right that his “focus must be on stability and not permanence and that the assessment is qualitative not quantitative”. However, she submitted, that the judge had not properly or sufficiently analysed the factors which had loosened the children’s integration in Russia and strengthened their integration in England. The judge had identified that, for “children of this age, stability

of person is likely to be more important than stability of place”, but he had not then carried this through into his analysis. She relied on the judge’s finding as to the “significant lack of stability” in the period up to March 2019 which was to be contrasted with the stability they would have experienced after 13th May when they were, as the judge found, in a “very familiar environment ... where they would quickly and easily achieve stability”.

69. Ms Fottrell also relied on a list of factors set out in her skeleton argument relating to the quality of the children’s lives in England, such as activities they were involved in and their relationship with the father’s family. She further relied on the judge’s “crucial” findings as set out in paragraph 59 (see paragraph 39 above) which, she submitted, should have led the judge to decide that the children’s “roots” in Russia were coming up with the see-saw tipping towards England. When these were combined with the judge’s finding that the children “would quickly and easily achieve stability” in England, the judge should have concluded that the see-saw had tipped.
70. On the issue of repudiatory retention, Ms Fottrell submitted that the judge’s determination hinged on his findings as to the terms on which the children came to England. She submitted that the judge was right to say that this was “central to the determination of this issue”. He was entitled to determine that the father was not intending to repudiate the nature of the stay and, in particular, to find that the father was not acting so as to prevent a return to Russia as he “had just been informed ... that the mother had no wish to return to Russia” (paragraph 63 of the judgment).
71. As to the inherent jurisdiction Ms Fottrell accepted that, although the judge had referred to Articles 5 and 13 of the 1996 Convention, neither party had advanced any argument in respect of the relevance of the Convention to the potential exercise of the court’s inherent jurisdiction. She argued that *In re J* would support the conclusion that the judge had been wrong to make an order under the inherent jurisdiction. She also submitted that no order could have been made under Article 11. There was no urgency in the present case and an order was not “necessary”. She relied on what Lady Hale had said at [39]. If Article 11 did not apply, it would be wrong to use the inherent jurisdiction to circumvent the effect of that provision.
72. Ms King submitted that the judge had applied the law on habitual residence correctly to the facts as he found them. The judge had “focused on the issue of integration from the children’s perspective”. She relied on *In re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 76 in which Lord Reed said, at [18]:

“Finally, it is relevant to note the limited function of an appellate court in relation to a lower court’s finding as to habitual residence. Where the lower court has applied the correct legal principles to the relevant facts, its evaluation is not generally open to challenge unless the conclusion which it reached was not one which was reasonably open to it”.

It is right to note, in passing, that in that case the Inner House of the Court of Session had overturned the Lord Ordinary, Lord Uist's, finding as to habitual residence on the basis that he had treated a shared parental intention to relocate to Scotland from France was "an essential element in any alteration of the children's habitual residence", at [9].

73. In support of the mother's cross-appeal, Ms King submitted that the judge had been wrong to find that the father had not acted so as to breach the mother's rights of custody. The judge should have found that he had "manifested a denial, or repudiation, of" the mother's rights by commencing proceedings in England.
74. Ms King accepted that the judge set out the legal test he had to apply. However, she submitted that the judge made findings which were not open to him on the evidence. He came to an unsustainable conclusion because the father had failed to return the children to the mother on 31st May 2019 in accordance with their agreement and had applied for a child arrangements order which included that the children should live with him in England. His application may have been "reactive" but it nevertheless amounted to a breach of the agreement and a breach of the mother's rights of custody in particular because the father sought an order that the children should live with him. In support of her submissions, Ms King also referred to parts of the father's statement in the Children Act proceedings.
75. Ms King acknowledged that the potential impact of the 1996 Convention on the exercise of the court's inherent jurisdiction had not been raised before the judge. She accepted that the judge had been wrong to make an order under the inherent jurisdiction. However, she submitted that it would have been open to the judge to make an order under Article 11. It was an urgent situation and a summary return order could be described as necessary in the circumstances of this case.

Determination

76. The father's appeal from the judge's finding on habitual residence and the mother's cross-appeal on the issue of repudiatory retention each involve challenges to the judge's evaluation of the evidence. It is accepted that the judge set out the right legal approach in respect of both issues. The issue is whether he applied the law wrongly or otherwise reached a decision which was not open to him on the evidence.
77. For the reasons summarised below, in my view, in respect of both determinations it is clear from the judgment and, became increasingly clear during the course of the hearing as the judgment was further analysed by counsel, that the judge correctly applied the relevant legal principles and reached a decision which was open to him and which is soundly reasoned in his judgment.
78. In respect of the issue of habitual residence, the judge did engage sufficiently with the factors or features of the case as relied on by Ms Fottrell. For example, he considered the quality of the children's lives between their arrival in England on 13th May and 12th

June. He specifically referred to some of the evidence relied on by Ms Fottrell and there is no reason to conclude that he omitted to consider any relevant factor. Indeed, the father's case is largely based *on* the judge's findings, his case being that those findings do not support his conclusion that the children were habitually resident in Russia.

79. The judge expressly identified that he needed to focus "on stability rather than permanence"; that "the assessment (was) qualitative nor quantitative"; and that he needed to "look for some degree of integration, not full integration". The judge also plainly took into account that the children's integration in Russia had been "rendered fragile". In my view, the father's case rested significantly on the submission that, in a number of respects, the judge had given too much weight to some factors and insufficient weight to others. Unless the judge has reached a conclusion that was, as Lord Reed said, "not reasonably open" to him, these submissions do not assist the father. In any event, I consider that the judge carefully analysed whether the "see-saw" had swung by reference to the factors connecting the children with each jurisdiction and the extent or the degree of their consequent integration and was plainly entitled to conclude that it had not.
80. I have reached the same conclusion in respect of the issue of repudiatory retention. First, I see no basis for concluding that the judge made findings which were not open to him on the evidence. Secondly, the judge expressly considered the matters relied on by the mother including, in particular, the nature of his application which included a "lives with order" and the father's statement.
81. In essence, Ms King's case amounted to a submission that no judge could reasonably have decided other than that the father's application to the court in England was a repudiatory breach of the mother's rights of custody. As Peter Jackson LJ observed during the hearing, the making of an application to court *might* of itself amount to a breach of rights of custody. However, the judge carefully analysed the circumstances of this case and, in my view, reached a conclusion that was open to him on the evidence and which is supported by his conclusion as to the father's intentions. There is no basis on which this court could interfere with that determination.
82. The final issue is whether the judge was right to make a return order under the inherent jurisdiction.
83. It is clear from the Court of Appeal's decision in *Re J* that, when the 1996 Convention applies, "recourse can only be had to the inherent jurisdiction if that is permitted by the jurisdictional code that (the 1996 Convention) establishes", at [34]. Further, if the 1996 Convention does not give jurisdiction to make the order sought, "the whole purpose of the 1996 Convention (which) is to determine, as between Contracting States, the state whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child ... would be defeated if, notwithstanding an absence of jurisdiction under the Convention, a Contracting State were to be able to assume jurisdiction by virtue of a domestic rule", at [74].

84. The 1996 Convention applies in this case because the judge found that the children were habitually resident in Russia at the relevant date. This meant that Russia did, but England did not, have substantive jurisdiction when the father commenced proceedings under the Children Act. In addition, at the date of the hearing before the judge, there were proceedings in Russia which were “still under consideration”, within Article 13. Further, an order had been made by the Russian court which the mother was seeking to enforce in England.
85. In those circumstances, following the dismissal of the mother’s application under the 1980 Convention, the structure of the 1996 Convention meant that the English court only had a “secondary” jurisdiction as provided by Article 11. This was, as in *In re J*, the only route by which the English court could make a return order. When deciding whether to make such an order, the court would, inevitably, have to apply the express provisions of Article 11 *and* decide whether the circumstances were such as to justify an order being made. Accordingly, it was not open to the court to make an order under the inherent jurisdiction with the result that the order made by the judge under it has to be set aside.
86. The next question is whether, if the judge had been asked to make an order under Article 11, he might have done so. In my view, for the following brief reasons, the clear answer is that he could not have done so.
87. First, in contrast to the situation in *In re J*, in the present case the Russian court was actively engaged and, indeed, had made an order requiring the father to return the children to the mother. In those circumstances, adopting what Lady Hale said in *In re J*, at [39], it “would obviously not be appropriate [to exercise the Article 11 jurisdiction because] the home country was already seized of the case and in a position to make effective orders”.
88. Secondly, I consider the position to be even clearer in the present case because the mother had already obtained a return order from the Russian court and was taking steps to enforce it in England. The enforcement process follows a defined route, as set out in rule 31 of the Family Procedure Rules 2010, and the grounds on which recognition and enforcement can be opposed are set out in the 1996 Convention (Article 23). That is the route which should have been followed in this case. The reasons for this include that the legal framework (and consequently the relevant issues) governing the enforcement of an order and that governing the making of an order under Article 11 are different. If both are simultaneously being invoked, which is to take precedence? Further, there would clearly be scope for potentially inconsistent orders if, for example, the court were to refuse to make an order under Article 11, on welfare grounds, but, subsequently, none of the grounds for refusing to enforce the foreign court’s order was established. In addition, the process for determining each application is very different. For example, the process of registration is required to be “simple and rapid” (Article 26). These differences again highlight the different issues engaged by each application.

89. Accordingly, in the circumstances of this case, there was no prospect of the court making an order under Article 11 of the 1996 Convention. The right course is for the mother's application to enforce the Russian court's order, which will include the father's appeal from the registration of that order, to be determined as soon as possible.

Lord Justice Arnold:

90. I agree.

Lord Justice Peter Jackson:

91. I also agree. The judge, having skilfully determined the issues of habitual residence and repudiatory retention, did not have the benefit of argument on the availability of, and limitations on, the secondary or residual jurisdiction provided by Article 11. Had he done so, he would surely have concluded that there was no gap in the scheme of the Convention to justify the exercise of the court's inherent powers, but would instead have let the mother's enforcement application take its course. To illustrate, the litigation chronology (see paragraphs 25–28 above) shows that the father could have appealed from the registration of the Russian order in time for his appeal to have been determined at the very hearing that led to the orders now under appeal. It would then have been evident that the Convention route must prevail and that there was no room for recourse to the inherent jurisdiction. That approach avoids the application of inconsistent tests and reduces the risk of conflicting decisions.