IN THE COURT OF APPEAL, CIVIL DECISION **Case No. CA-2023-000216/312**

ON APPEAL FROM THE DECISION OF THE HONOURABLE MR JUSTICE MACDONALD IN THE LONDON BOROUGH OF HACKNEY -v- P & ORS [2022] EWHC (FAM).

IN THE MATTER OF THE 1996 HAGUE CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN

AND IN THE MATTER OF SECTION 31 OF THE CHILDREN ACT 1989

AND IN THE MATTER OF RE H (A GIRL)

INTERVENTION BUNDLE

Prepared on behalf of the Amicus Committee of the International Academy of Family Lawyers (the "IAFL")

Filed on 23rd May 2023

Jacqueline Renton
Charlotte Baker
Frankie Shama

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WRITTEN SUBMISSIONS

Prepared on behalf of the Amicus Committee of the International Academy of Family Lawyers (the "IAFL")

Jacqueline Renton
Charlotte Baker
Frankie Shama

1. The IAFL is very grateful for the opportunity to assist the Court in this very important issue concerning jurisdiction in children proceedings in England and Wales subsequent to its departure from the European Union ("the EU").

2. Information about the IAFL is set out in the application prepared in support of this intervention and not repeated here. That application is included within a slim bundle served along with these submissions, which includes the authorities relied upon by the IAFL. Unfortunately it has not been possible to obtain translations in the limited time available.

THE IAFL'S POSITION: A SUMMARY

3. The IAFL takes the view that it is of significant benefit to the international family law community if states are encouraged to become signatories to the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* ("*the 1996 Hague Convention*"). It benefits children, parents and authorities across the globe. A more inter-connected family law community will ensure a more consistent and clear approach with regard to child protection, and in turn is more likely to promote the welfare of the children. As such, decisions such as the one before this court are important not just for states that are already signatories to *the 1996 Hague Convention,* but also for states who are contemplating becoming signatories as they will want to understand the way in which, if any, their domestic law and procedure is impacted by becoming a signatory.

4. In the limited time available, the IAFL has endeavoured to seek views from IAFL Fellows in non-EU, *1996 Hague Convention* countries. Of course, no country is in an identical position to England and Wales given that any residual national law will be different to the residual national law of England and Wales. The outcome of all these enquires is that there is very limited, international authority on the points raised in this appeal, and the best example is from Switzerland. It is clear that the decision of the Court of Appeal in the present case may well have significant implications for the wider international community. Although the present case arises in the context of public law proceedings, the issues under consideration in respect of the relevant date for the purposes of Article 5 of *the 1996 Hague Convention* will also apply to private law applications.

5. As such, the IAFL has adopted a more principled approached to this appeal, with a particular focus on ensuring the following:-

    a. There is a clarity of approach so that lawyers can provide clear and consistent advice to clients;

    b. *The 1996 Hague Convention* and its inter-relationship with national law bolsters, not undermines, the range of powers available to a court when seeking to protect a child;

    c. There is limited delay prior to the resolution of issues of jurisdiction.

6. **In summary, the IAFL's submissions are as follows with respect to the two grounds of appeal advanced by the appellant, and the points raised in the respondent's notice:**

Ground one: the relevant date

7. The clearest and most straightforward way of interpreting the relevant date under Article 5 of *the 1996 Hague Convention* is by fixing it to the date the application is issued. Such an approach is in line with the *lis pendens* principle in *Council Regulation (EC) No 2201/2003* ("*BIIa*"), and the approach under the Family Law Act 1986 (which applies as part of national law, in respect of Part I orders, throughout the UK). Whilst the UK is no longer part of the EU, it is of an obvious benefit for England and Wales to maintain an approach consistent with its nearest neighbours when determining issues such as these. This is also an approach that is in line with Swiss law.

8. In the alternative, the IAFL submits that the date for determining habitual residence must be at the first hearing listed to determine the issue of jurisdiction and such a hearing must be listed expeditiously in both private and public law proceedings. It is imperative that delay in this sort of situation is avoided. Delay can impact on the analysis of habitual residence, in circumstances where habitual residence is a factual enquiry (without gloss) based on a child's degree of integration and can change unilaterally.[1]

[1] See ***Re R (Children)* [2015] UKSC 35** at [§17]

Ground two: the existence of a residual domestic jurisdiction

9. The correct, purposive construction of *the 1996 Hague Convention* is that it does not seek to exclude alternative bases of jurisdiction as provided for under national law, in the event that jurisdiction cannot be established under *the 1996 Hague Convention*.

10. The IAFL is anxious to avoid a situation whereby the net effect of a state becoming a signatory to an international convention designed to provide more protection for children internationally, has the intended consequence of limiting the tools available to a court. As such, in the event that *the 1996 Hague Convention* does not lead to the establishment of a jurisdiction in a child protection case, national law can and should remain applicable, as is in any event provided for by the Family Law Act 1986.

11. Notwithstanding the IAFL's endorsement of the general principle that *the 1996 Hague Convention* does not oust a residual domestic jurisdiction, it wishes to emphasise that the fact *a* jurisdiction exists sufficient to commence proceedings is a separate question to whether or not that jurisdiction *should be exercised*. In cases where both states are a signatory to *the 1996 Hague Convention*, and jurisdiction is established under Articles 5 or 6, the Court can transfer proceedings under Articles 8-9 of *the 1996 Hague Convention* to the *"better placed"* Court (see, for example, ***Derbyshire County Council v Mother and Ors* [2022] EWHC 3405 (Fam).** In cases involving a non-1996 Hague Convention country (per this case), the Court can undertake a *forum conveniens* analysis in order to determine whether it should its exercise jurisdiction in England or Wales or stay its proceedings in favour of an application being commenced or continued elsewhere.

Respondent's notice

12. *The 1996 Hague Convention* is designed to improve the protection of children in international situations, by providing a framework and mechanics for an integrated system of co-operation, recognition and enforcement. It seeks to avoid conflicts between legal systems in relation to measures taken for their protection of children.[2] These objectives are clearly set out in the preambles and Article 1, as well as the *Lagarde Report.*

[2] See para 2.2 of the Practical Handbook on the 1996 Hague Convention.

13. The IAFL invites the Court to uphold the reasoning of Macdonald J with regards to the applicability of *the 1996 Hague Convention* to non-Contracting States at **[§78-94]** of his judgement. That approach accords with the Australian approach, as explained by Bennett J in ***Bunyon and Lewis (No. 3) [2013] FamCA 888*** at **[§164]:**

> *"Insofar as his Honour's reasons suggest that s 111CC applies only between states which are signatories to the 1996 Convention, that is not correct. The provisions in our legislation in relation to the protection of children internationally apply to countries which are Contracting States (like Australia) and to countries which are not Contracting states albeit not equivalently. For instance, s111CA(1) defines another country as being a convention country or a non-Convention country. Section 111CC expressly refers to non-Convention countries. Section 111CDI makes provision for jurisdiction with respect to Australian children who are present in a non-Convention country. Section 111CD(f) makes provision for jurisdiction with respect to children who are habitually resident in a non-Convention country but present in Australia and s 111CD(d) makes provision in relation to children who are refugees."*

14. Ensuring minimal delay prior to the resolution of an issue of jurisdiction this should counter the understandable concerns raised by the local authority in its respondent's notice.

THE IAFL'S SUBMISSIONS: IN DETAIL

Ground one: the relevant date

Primary position: the relevant date is the date of the application

15. The IAFL strongly supports the contention that the relevant date for the purposes of establishing habitual residence is the date on which the application is issued. To that end, it adopts and endorses the rationale of Lieven J at [§18-26] of ***Derbyshire*** *(supra).* The IAFL submits this for a number of reasons.

16. **Firstly**, the IAFL observes that the consequence of Article 5(1) being silent as to the relevant date for establishing habitual residence requires the Court to adopt a purposive approach to its construction, and the Court should avoid placing too much weight on the possibility of habitual residence changing mid-proceedings, as anticipated by Article 5(2). In support of MacDonald J's approach, much focus is placed on the absence of a specific provision of *perpetuatio fori* in Article 5(1) (when read in the context of the *Lagarde Report)*, but it is submitted that the absence of the same does not, in itself, create any presumption or rule as to when habitual residence ought to be determined. *Perpetuatio fori*

is not, in itself, a legal principle which requires the relevant date to be the date the Court is seised. What it actually means is that *"once a competent court is seised, in principle it retains jurisdiction even if the child acquires habitual residence in another Member State during the course of the court proceeding".*[3] The focus in Article 5(2) on the ability for jurisdiction to change is not in itself a sufficient reason for departing from well-established practice in favour of a relevant date fixed at an uncertain time in the future.

17. To this end, paragraph 42 of the *Lagarde Report* – which analyses the responses from the delegates to the prospect of including the principle *perpetuatio fori* within the *1996 Hague Convention* - deserves careful scrutiny. The debate centred on what should happen when there is a change of habitual residence during the currency of proceedings, as opposed to what date should be fixed as the relevant date for the purpose of first establishing jurisdiction:

> *"42. Certain delegations explained their negative vote by their hostility to the very principle of perpetuatio fori in this field and wanted jurisdiction to change automatically in case of a change of habitual residence, while other delegations thought that it would be more simple for the Convention not to say anything on this subject thereby abandoning to the procedural law the decision on perpetuatio fori. The first opinion appeared to be the more exact* ***in the case of a change of habitual residence from one Contracting State to another Contracting State.*** *Indeed it is not acceptable that* ***in such a situation,*** *which is located entirely within the interior of the scope of application of the Convention, the determination of jurisdiction be left to the law of each of the Contracting States. Moreover this solution is one which currently prevails for the interpretation of the Convention of 5 October 1961."*
>
> (authors' emphasis)

18. Further, the Court may find it helpful to compare Article 5(2) of *the 1996 Hague Convention* with Article 9 of *BIIa*, as set out below (and noting that there is no separate equivalent of Article 9 of *BIIa* in *the 1996 Hague Convention* other than Article 5(2)):

> ***Article 5(2) of the 1996 Hague Convention:***
>
> *"(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction."*

[3] *C v M* (Case C-376/15 PPU), delivered on 24 September 2014, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=158441&doclang=EN

Article 9 of BIIa:

"Continuing jurisdiction of the child's former habitual residence

1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.

2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction."

19. Both provisions are designed, in different ways, to manage the transfer of jurisdiction to another Member State / Contracting State following a lawful move and the consequential, inevitable change in habitual residence. The key difference of course is that Article 9 of *BIIa* is predicated as an optional derogation from Article 8 of *BIIa* (habitual residence) whereas Article 5(2) of *the 1996 Hague Convention* expressly envisages habitual residence changing and proceedings transferring with it. Moreover, Article 5(2) anticipates proceedings continuing (and perhaps being transferred, pursuant to Articles 8-9 of *the 1996 Hague Convention*), whereas Article 9 of *BIIa* anticipates them concluding in State A and starting afresh in State B after the 3-month period has elapsed.

20. Having said this, the IAFL submits that Article 5(2) then, when read in the context of both the *Lagarde Report* and when compared to Article 9 of *BIIa,* is far more comfortably seen as a basis upon which jurisdiction can transfer rather than a reason to delay the establishment of habitual residence at the date of application.

21. **Secondly,** if Article 5(2) is concerned with the transfer of jurisdiction and Article 5(1) silent as to the relevant date, then it is respectfully submitted that the simplest and clearest solution is to fix the relevant date as the date of application, in accordance with well-established practice. This is hugely attractive, and would provide a great deal of certainty when advising clients as well as avoiding a drain on already scarce resources in the Family Court. It is entirely consistent with the approach taken by *BIIa* and the *lis pendens*

provisions concerned therein, as well as the approach taken under the Family Law Act 1986, pursuant to section 7(c)(i).

22. Although some concern has been raised as to the 'artifice' of the situation if the date is the day of application (see Children's Guardian's skeleton at paras 27 – 28), the IAFL submits that this is always the case when an issue of jurisdiction is determined at the date that proceedings are issued, or shortly thereafter. However, jurisdiction is a technical and preliminary issue, and a delayed resolution of the issue of jurisdiction also has consequences that might not always be coterminous with a child's welfare. For instance, in some cases a delayed determination of the issue of habitual residence might encourage parents to take unilateral steps to 'bolster' their case on habitual residence, and those steps might not always be in the child's best interests. In a UK context, this is particularly apt in circumstances where the IAFL is acutely aware of the pressures on the Family Justice System and the length of time that both private and public law proceedings, currently take to be determined which appears to be increasing year on year.[4] Whilst it is acknowledged this might be more of a consideration in contested private law proceedings where a parent is seeking to establish the English court's jurisdiction in the face of opposition from the other parent, as opposed to public law proceedings where generally speaking a parent is seeking to avoid the English court having jurisdiction, this is nonetheless still an important consideration for the Court bearing in mind the wide applicability of a decision on the relevant date point under article 5 of *the 1996 Hague Convention*.

23. **Lastly**, such an approach is on all fours with the approach under Swiss law. Swiss law and procedure operates on the basis that jurisdiction must be established when the application is initiated, and the judge is required to verify its competence to hear the matter at that stage.

[4] In respect of private law children proceedings there has continued to be an upward trend in the timelines for proceedings since the middle of 2016 where the number of new cases overtook the number of disposals. Overall, it took on average 45 weeks for private law cases to reach final order during 2022, compared to 40 weeks in 2021, and just 22 weeks in 2016 (https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2022/family-court-statistics-quarterly-october-to-december-2022#children-act---private-law). In public children proceedings the situation is no better. Overall, it took on average 44.4 weeks to conclude a care case in 2021, compared to just 27 weeks in 2016 (https://www.judiciary.uk/guidance-and-resources/a-view-from-the-presidents-chambers-november-2022/ .

24. Article 9(2) of the Federal Act on Private International Law[5] provides as follows with regards to *lis pendens:*

> "*In order to determine when an action has been initiated in Switzerland, the conclusive date is that of the first act necessary to initiate the proceedings. A notice to appear for conciliation is sufficient."*

25. Articles 59 and 60 of the Swiss Civil Procedural Code[6] provides as follows:

> ***Art. 59 Principle***
> *1 The court shall consider an action or application provided the procedural requirements are satisfied.*
> *2 Procedural requirements are in particular the following:*
> *a. the plaintiff or applicant has a legitimate interest;*
> *b. the court has subject matter and territorial jurisdiction;*
> *c. the parties have the capacity to be a party and the capacity to take legal action;*
> *d. the case is not the subject of pending proceedings elsewhere;*
> *e. the case is not already the subject of a legally-binding decision;*
> *f. the advance and security for costs have been paid.*
>
> ***Art. 60 Verification of compliance with the procedural requirements***
> *The court shall examine ex-officio whether the procedural requirements are satisfied.*

26. Whilst the possibility for habitual residence to change during proceedings is very much envisaged in Switzerland (see, for example, **Case 5A_274/2016**),[7] the relevant date for the purpose of establishing habitual residence where proceedings commence in Switzerland is the date of application.

27. In terms of the international approach, the court might also find it helpful to consider the operation of jurisdiction in the USA under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). The Act unifies jurisdiction across the states of the USA, and also uniquely defines *"state"* to include foreign states (ie: countries outside of the USA). The *"home state"* is determined with reference to the date on which an application is issued, and once the *"home state"* is established that state continues to have jurisdiction

[5] Available here: https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en

[6] Available here: https://www.fedlex.admin.ch/eli/cc/2010/262/en

[7] Available here: https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F26-08-2016-5A_274-2016&lang=fr&type=show_document&zoom=YES&

for a six month period even if the child is removed from the *"home state",* as long as one of the parents remain in the "*home state".*

Secondary position: the relevant date is the date on which the issue of jurisdiction is determined, at a hearing which should be listed expeditiously

28. In the alternative, if the Court is not persuaded that the relevant date ought to be the date of the application, then the IAFL submits that the relevant date should be fixed to the first hearing at which the Court can determine the issue of jurisdiction, and that the Court should give clear guidance to the effect that this hearing should be conducted in weeks, not months, after the application is issued. The IAFL makes this submission for a number of reasons:-

29. **Firstly,** it is submitted that it is important that the issue of jurisdiction is grappled with as early as possible as the Court cannot, as a matter of law, make any substantive welfare decisions until the issue of jurisdiction is resolved. The Court has an urgent jurisdiction under Article 11 of *the 1996 Hague Convention* but it is limited in scope, but must always ask itself what jurisdictional basis it is operating under, from the outset, *per* Sir James Munby (then-President) in ***Re F (A Child)*** **[2014] EWCA Civ 789** at [§11(iv)-12][8]:-

> *iv. Since the point goes to jurisdiction* ***it is imperative that the issue is addressed at the outset.*** *In every care case with a foreign dimension jurisdiction must be considered at the earliest opportunity, that is, when the proceedings are issued and at the Case Management Hearing: see Nottingham City Council v LM and others [2014] EWCA Civ 152, paras 47, 58.*
>
> *ii.* ***Good practice requires that in every care case with a foreign dimension the court sets out explicitly, both in its judgment and in its order, the basis upon which, in accordance with the relevant provisions of BIIR, it has either accepted or rejected jurisdiction.*** *This is necessary to demonstrate that the court has actually addressed the issue and to identify, so there is no room for argument, the precise basis upon which the court has proceeded: see Re E, paras 35, 36.*
>
> *iii. Judges must be astute to raise the issue of jurisdiction even if it has been overlooked by the parties: Re E, para 36.*
>
> *12. There is a further point to which it is convenient to draw attention.* ***If it is, as it is, imperative that the issue of jurisdiction is addressed at the outset of the***

[8] The case considers *BIIa*, but it is submitted that the rationale applies equally to all cases where the issue of jurisdiction has to be determined.

proceedings, it is also imperative that it is dealt with in a procedurally appropriate manner:

i. *The form of the order is important. While it is now possible to make an interim declaration, a declaration made on a 'without notice' application is valueless, potentially misleading and should accordingly never be granted: see St George's Healthcare NHS Trust v S, R v Collins and Others ex p S [1999] Fam 26. If it is necessary to address the issue before there has been time for proper investigation and determination, the order should contain a recital along the lines of "Upon it provisionally appearing that the child is habitually resident ..." Once the matter has been finally determined the order can contain either a declaration ("It is declared that ...") or a recital ("Upon the court being satisfied that ...") as to the child's habitual residence.*

ii. *The court cannot come to any final determination as to habitual residence until a proper opportunity has been given to all relevant parties to adduce evidence and make submissions. If they choose not to avail themselves of the opportunity then that, of course, is a matter for them, though it is important to bear in mind that a declaration cannot be made by default, concession or agreement, but only if the court is satisfied by evidence: see Wallersteiner v Moir [1974] 1 WLR 991."*

30. This point is bolstered by the fact that any applicant in either public or private law proceedings must establish the basis of the jurisdiction it asserts the Court has at the time that the application is issued, even if the relevant date for the purposes of establishing habitual residence is to be a later date. In other words, an applicant (such as the local authority in the present case) cannot issue proceedings on a speculative basis with regards to jurisdiction, in the hope that they will then be able to establish jurisdiction later on down the line during the currency of the proceedings - they need to be satisfied that there is a jurisdictional basis for those proceedings from the time of their inception.

31. **Secondly,** the IAFL is concerned that any approach that allows for the date of determination of habitual residence to vary significantly in every case prevents any sort of certainty when giving legal advice. It will depend on the particular resources of particular Courts to properly list and determine such applications, and that will (of course) vary hugely across England and Wales, as well as internationally.

32. **Thirdly,** it is submitted that it is a poor use of both the Court's resources and the resources of the family involved if proceedings are to continue for an appreciable period of time, and potentially even final hearing, prior to the Court determining the issue of jurisdiction, especially if the decision of the Court is that the proceedings should be dismissed for want

of jurisdiction in any event. See, for example, the Australian case of ***Bunyon and Lewis (No. 3)*** **[2013] FamCA 888,** where Bennett J considered jurisdiction as a preliminary issue, separate from the determination of what parenting orders (if any) should be made in respect of the subject child but some several months after the proceedings had been initiated. The application concerned a child who had lawfully moved to The Netherlands with the father in December 2012 (the child's mother was deceased). Bennett J ultimately dismissed the application for want of jurisdiction. It appears from his analysis that he was satisfied that the child immediately became habitually resident in the Netherlands and therefore did so before proceedings were initiated in Australia, however, he ultimately concluded that the relevant date was the date that the Court is to take the measure (i.e. make parenting orders). He noted, however, that the situation would be different had this been an international abduction case **[§184-187].** This case demonstrates:-

a. The importance of resolving jurisdictional disputes at an early stage and separately from decisions about final orders. Absent jurisdiction; proceedings must conclude.

b. The potential for serious difficulties and unfairness to abound when jurisdictional disputes are not resolved expediently.

33. **Lastly,** in the event that the Court has established that it has jurisdiction and decided it should exercise it, the IAFL submits that the Court should not then be required to revisit that question at every interim hearing. For example:-

a. If the child remains present in England and Wales and the Court is satisfied it has jurisdiction based on habitual residence, then that will not change throughout the course of the proceedings unless the Court has sanctioned a lawful move to another *1996 Hague Convention* country. If so, then a party may make an application to the Court for the question of jurisdiction to be considered again, as anticipated by Article 5(2). As discussed above, that is akin to the situation that existed in England and Wales under Article 9 of *BIIa*.

b. If the child moves to another *1996 Hague Convention* country then either: