UK Supreme Court Rules on Concept of Habitual Residence of Children

On 14 January 2014, the Supreme Court of the United Kingdom delivered its judgment In the matter of LC (Children) and In the matter of LC (Children) (No 2).

Lord Wilson summarized the principal question raised by the two appeals as follows:

> *Now that it is clear that the test for determining whether a child was habitually resident in a place is whether there was some degree of integration by her (or him) in a social and family environment there, may the court, in making that determination in relation to an adolescent child who has resided, particularly if only for a short time, in a place under the care of one of her parents, have regard to her own state of mind during her period of residence there in relation to the nature and quality of that residence? In my view this is the principal question raised by these appeals.*

The Court issued the following press summary.

BACKGROUND TO THE APPEALS

The appeal relates to the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Convention") and to section 1(2) of the Child Abduction and Custody Act 1985. It is brought within proceedings issued by a mother (Spanish national living in Spain) against a father (British national living in England) for the summary return of their four children (T' (a girl aged 13), 'L' (a boy aged 11), 'A' (a boy aged 9) and 'N' (a boy aged 5)) from England to Spain. The Convention stipulates that, subject to narrow exceptions, a child wrongfully removed from, or retained outside, his or her place of habitual residence shall promptly be returned to it. The test for determining whether a child is habitually resident in a place is now whether there is some degree of integration by him or her in a social and family environment there.

The principal question in this appeal is whether the courts may, in making a determination of habitual residence in relation to an adolescent child who has resided for a short time in a place under the care of one of his or her parents, have regard to that child's state of mind during the period of residence there. A subsidiary question is whether, in this case, the trial judge erred in exercising his discretion to decline to make the eldest child, T, a party to the proceedings.

The parents met in England and lived in this country throughout their relationship, which ended early in 2012. On 24 July 2012 the mother and the four children, who were all born in the UK, moved to Spain where they then lived with their maternal grandmother. It was agreed that the children would spend Christmas with their father and on 23 December 2012 they returned to England. They were due to return to Spain on 5 January 2013. Shortly before they were due to fly, the two older boys hid the family's passports and they missed the plane. On 21 January 2013 the mother made an application under the Convention for the children's return to Spain. The father applied for T to be joined as a party so that she might be separately represented, which the High Court refused.

The High Court found all four children to be habitually resident in Spain and thus that they had been wrongfully been retained by their father. The judge acknowledged that the eldest, T, objected to being returned to Spain but determined that she should nonetheless be returned along with the three younger children.

The Court of Appeal dismissed the appeal against the judge's finding that the children's habitual residence was in Spain. However, the Court of Appeal reversed the judge's decision to return T to Spain finding that, so robust and determined were T's objections, they should be given very considerable weight. The Court of Appeal concluded that the appropriate course was to remit to the judge the question whether it would be intolerable to return the three younger children to Spain in light of the fact that T was not going to go with them. The Court of Appeal dismissed the appeals not only of L and A but also of T against the High Court's failure (in T's case, refusal) to make them parties to the proceedings.

JUDGMENT

The Supreme Court unanimously finds that T's assertions about her state of mind

during her residence in Spain in 2012 are relevant to a determination whether her residence there was habitual. The Supreme Court sets aside the conclusion that T was habitually resident in Spain on 5 January 2013 and remits the issue to the High Court for fresh consideration. The Supreme Court also sets aside the finding of habitual residence in respect of the three younger children so that the issue can be reconsidered in relation to all four children.

The Supreme Court unanimously also concludes that T should have been granted party status and that the Court of Appeal should have allowed her appeal against the judge's refusal of it.

REASONS FOR THE JUDGMENT

- Lord Wilson gives the lead judgment of the Court. Courts are now required, in analysing the habitual residence of a child, to search for some integration of her in a social and family environment [34]. Where a child goes lawfully to reside with a parent in a state in which that parent is habitually resident it will be highly unusual for that child not to acquire habitual residence there too. However, in highly unusual cases there must be room for a different conclusion, and the requirement of some degree of integration provides such room [37].
- No different conclusion will be reached in the case of a young child. Where, however, the child is older, particularly where the child is or has the maturity of an adolescent, and the residence has been of a short duration, the inquiry into her integration in the new environment may warrant attention to be given to a different dimension [37]. Lady Hale, with whom Lord Sumption agrees, would hold that the question whether a child's state of mind is relevant to whether that child has acquired habitual residence in the place he or she is living cannot be restricted only to adolescent children [57]. In her view, the logic making an adolescent's state of mind relevant applies equally to the younger children, although the answer to the factual question may be different in their case [58].
- The Court notes that what can be relevant to whether an older child shares her parent's habitual residence is not the child's "wishes", "views", "intentions" or "decisions" but her state of mind during the period of her residence with that parent [37].
- The Court rejects the suggestion that it should substitute a conclusion

that T remained habitually resident in England on 5 January 2013 [42]. The inquiry into T's state of mind in the High Court had been in relation to her objections to returning to Spain and was not directly concerned with her state of mind during her time there [42 (i)]. In addition, the mother has not had the opportunity to give evidence, nor to make submissions, in response to T's statements to the Cafcass (Children and Family Court Advisory and Support Service) officer regarding her state of mind when in Spain [42 (v)]. Lady Hale expresses grave doubts about whether sending the case back to the High Court for further enquiries into the children's states of mind would be a fruitful exercise [67]. However, in the interest of justice, she concludes that it should nonetheless be sent back [86].

- The majority do not think the state of mind of L or A could alone alter the conclusion about their integration in Spain, but note another significant factor, namely the presence of their older sister, T, in their daily lives [43]. In relation to the habitual residence of the three younger children and in the light of their close sibling bond, the majority query whether T's habitual residence in England (if such it was) might be a counterweight to the significance of the mother's habitual residence in Spain [43]. Lady Hale agrees with this analysis when applied to the youngest child. [65].
- With regard to the subsidiary appeal, the Court notes that an older child in particular may be able to contribute relevant evidence, not easily obtainable from either parent, about her state of mind during the period in question [49]. However, it is considered inappropriate to hear oral evidence from T even as a party. Instead, a witness statement from T; cross-examination of the mother by T's advocate; and the same advocate's closing submissions on behalf of T should suffice to represent her contribution as a party [55].