Hilary Term

[2016] UKSC 4

On appeal from: [2015] EWCA Civ 886

JUDGMENT

In the matter of B (A child)

before

Lady Hale, Deputy President

Lord Clarke

Lord Wilson

Lord Sumption

Lord Toulson

JUDGMENT GIVEN ON

3 February 2016

Heard on 8 and 9 December 2015

Appellant	Respondent
David Williams QC	William Tyler QC
Alistair Perkins	Hannah Markham
Michael Gration	Miriam Carrion Benitez
Mehvish Chaudhry	
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LORD WILSON (with whom Lady Hale and Lord Toulson agree):

INTRODUCTION

1.
It has been hard-wired into the mind of many family lawyers in England and Wales that, were a parent to remove a child from a state in which they were habitually resident to another state with the settled intention that they would cease to reside in that first state and make their home in that second state, the child would be likely to lose habitual residence in the first state immediately upon the removal and, until later acquiring habitual residence in the second state, would be likely not to be habitually resident anywhere. The absence of habitual residence anywhere places a child in a legal limbo. The main question raised by this appeal, which arguably the lower courts were not free to answer, is whether the expectation of family lawyers about the point at which habitual residence is lost requires adjustment in the light of this court's recent adoption of the European concept of habitual residence. The court's answer to this question should enable it to determine whether the lower courts were correct to conclude that, on the relevant date, the child at the centre of this appeal was in the limbo to which I have referred.

2.
The child is B, a girl, who was born in April 2008 and so is now aged seven. The women who are the two central parties to this appeal were living in England in a same-sex relationship from 2004 to 2011. Other than biologically, B is the product of their relationship. The respondent is the biological mother of B and her father is an unknown sperm donor of Asian ethnicity. The appellant has strong claims also to be described as a mother. Nevertheless, in order to avoid confusion, it is better to refer to the central parties as the appellant and the respondent respectively.

3.
The appellant, who continues to live in England, is a British national, aged 35, of Indian ethnicity. The respondent is a British national, aged 45, of Pakistani ethnicity. B, likewise, is a British national. On 3 February 2014 the respondent took B to live in Pakistan, where they have remained ever since. On 13 February 2014, aware that the respondent had removed B from her home but unaware that she had taken her abroad, the appellant issued an application under the Children Act 1989 ("the 1989 Act") for leave to apply for what were then still described as orders for shared residence of B or for contact with her. On 6 June 2014, having learnt that the respondent had taken her to Pakistan, the appellant also applied for orders that B should be made a ward of court and be returned to England. On 31 July 2014 Hogg J dismissed both of the appellant's applications: [2014] EWHC 3017 (Fam). And on 6

August 2015 the Court of Appeal (Sir James Munby P, Black and Underhill LJJ), by a judgment of the court delivered by Black LJ, dismissed her appeal: [2015] EWCA Civ 886.

FACTS

4.
In 2000, prior to her relationship with the appellant, the respondent had begun to investigate the possibility of her conceiving a child by artificial means and in 2001 she had made unsuccessful attempts to do so. In 2004 their relationship began and they set up home together; but they never entered into a civil partnership. In 2005 and 2006, as a couple, they together explored that same possibility. At their joint request, a licensed hospital administered two cycles of intrauterine insemination ("IUI") to the respondent but the treatment was unsuccessful. Then they made a joint application to their local authority for assessment as potential adopters. Six months later, however, at the instigation of the appellant, who did not feel ready to be a parent, they withdrew their candidacy. Ultimately, in April 2007, they applied to another licensed hospital for the respondent to have further IUI treatment under the National Health Service. "I see no reason", wrote the counsellor, "why this couple should not be treated". On this occasion the treatment was successful and in April 2008 B was born.

5.
Shortly prior to B's birth the appellant and the respondent had bought a house in their joint names. They lived there together with B until December 2011, when in acrimonious circumstances their relationship finally broke down and the appellant left.

6.
Upon B's birth the respondent gave up work for a year. The appellant took two weeks of "paternity leave" and a further two weeks of holiday, whereupon she resumed full-time employment. Most of B's care was undertaken by the respondent but, when she got home, the appellant helped to care for her, for example to give her a bath and put her to bed; and at weekends, as co-parents, they took B out, in particular to visit members of their families. Living within easy reach of them were the appellant's parents, the respondent's parents and her two sisters, together with various young cousins of B. She became close to these relations, who all remain resident in England today. When in 2009 the respondent resumed work, the appellant's parents looked after B for two days each week but, when she began to attend a nursery, their care of her was reduced to one day each week. When she began to talk, B began to call the respondent "mama" and the appellant "mimi". On behalf of B, the respondent wrote Mother's Day cards to the appellant; on one of them she wrote "I can't believe how lucky I am to have you as my Mama".

7.
Following her departure from the family home, the appellant continued to pay half the mortgage instalments referable to it and to make other payments which she describes as for B's maintenance and which the respondent describes as her continuing contribution to utility bills. The respondent accuses the appellant of withdrawing from many aspects of parenting, for example in relation to B's schooling; but on any view the appellant pressed for contact with B and on any view the respondent was to some extent resistant to it. Over the following two years the respondent progressively reduced the level of the appellant's contact with B - from six hours every week in the first few months, to three hours every fortnight in the following year and then to only two hours every three weeks in the year prior to the move to Pakistan.

8.

The appellant was not content with the reduction in her contact with B, nor with the ostensible difficulties placed by the respondent in the way of her seeing B on a number of the pre-arranged days. Bad-tempered emails passed between them. By November 2012 the appellant was inviting the respondent, albeit unsuccessfully, to join her at family mediation. Then, in October 2013, the appellant wrote to the respondent a letter before action. She expressed concern about the effect on B's emotional wellbeing of the minimal contact which the respondent had allowed to take place between them and she invited her to consent to a shared residence order, pursuant to which B would stay with the appellant on three nights each fortnight and for further periods during school holidays. The respondent does not appear to have replied to the letter.

9.
Meanwhile the respondent had begun privately to consider whether to take B to live in Pakistan, where, according to her, certain unidentified members of her wider family remain. In June 2013 she had been made redundant and life had become particularly difficult for her. In November 2013 she went alone to Islamabad and there she discussed with a friend the possibility of entry into a business partnership with him and looked at a possible school for B. In December 2013, following her return to England, the respondent secretly decided to move there with B as soon as possible.

10.
Also in December 2013 the respondent took B on holiday to Morocco. On the first occasion of contact following their return B handed a Moroccan card to the appellant. On the card B had written "To mimi I missed you so much love [B]" and she had drawn hearts and kisses.

11.
At around that time the respondent at last agreed to attend a mediation session with the appellant. It took place on 15 January 2014. The respondent made no mention of her imminent departure with B to Pakistan and it is hard to avoid the conclusion that the session was a charade. It was agreed that the next session would take place on 5 February 2014.

12.
The last occasion of direct contact between the appellant and B took place on 26 January 2014. According to the appellant, B told her that she was moving and that she was scared that the appellant would not be able to find her.

13.
The next occasion of contact was fixed to take place three weeks later, namely on 16 February 2014. Late in January, by email, the appellant asked the respondent to agree to change the date. There was no reply. On 7 February the appellant sent a further email. It bounced back. The appellant discovered that the respondent's facebook and twitter pages had been closed. Then, on 8 February, the appellant received a letter from the respondent. It had been posted by someone in England on 6 February. In it the respondent gave no indication of the whereabouts of herself and B. She wrote "I've enclosed the house key as I have now moved … our communication has been so strained and stressful … I will be in touch in a few weeks, once we settle, to establish what you have decided to do about the house".

14.
The respondent's removal of B to Pakistan on 3 February 2014 was lawful. The absence of the appellant's consent did not vitiate it. The appellant has never been B's legal parent. Had the insemination which led to B's conception occurred after 6 April 2009, and had the respondent so agreed in writing, the appellant would have been treated in law as B's parent: sections 43 and 44 of the Human Fertilisation and Embryology Act 2008. Had she thereupon been registered as a parent,

the appellant would also have acquired parental responsibility for B: section 4ZA(1)(a) of the 1989 Act. Alternatively, if the appellant had secured a shared residence order referable to B prior to 3 February 2014, she would have acquired parental responsibility for her under the former version of section 12(2) of the 1989 Act. In the event, however, she never had parental responsibility for B.

15.
Later the respondent was to give the following evidence, which Hogg J accepted, about the circumstances of herself and B in Pakistan in the weeks following their arrival on 4 February 2014:

(a)
she arrived in Islamabad on a visa which entitled her to remain with B in Pakistan for about three months;

(b)
she stayed with B in the home of her potential business partner for about the first three weeks;

(c)
on 10 February she began working in partnership with him;

(d)
on 18 February she registered B at an English-speaking school (being other than the one which she had previously considered), at which on the following day B began to attend;

(e)
on 19 February she entered into an agreement to rent a two bedroom flat for one year with effect from 1 March;

(f)
on (presumably) 1 March she moved with B into the flat; and

(g)
on 18 April she was issued with a National Identity Card which entitled her to reside with B in Pakistan indefinitely.

16.
On 24 July 2014, five days before the beginning of the hearing before Hogg J, the appellant spoke to B by telephone. Since then there have been five further occasions of contact by telephone. No other contact has taken place between them since the move to Pakistan.

PROCEEDINGS

17.
When on 13 February 2014 the appellant issued her application under the 1989 Act, she remained unaware of B's whereabouts so she also issued an application under section 33 of the Family Law Act 1986 for orders that specified public authorities should disclose to the court all their information relating to B's whereabouts. An order was made against the Child Benefit Office but it yielded no relevant information. In April 2014, still unaware of the whereabouts of the respondent and B, the appellant secured an order for substituted service of her applications upon the respondent, namely by post to the address of her parents. The respondent says that in his mind her father had somehow been able to avoid directly confronting her sexuality, her intimate relationship with the appellant and the circumstances of B's conception; and that, when he opened the envelope, he was deeply shocked and angry about what he perceived to be the respondent's dishonour of the family. There may well be

grounds for criticising the appellant for having invited the court to order that the substituted service should be at the parents' address as opposed, for example, at the address of one of the respondent's sisters. At all events the service led to the respondent's instruction of English solicitors who, on 9 May 2014, informed the appellant's solicitors that the respondent and B had gone to Pakistan. Later the respondent divulged that she and B were in Islamabad but, for reasons unexplained to the court, she has never disclosed their precise address there.

18.
The appellant's belated discovery that B was abroad led her, on 6 June 2014, to issue a further application, namely for orders to be made by the High Court in the exercise of its inherent jurisdiction over B, as a British subject, that she be made a ward of court and be at once brought back to England. On 9 June 2014, apprised of the fact that the respondent disputed the court's jurisdiction to make any of the orders sought by the appellant, Moylan J directed that the issue of jurisdiction be determined at a hearing beginning on 29 July 2014 and he ordered that the respondent should attend it in person. By a recital to his order, Moylan J also invited the respondent to reflect upon the practical availability of any forum, other than in England and Wales, in which she and the appellant might safely and realistically resolve their disputes. In due course, having presumably reflected upon it, the respondent averred that the correct jurisdiction in which to raise any issues in relation to B was that of Pakistan.

19.
Four days before the hearing fixed to begin on 29 July 2014, Peter Jackson J heard an application by the respondent to vary the order that she should attend it in person. She asserted that her father had been so outraged by what he had learnt from the court documents as to have threatened to break her legs and that, were she to come to England, she would be at risk of physical harm, perhaps even of death, at his hands or at those of the local community. Instead the respondent offered to give evidence at the substantive hearing by video-link. On the undertaking of the appellant not to inform the respondent's family that the hearing was about to take place, the judge refused the respondent's application and made a further order for her attendance in person. Nevertheless the respondent refused to comply with the orders for her attendance before Hogg J in person. She did not even give evidence to her by video-link. She gave evidence only by telephone.

20.
On 31 July 2014, following receipt of evidence relevant to jurisdiction from the appellant in the witness box as well as from the respondent by telephone, Hogg J gave judgment. It was, as she noted, common ground that prior to 3 February 2014 the respondent and B had been habitually resident in England. Notwithstanding her inability to have observed the respondent during cross-examination about her motives, Hogg J found that, when departing for Pakistan on that date, the respondent had genuinely intended to make a new life for herself and for B there and that her motivation had not been to evade the appellant's increasing demands to be allowed to play a fuller role in B's life. So she held that the respondent had thereupon lost her own habitual residence in England. She accepted that the appellant had been a significant person in B's life, particularly prior to the breakdown of the relationship between the two women; that the appellant still had much to offer B; and that B had said that she would miss the appellant and had wished to remain in touch with her. But, asked Hogg J, was B's wish to remain in touch with the appellant enough to sustain a continuation of her habitual residence in England? Her answer was no. Accordingly she held that B had also lost her English habitual residence on 3 February 2014 and thus that the court had no jurisdiction to determine the application issued by the appellant on 13 February 2014 pursuant to the 1989 Act. It was nevertheless

probable, observed the judge, that neither the respondent nor B had acquired habitual residence in Pakistan by that date.

21.
Then Hogg J addressed the appellant's application for the exercise of her inherent jurisdiction over B as a British subject. She noted the appellant's central contention that, in the light of society's attitude in Pakistan towards homosexual acts, she would not be able even to present her case, as a same-sex parent, to the courts there; and the appellant's wider contentions that, as a lesbian, the respondent was putting herself and B at risk by living in Pakistan and that, while B needed in due course to develop a fuller understanding of the circumstances of her conception and early home life, she would, were the respondent to have told her the truth about them, put herself at risk even by speaking about them in Pakistan. The judge, however, accepted that the respondent was well aware of the difficulties which would attend her entry into a same-sex relationship in Pakistan. The judge held that the jurisdiction over a British subject who was neither habitually resident nor present in England and Wales should be exercised only if the circumstances of the case were "dire and exceptional" and that those of the present case did not so qualify.

22.
"This case before me", concluded Hogg J, "is at heart one of 'contact' in the old-fashioned terminology and about making arrangements for seeing a significant person in [B's] life". Then she observed that, had the respondent made an application for permission to remove B to Pakistan, it would have stood a very good chance of success and that there would have been plans, if not orders, for the appellant to have indirect contact. With respect to Hogg J, others might attribute a somewhat lower chance of success to the respondent's hypothetical application; and counsel have been unable satisfactorily to explain the judge's apparent suggestion that the extent of B's contact with the appellant for which the court would have provided would have been no more than indirect.

23.
In the appellant's appeal to the Court of Appeal against the orders of Hogg J the Reunite International Child Abduction Centre ("Reunite") was permitted to intervene. By its judgment, the court concluded that Hogg J had been entitled to hold that on 3 February 2014 B had lost her English habitual residence. It also concluded that, although the attenuation, or even the ultimate loss, of her relationship with the appellant would be a real detriment to B, the circumstances were not so exceptionally grave as to justify exercise of the inherent jurisdiction by reference to her nationality.

24.
The Court of Appeal correctly observed that there was no direct evidence to substantiate the appellant's asserted inability to present her case to the courts of Pakistan. But it surveyed a mass of general material about the attitude of society in Pakistan to same-sex relationships and concluded from it that, although the issue of sexual relations between women was unexplored territory in law, there was in Pakistan pervasive societal and state discrimination, social stigma, harassment and violence against both gay men and lesbian women, together with a lack of effective protection by the state against the activities of non-state actors. So the Court of Appeal proceeded on the basis - not challenged by the respondent in the course of this further appeal - that courts in Pakistan would be unlikely to recognise that the appellant had any relationship with B which would entitle her to relief and that therefore she would have no realistic opportunity to advance her claim there.

CONSEQUENCE

25.

The consequence of the conclusions reached in the lower courts, in both of them by judges of great experience in the field of family law, is that applications intended to secure for B a continuing relationship with the woman who, with the respondent's consent, has acted as one of her parents and who, even for the two years following the separation, managed to maintain a significant, loving presence in her life have been dismissed without any appraisal of B's welfare; without any knowledge of her current situation; without any collection of her wishes and feelings; and in circumstances in which no such applications can be entertained in any other court.

26.
Is it correct that, by the clandestine removal of her to Pakistan, the respondent has placed B's interests beyond all judicial oversight? The Court of Appeal's affirmative answer is arresting. It demands this court's close scrutiny.

HABITUAL RESIDENCE

(a) Principle

27.
A child's habitual residence in a state is the internationally recognised threshold to the vesting in the courts of that state of jurisdiction to determine issues in relation to him (or her). Article 8 of Council Regulation (EC) No 2201/2003 ("Regulation B2R") provides that the courts of an EU state shall have jurisdiction in matters of parental responsibility over a child habitually resident there at the time when the court is seised. By way of exception, article 12 confers jurisdiction on a state which has other links with the child but only where the parties have accepted its jurisdiction. Article 13 provides that, where a child's habitual residence cannot be established (which means where the child is not habitually resident in any EU state) and where article 12 does not apply, jurisdiction vests in the courts of the state in which the child is present. Article 14, entitled "Residual jurisdiction" provides that, where no court of a member state has jurisdiction under the preceding articles, jurisdiction shall be determined by the laws of each state.

28.
A child's habitual residence is also the thread which unites the provisions of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the 1980 Convention"). This Convention applies to a child habitually resident in a contracting state immediately before his wrongful removal or retention: article 4. It is the law of that state which dictates whether his removal or retention was wrongful: article 3(a). It is that state to which, subject to exceptions, other contracting states must order the child to be returned: article 12. Under the Hague Convention on Jurisdiction etc 1996 it is, again, the courts of the contracting state of the child's habitual residence which, as against other contracting states, has jurisdiction to make orders for his protection: article 5(1).

29.
Regulation B2R extends beyond the identification of jurisdiction as between EU states themselves. It binds each EU state irrespective of whether the other state with potential jurisdiction is an EU state. Thus the Family Law Act 1986 ("the 1986 Act") now provides, by section 2(1)(a), that an order under section 8 of the 1989 Act may be made only if the court has jurisdiction under Regulation B2R or if other conditions, irrelevant for present purposes, are satisfied. By her application issued on 13 February 2014 the appellant applied for leave to apply for orders under section 8 of the 1989 Act and the result is that the court has jurisdiction to determine her application only if B was habitually resident in England and Wales on the date of its issue.

30.
Two consequences flow from the modern international primacy of the concept of a child's habitual residence. The first is that, as Reunite submits to this court and as the respondent broadly accepts, it is not in the interests of children routinely to be left without a habitual residence. In that event the machinery of international instruments designed to achieve an orderly resolution of issues relating to them does not operate as primarily intended. Indeed, if they are unilaterally removed from a state in which they were not habitually resident, those aggrieved by their removal can have no recourse to the 1980 Convention. In In re F (A Minor) (Child Abduction) [1992] 1 FLR 548, 555, Butler-Sloss LJ accepted that for that reason it was important that, where possible, a child should have an habitual residence. Indeed, in his article entitled "The Concept of Habitual Residence" in the Juridical Review 1997, p 137, Dr Clive, the great Scottish family law jurist, wrote at p 143 that "with the increasing importance of habitual residence as a connecting factor, it is not sensible to have a situation in which people are routinely without a habitual residence". In the absence of the habitual residence of children anywhere, Regulation B2R provides a fall-back jurisdiction based on their presence. But, in the context of adult disputes about them, the presence of children in a particular state on a particular day is an unsatisfactory foundation of jurisdiction because, by moving them from one state to another, one of the adults can so easily invoke a favourable jurisdiction or pre-empt invocation of an unfavourable one.

31.
The second consequence is that the interpretation in the courts of England and Wales of the concept of habitual residence should be consonant with its international interpretation: see the judgment of the Court of Justice of the European Union ("the CJEU") in Proceedings brought by A [2010] Fam 42, para 34. Its traditional interpretation in England and Wales has been substantially influenced by the stance adopted by one or both of the parents, often at the expense of focus on the child's own situation. By way of example, our courts had accepted a proposition that one parent with parental responsibility could not achieve a change in the child's habitual residence without the consent of the other parent with parental responsibility: Re M (Abduction: Habitual Residence) [1996] 1 FLR 887, 892 E-H and 896 B. This court has now held that proposition to be wrong: In re R (Children) [2015] UKSC 35; [2016] AC 760. By way of another example, our old law largely proceeded by reference to a proposition that a child's habitual residence would necessarily follow the habitual residence of the parent with whom he lived: see the discussion of it in In re LC (Children) [2014] UKSC 1; [2014] AC 1038, para 33. But it was held in the LC case, at paras 34 to 37, that the international interpretation of habitual residence required that proposition to be relaxed.

32.
The present case requires the court to turn its attention to a third aspect of the concept of a child's habitual residence, namely the circumstances in which he loses it, and to ask itself whether the longstanding domestic analysis of those circumstances, yet again heavily dependent on parental intention, is consonant with the modern international concept.

33.
The domestic analysis to which I have referred is to be found in the decision of the House of Lords in In re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562. The facts have some similarities with those of the present case although the latter has features which may more strongly militate against any immediate loss of the child's habitual residence upon removal. On 21 March 1990 the mother removed the child, aged two, from Australia, where he had been habitually resident, to England with the intention of permanently residing here. She did so without the knowledge of the father who also

resided in Australia but who, not having been married to the mother, had at that time no rights of custody in relation to the child. So the mother's removal of him was not wrongful within the meaning of the 1980 Convention. On 12 April 1990, however, an Australian judge conferred rights of custody on the father. So was the mother's retention of the child in England after that date wrongful within the meaning of the 1980 Convention? It was wrongful only if the child had continued to be habitually resident in Australia on that date. The appellate committee held that, while he had not by then acquired habitual residence in England, he had lost his habitual residence in Australia upon his removal three weeks earlier.

34.
It is well-known that, in giving the only substantive speech in the J case, Lord Brandon of Oakbrook made, at pp 578-579, four preliminary points. The first was that the expression "habitual residence" should be given its natural meaning. The second was that an issue about a person's habitual residence in a particular country was one of fact. The fourth, which may remain correct notwithstanding the decision in the LC case, was that the habitual residence of a child aged only two who was in the sole lawful custody of his mother would be the same as hers. It is the validity of Lord Brandon's third point, for which he cited no authority, that is central to the present appeal. Hogg J quoted it in full. Lord Brandon said:

"The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B."

In the light of his third and fourth points Lord Brandon concluded as follows:

"The mother had left Western Australia with a settled intention that neither she nor J should continue to be habitually resident there. It follows that immediately before 22 March 1990, when the retention of J in England by the mother began, both she and J had ceased to be habitually resident in Western Australia." (emphasis supplied)

35.
The analysis by the CJEU of the concept of a child's habitual residence is located in its judgments in Proceedings brought by A, cited in para 31 above, and in Mercredi v Chaffe [2012] Fam 22.

36.
In Proceedings brought by A the issue for determination in Finland was whether children taken into care in November 2005 had then been habitually resident there. They had lived with their mother in Sweden for four years until the summer of 2005, when they had returned to Finland, where they had lived on campsites and not been sent to school. The court's ruling, at p 69, was as follows:

"2. The concept of 'habitual residence' under article 8(1) of [Regulation B2R] must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and 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 must be taken into consideration."

The court had also suggested, at para 40, that the intention of the parents to settle permanently with the child in another member state, manifested by certain tangible steps such as the purchase or lease of a residence there, might indicate what, perhaps significantly, the court chose to describe as a "transfer" of habitual residence.

37.
In the Mercredi case the issue for determination in England and Wales was whether a baby aged two months, lawfully removed by the French mother from the UK to La Réunion, remained habitually resident here five days later when the English court became seised of the British father's application. The CJEU carefully followed its ruling in Proceedings brought by A but, by reference to the different facts, chose also to stress, at paras 53 and 56, that the analysis of the social and family environment of a pre-school child would differ from that of a school-age child and would include consideration of the geographic and family origins of the parent who had effected the move and of the family and social connections of that parent and the child with the state to which they had moved.

38.
In A v A (Children: Habitual Residence) [2013] UKSC 60; [2014] AC 1, this court held that the criterion articulated in the two European authorities ("some degree of integration by the child in a social and family environment"), together with the non-exhaustive identification of considerations there held to be relevant to it, governed the concept of habitual residence in the law of England and Wales: para 54(iii) and (v) of Lady Hale's judgment, with which all the members of the court (including Lord Hughes at para 81) agreed. Lady Hale said at (v) that the European approach was preferable to the earlier English approach because it was "focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors".

39.
It is worthwhile to note that the new criterion requires not the child's full integration in the environment of the new state but only a degree of it. It is clear that in certain circumstances the requisite degree of integration can occur quickly. For example article 9 of Regulation B2R, the detail of which is irrelevant, expressly envisages a child's acquisition of a fresh habitual residence within three months of his move. In the J case, cited above, Lord Brandon suggested that the passage of an "appreciable" period of the time was required before a fresh habitual residence could be acquired. In Marinos v Marinos [2007] EWHC 2047 (Fam); [2007] 2 FLR 1018, para 31, Munby J doubted whether Lord Brandon's suggestion was consonant with the modern European law; and it must now be regarded as too absolute. In A v A, cited above, at para 44, Lady Hale declined to accept that it was impossible to become habitually resident in a single day.

40.
But do the two European authorities assist in identifying the object of central relevance to this appeal, namely the point at which habitual residence is lost?

41.
Yes, in two ways.

42.
The first is indirect. Recital 12 to Regulation B2R states:

“The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity.”

By proximity, “the court clearly meant the practical connection between the child and the country concerned”: Lord Hughes in A v A, cited above, at para 80(ii). In its analysis of the concept of habitual residence the CJEU, both in Proceedings brought by A at para 35 and in the Mercredi case at paras 46 and 47, stressed the significance of recital 12. Of course it does not follow that the court can construe a child’s habitual residence by reference to the result which best serves his interests. The effect of the recital is more subtle and more limited yet nevertheless significant: where interpretation of the concept of habitual residence can reasonably follow each of two paths, the courts should follow the path perceived better to serve the interests of children. Or, to be more specific to the facts of the present case: if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former.

43.
The second is arrestingly direct. In her Opinion in Proceedings brought by A Advocate General Kokott said:

“45. It is also conceivable in exceptional cases that during a transitional stage there will no longer be habitual residence in the former state while the status in the new state has not yet crystallised into habitual residence. Precisely for such a case, article 13 of [Regulation B2R] confers a residual jurisdiction on the courts of the member state in which the child is present.”

In its judgment in the same case the court said:

“43. However, it is conceivable that at the end of [the integration] assessment it is impossible to establish the member state in which the child has his habitual residence. In such an exceptional case, and if article 12 ... is not applicable, the national courts of the member state in which the child is present acquire jurisdiction ... pursuant to article 13(1) ....”

The court’s reference to a situation in which it is “impossible to establish” the child’s habitual residence might at first sight seem ambiguous. Is it referring to a situation in which the child has an habitual residence somewhere but the evidence does not enable the court to identify the state in which he has it? The answer is clearly no. The court is referring to a situation in which a child has no habitual residence. The court is expressly indorsing para 45 of the Advocate General’s Opinion (note its repetition of her words “conceivable” and “exceptional”) but is recasting her point within the slightly ambiguous language of article 13 of B2R, namely “where a child’s habitual residence cannot be established”.

44.
In A v A, cited above, Baroness Hale, at para 54(viii), referred to para 45 of the Advocate General’s Opinion and to para 43 of the court’s judgment in Proceedings brought by A and observed that it was “possible” for a child to have no habitual residence. Lord Hughes, at para 80(ix), indorsed the European court’s conclusion by saying that the circumstances in which a child had no habitual residence would be “exceptional”.

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), 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 overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him:

(a)
the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;

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

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

47.
Lord Brandon's third preliminary point in the J case, set out in para 34 above, should no longer be regarded as correct; and Hogg J fell into error in being guided by it. As exemplified by the terms in which Lord Brandon applied it to the facts of that case, also set out in para 34, his analysis of a child's habitual residence afforded to parental intention a dispositive effect inconsistent with the child-focussed European concept now adopted in England and Wales; and the result of his analysis was to consign a large number of children to the limbo of lacking any habitual residence in circumstances in which the modern law expects such a result to be exceptional, albeit conceivable. It is nevertheless fruitless to inquire whether the conclusion of the appellate committee about the child's loss of habitual residence in Australia within three weeks of his move would remain valid today.

(b) Application

48.
It follows that, in asking whether B's wish to remain in touch with the appellant was enough to sustain a continuation of her habitual residence in England on 13 February 2014, Hogg J should now be seen to have asked herself far too narrow a question. The question is whether B had by then achieved the requisite degree of disengagement from her English environment; and highly relevant to the answer will be whether she had by then achieved the requisite degree of integration in the environment of Pakistan.

49.

In my opinion each of the following factors might contribute to a conclusion that B had by that date achieved the requisite degree of disengagement from her English environment:

(a)
B went to Pakistan with the respondent, who was her biological mother, her primary carer and the person who alone had parental responsibility for her;

(b)
B's removal to Pakistan was lawful;

(c)
B knew that she was going to live in Pakistan;

(d)
part of B's ethnic heritage was in Pakistan and certain members of her wider family, albeit unidentified, apparently remain living there;

(e)
the respondent took B to Pakistan in the genuine belief that they would have a better life there and with the intention that they would settle there; and

(f)
two months earlier the respondent had conducted a reconnoitre of possible arrangements for their future life in Islamabad.

50.
In my opinion each of the following factors might contribute to a conclusion that B had not by that date achieved the requisite degree of disengagement from her English environment:

(a)
B had lived in England throughout the five years of her life;

(b)
she had never previously set foot in Pakistan;

(c)
her language was English and she barely spoke Urdu;

(d)
she was a British subject;

(e)
the appellant, who was a central figure in B's life, indeed probably the second most important figure, had been left behind in England;

(f)
B's removal was effected without the appellant's knowledge, still less approval;

(g)
B was aware that her removal was to be kept secret from the appellant;

(h)

B retained significant emotional links with the appellant and feared that she would miss her following the move to Pakistan;

(i)
other important adult figures in B's life, in particular both sets of grandparents and two aunts, together with various young cousins, had also been left behind in England;

(j)
the home in which B had lived throughout her life had not been sold and remained available for her immediate re-occupation with the respondent;

(k)
by 13 February 2014 B had been present in Pakistan for only nine days;

(l)
at that time she and the respondent had the right to remain there for only about three months;

(m)
they were then staying temporarily with a friend of the respondent;

(n)
no independent accommodation had by then been secured by the respondent; and

(o)
B was not then even attending school in Pakistan nor even registered with a school there.

(c) Conclusion

51.
I conclude that, taken cumulatively, the factors set out in para 50 are stronger than those set out in para 49 and compel a conclusion that on 13 February 2014 B retained habitual residence in England. Accordingly the appellant's application issued on that date under the 1989 Act can and should proceed to substantive determination. The judge may wish to consider whether to make B a party to the application, acting by a children's guardian, and, if so, whether to invite the guardian to instruct an independent social worker to interview B in Pakistan and to explore the circumstances of her life there. Were the court's eventual conclusion to be that it was in B's interests to return to England, either occasionally, in order to spend time with the appellant here, or even permanently, in order to reside here again whether mainly with the respondent or otherwise, its order could include consequential provision under section 11(7)(d) of the 1989 Act for the respondent to return her, or cause her to be returned, to England for such purposes.

NATIONALITY

52.
There is accordingly no need to consider whether, on the footing that she had no jurisdiction to determine the appellant's application under the 1989 Act, Hogg J was entitled to decline to exercise her inherent jurisdiction to make B, as a British subject, a ward of court and to order (or even to consider whether to order) the respondent to return her, at any rate on a temporary basis, to England. In A v A, cited above, this court held that the prohibition comprised in sections 1(1)(d), 2(3) and 3(1) of the 1986 Act against making an order in wardship proceedings for the care of, or contact with, a British child neither habitually resident nor present in England and Wales did not preclude a bare

order for his return to England: para 28 (Lady Hale, with whom the other members of the court agreed).

53.
This court has received extensive submissions from both of the central parties and from each of the three interveners about the proper exercise of the court's power - or indeed the discharge of its alleged duty - to exercise its inherent jurisdiction where no other jurisdiction exists in which the welfare of a British child can be addressed. With apologies to the solicitors and counsel who, all unremunerated, have laboured to craft them, I decline to lengthen this judgment by addressing almost all of these submissions. I do, however, agree with Lady Hale and Lord Toulson when, in para 60 below, they reject the suggestion that the nationality-based jurisdiction falls for exercise only in cases "at the extreme end of the spectrum". I consider that, by asking, analogously, whether the circumstances were sufficiently "dire and exceptional" to justify exercise of the jurisdiction, Hogg J may have distracted herself from addressing the three main reasons for the court's usual inhibition about exercising it. In para 59 below Lady Hale and Lord Toulson identify those reasons and I agree that arguably none of them carries much force in the present case. To my mind the most problematic question arises out of the likelihood that, once B was present again in England pursuant to an order for her return, the appellant would have issued an application for orders relating to care of her or contact with her. The question would be whether in such circumstances an order for her return would improperly have subverted Parliament's intention in enacting the prohibitions comprised in sections 1(1)(d), 2(3) and 3(1) of the 1986 Act. Or, in such circumstances, should the interests of the child prevail and indeed would Parliament have so intended?

THE DISSENTING JUDGMENTS

54.
In para 65 below Lord Sumption complains that the only proposed ground for allowing the appeal is that it is "highly unlikely, albeit conceivable" that one habitual residence will be lost before another is acquired. There, with respect, Lord Sumption misunderstands my judgment. What I suggest - in para 45 above - is that the modern concept of habitual residence operates in the expectation that an old habitual residence is lost when a new one is gained. The mere unlikelihood of the correctness of an outcome favoured by a judge would be a disgraceful ground for allowing an appeal. The ground for allowing this appeal is that the modern concept of habitual residence identifies the point of its loss as being the stage when the person achieves the requisite degree of disengagement from the old environment (para 48 above); that intention, in this case parental intention, is no longer dispositive in this respect (para 47 above); that highly relevant to the person's achievement of that requisite degree of disengagement is his achievement of the requisite degree of integration in the new environment (para 48 above); and that, by application of the modern concept, B had not lost her habitual residence in England by 13 February 2014 (para 51 above).

55.
In para 72 below Lord Sumption quotes from para 44 of the Opinion of Advocate General Kokott in Proceedings brought by A, cited above. Might I suggest that inadvertently Lord Sumption has in this regard been too selective? The Advocate General suggests:

"44. … all the circumstances of the individual case must be taken into account where there is a change of place. An indication that the habitual residence has shifted may in particular be the corresponding common intention of the parents to settle permanently with the child in another state. The parents' intention may manifest itself, for example, in external circumstances such as the

purchase or lease of a residence in the new state, notifying the authorities of the new address, establishing an employment relationship, and placing the child in a kindergarten or school. As a mirror image, abandoning the old residence and employment and notifying the authorities of departure suggest that habitual residence in the former state is at an end."

I have set the words quoted by Lord Sumption in italics. My understanding, however, is that in para 44 the Advocate General recommends a composite consideration of "all the circumstances" both in the new environment and, "as a mirror image", in the old environment in order to determine whether habitual residence has "shifted" from the latter to the former. She does not suggest consideration only of severance of links with the old environment with a view to determining whether, even if no new habitual residence has been gained, the old one has been lost. For it is only in the next paragraph that she turns to that possibility.

56.
Both Lord Sumption at para 70 and Lord Clarke at para 92 consider that it makes no sense to regard a person as habitually resident in England and Wales if she is not resident there at all because she has left it to live permanently elsewhere. With respect, my view is different. For me it makes no sense to regard a person's intention, in this case a parent's intention, at the moment when the aeroplane leaves the ground as precipitating, at that moment, a loss of habitual residence. At all events, and more importantly, I remain clear that such is not the modern law.

LADY HALE AND LORD TOULSON:

57.
We agree fully with Lord Wilson's reasoning and conclusion on the issue of habitual residence. He has described the identification of a child's habitual residence as overarchingly a question of fact (para 46). At the risk of appearing pedantic, we would prefer to describe it as a mixed question of fact and law, because the concept is a matter of law but its application is a matter of fact. We do not, however, understand Lord Wilson to be laying down a rule of law that a child must always have an habitual residence: rather that, as a matter of fact, the loss of an established habitual residence in a single day before having gained a new one would be unusual. In this particular case, although the respondent said that her intentions were permanent, looked at from the child's point of view, on the relevant date they had been in Pakistan for only nine days, they had no home there, and she had not yet been entered into a school. Had the respondent then changed her mind and decided that the move was a bad idea, it is unlikely that a court would have held that the habitual residence of either of them had changed during those few days.

58.
Lord Wilson's conclusion on the issue of habitual residence makes it unnecessary to reach a decision on the hypothetical question whether it would have been right for the court to exercise its jurisdiction founded on B's nationality if she had no habitual residence at the time when these proceedings began. It is not in doubt that the restrictions on the use of the inherent or parens patriae jurisdiction of the High Court in the Family Law Act 1986 do not exclude its use so as to order the return of a British child to this country: this court so held in A v A (Children: Habitual Residence) [2013] UKSC 60; [2014] AC 1. The Court of Appeal devoted a large proportion of their judgment to this aspect of the case. Their approach is summed up in para 45:

"Various words have been used down the years to describe the kind of circumstances in which it may be appropriate to make an order - 'only under extraordinary circumstances', 'the rarest possible thing', 'very unusual', 'really exceptional', 'dire and exceptional' 'at the very extreme end of the

spectrum'. The jurisdiction, it has been said must be exercised 'sparingly', with great 'caution' … and with 'extreme circumspection'. We quote these words not because they or any of them are definitive - they are not - but because, taken together, they indicate very clearly just how limited the occasions will be when there can properly be recourse to the jurisdiction."

59.
Lord Wilson has listed a number of important issues to which that question would have given rise and which must wait for another day. It is, however, one thing to approach the use of the jurisdiction with great caution or circumspection. It is another thing to conclude that the circumstances justifying its use must always be "dire and exceptional" or "at the very extreme end of the spectrum". There are three main reasons for caution when deciding whether to exercise the jurisdiction: first, that to do so may conflict with the jurisdictional scheme applicable between the countries in question; second, that it may result in conflicting decisions in those two countries; and third, that it may result in unenforceable orders. It is, to say the least, arguable that none of those objections has much force in this case: there is no applicable treaty between the UK and Pakistan; it is highly unlikely that the courts in Pakistan would entertain an application from the appellant; and it is possible that there are steps which an English court could take to persuade the respondent to obey the order.

60.
The basis of the jurisdiction, as was pointed out by Pearson LJ in In re P (GE) (An Infant) [1965] Ch 568, at 587, is that "an infant of British nationality, whether he is in or outside this country, owes a duty of allegiance to the Sovereign and so is entitled to protection". The real question is whether the circumstances are such that this British child requires that protection. For our part we do not consider that the inherent jurisdiction is to be confined by a classification which limits its exercise to "cases which are at the extreme end of the spectrum", per McFarlane LJ in In re N (Abduction: Appeal) [2012] EWCA Civ 1086; [2013] 1 FLR 457, para 29. The judgment was ex tempore and it was not necessary to lay down a rule of general application, if indeed that was intended. It may be that McFarlane LJ did not so intend, because he did not attempt to define what he meant or to explain why an inherent jurisdiction to protect a child's welfare should be confined to extreme cases. The judge observed that "niceties as to quite where the existing extremity of the jurisdiction under the inherent jurisdiction may be do not come into the equation in this case" (para 31).

61.
There is strong reason to approach the exercise of the jurisdiction with great caution, because the very nature of the subject involves international problems for which there is an international legal framework (or frameworks) to which this country has subscribed. Exercising a nationality based inherent jurisdiction may run counter to the concept of comity, using that expression in the sense described by US Supreme Court Justice Breyer in his book The Court and the World (2015), pp 91-92:

"… the court must increasingly consider foreign and domestic law together, as if they constituted parts of a broadly interconnected legal web. In this sense, the old legal concept of 'comity' has assumed an expansive meaning. 'Comity' once referred simply to the need to ensure that domestic and foreign laws did not impose contradictory duties upon the same individual; it used to prevent the laws of different nations from stepping on one another's toes. Today it means something more. In applying it, our court has increasingly sought interpretations of domestic law that would allow it to work in harmony with related foreign laws, so that together they can more effectively achieve common objectives."

62.

If a child has a habitual residence, questions of jurisdiction are governed by the framework of international and domestic law described by Lord Wilson in paras 27 to 29. Conversely, Lord Wilson has identified the problems which would arise in this case if B had no habitual residence. The very object of the international framework is to protect the best interests of the child, as the CJEU stressed in Mercredi. Considerations of comity cannot be divorced from that objective. If the court were to consider that the exercise of its inherent jurisdiction were necessary to avoid B's welfare being beyond all judicial oversight (to adopt Lord Wilson's expression in para 26), we do not see that its exercise would conflict with the principle of comity or should be trammelled by some a priori classification of cases according to their extremity.

LORD SUMPTION (dissenting) (with whom Lord Clarke agrees):

Introduction

63.
I regret that I am unable to agree with the opinion of the majority.

64.
The reason, in summary, is that while the test for what constitutes habitual residence is a question of law, whether it is satisfied is a question of fact. The judge directed herself in accordance with all the relevant authorities. She heard the evidence of both ladies in addition to reviewing a substantial volume of other material. She found as a fact that the child lost her habitual residence in the United Kingdom on 3 February 2014, when she left the United Kingdom with the Respondent to start a new life in Pakistan with no intention of returning. That finding was upheld by the Court of Appeal. It followed that the child was not habitually resident in the United Kingdom on 13 February when these proceedings were begun, even though by then she was probably not yet sufficiently integrated into the life of Pakistan to have acquired habitual residence there.

65.
The sole ground on which it is now proposed to set the judgment aside is that it is "highly unlikely, albeit conceivable" that habitual residence will be lost before a new habitual residence has been acquired. I remain uncertain whether this is said to be a principle of law or a proposition of fact. So far as it is a principle of law, it appears to me to be wrong. So far as it is a proposition of fact, the judge addressed all the relevant considerations in making her findings.

66.
It is said that this result leaves the child in a jurisdictional limbo because on that footing she has no habitual residence anywhere. In my opinion, there is no jurisdictional limbo. Habitual residence is the primary test for jurisdiction, but it is not the only one. In English and EU law, in the absence of an ascertainable habitual residence, jurisdiction may be founded on the presence of the child. No attempt has been made to prove that the law of Pakistan is any different, and I would be very surprised if it was. The real objection to the courts of Pakistan is not that they lack jurisdiction but that they are likely to disapprove of same-sex relationships and will not necessarily recognise a non-genetic family relationship. That is a source of legitimate concern to the English courts, but it is not a basis on which they are entitled to claim jurisdiction.

Loss of habitual residence

67.

I will deal first with the suggestion that there is something wrong in principle with a finding that a former habitual residence has been lost before a new one has been obtained.

68.
The habitual residence of a child is the primary basis of jurisdiction in member states of the European Union, by virtue of article 8 of Council Regulation (EC) 2201/2003. In Proceedings brought by A (Case C-523/07) [2010] Fam 42, the Court of Justice held that this meant that the presence of the child within the jurisdiction of a state must be:

“not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment. In particular, 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 must be taken into consideration. As the Advocate General pointed out in para 44 of her opinion, the parents’ intention to settle permanently with the child in another member state, manifested by certain tangible steps such as the purchase or lease of a residence in the host member state, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that state.” (paras 38-40)

This statement was substantially repeated in Mercredi v Chaffe (Case C-497/10PPU) [2012] Fam 22, and was adopted by this court as part of the domestic law of England in A v A (Children: Habitual Residence) [2014] AC 1.

69.
Recital (12) of the Council Regulation recites that “the grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child.” In the context of article 12 of the Regulation, the Court of Justice has recently drawn attention to this recital in E v B (Case C-436/13) [2015] Fam 162, para 45. But its value, as both the recital and the judgment make clear, is as a guide the interpretation of the Regulation’s jurisdictional rules. It explains why the social integration test of habitual residence has been adopted. Now that it has been adopted, the task of the courts is to apply it. The recital is not a licence to treat questions of jurisdiction as discretionary or to import legal qualifications into the essentially factual exercise of determining where a child is socially integrated and where she is not.

70.
A person may be resident in a country without being habitually resident there. It is inherent in the concept of a “habitual” residence that in many, probably most cases, a new residence may not become habitual until some time has elapsed. The same is true of the integration test for habitual residence which has been adopted by EU and English law. Integration into the social and family environment of a new place of residence cannot always be achieved at once. However, it is self-evidently easier to lose a habitual residence at once. This is because the severance of old links is a unilateral act. It can be achieved faster than the acquisition of new ones which involve the engagement of other people and institutions. It makes no sense to regard a person as habitually resident in the United Kingdom if she is not resident there at all because she has left it to live permanently elsewhere. The fact that there is a house in the United Kingdom which could be reoccupied or that there are friends or relations in the United Kingdom to which the child could return are irrelevant if (as the judge accepted) the child had been lawfully and permanently removed from the country.

71.

Of course this does mean that there may be a period during which the child, although resident in a particular country is not “habitually resident” anywhere. Other jurisdictional tests, such as presence within the jurisdiction, nationality or domicile would have had the advantage of allowing a seamless transition from one status to another. But the law has not adopted these tests. Instead it has adopted a test which by its nature is liable to produce a hiatus. This is simply an inescapable consequence of the concept of a “habitual” residence in a case where a child migrates from a familiar to an unfamiliar place.

72.
The courts have had no difficulty in accepting these as obvious propositions of fact. Advocate General Kokott in Proceedings brought by A (Case C-523/07) acknowledged that “abandoning the old residence and employment and notifying the authorities of departure suggest that habitual residence in the former state is at an end” (para 44) and that “in exceptional cases… during a transitional stage there will no longer be habitual residence in the former state while the status in the new state has not yet crystallised into habitual residence” (para 45). She thought that such situations would be exceptional, but in the nature of things they can be no more exceptional than the facts which give rise to them. In In re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, 578-579, Lord Brandon, speaking for a unanimous appellate Committee, observed that:

“there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead.”

The courts have more recently expressed reservations about parts of this passage, mainly because it tends to overstate the difficulty of acquiring a new habitual residence. As Baroness Hale observed in A v A (Children: Habitual Residence), supra, at para 44, this is “best seen as helpful generalisations of fact, which will usually but not invariably be true”. That is of course because habitual residence is a question of fact, as Lord Brandon himself had pointed out immediately before the passage cited. She went on, in the same paragraph, to adopt that part of Lord Brandon’s generalisation which is directly relevant to the present case:

“I would not accept that it is impossible to become habitually resident in a single day. It will all depend on the circumstances. But I would accept that one may cease to be habitually resident in one country without having yet become habitually resident in another.”

73.
If an old habitual residence cannot be lost until a new one has been acquired, it must therefore be by virtue of some rule of rule of law by which regardless of the facts the severance of the child’s links with her former habitual residence is somehow deemed in law to be suspended pending the acquisition of a new habitual residence. Yet it is far from clear to me how this is to be reconciled with what is an essentially a factual enquiry, as every court which has hitherto considered this question has emphasised. In A v A, at para 39 Baroness Hale deprecated the tendency of the courts to “overlay the factual concept of habitual residence with legal constructs”. These observations were later repeated by Baroness Hale in In re L (A Child) (Custody: Habitual Residence) [2014] AC 1017 at paras 20-21, and more recently by Lord Reed, with whom every other member of this court agreed, in the Scottish case of In re R (Children) [2016] AC 76, para 17.

74.

The judgment of the Court of Appeal, delivered by Black LJ, put the point, at para 29, in terms which I cannot improve upon:

“The arguments advanced by the appellant and also on behalf of the intervener, Reunite, appeared at times to amount to an invitation to swathe habitual residence in sub-principles, or glosses, or comments, in a way which would fly in the face of the determinedly factual approach of the European jurisprudence and the Supreme Court. So, for example, we were invited to say that it would only be in exceptional cases that a child would lose one habitual residence before acquiring another … it may be that there will turn out to be relatively few cases in which the habitual residence of a child does not transfer seamlessly from one country to another, but if so, that will be because the facts tend to be that way and not because the courts impose upon themselves the artificial discipline of only finding it otherwise in exceptional circumstances.”

A jurisdictional limbo?

75.
The notion that there must be a seamless transfer of habitual residence is a classic legal construct, which has no place in the essentially factual enquiry involved in identifying a child’s habitual residence. The reason given by the majority for adopting that notion is not that it is factually impossible, or virtually so, for a child to have no habitual residence. Their reason is that it is legally undesirable because it produces a jurisdictional limbo. However it may be described by its authors, I find it impossible to regard this as anything other than a proposition of law. And I respectfully suggest that it is not correct. Article 13 of the Council Regulation provides for residual jurisdiction to lie with the courts of the country where the child is present in a case where a child’s habitual residence “cannot be established”. As Advocate General Kokott pointed out at para 45 of her advice in Proceedings brought by A, supra, article 13 was included precisely in order to cover the situation where a former habitual residence has been lost but the child’s status in her new home “has not yet crystallised into habitual residence.” A similar provision appears in article 6(2) 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. Jurisdiction based on presence is also provided for by sections 2 and 3 of the Family Law Act 1986 in cases where neither the Council Regulation nor the 1996 Hague Convention applies, and it serves the same function in that context. For this reason, there is no need for a principle of seamless transfer except in cases where the child has been removed to a state (if indeed there is such a state) where there is no jurisdiction founded on the presence of the child within its territory.

76.
It may well be true, as Lord Wilson observes (para 30), that jurisdiction based on presence is unsatisfactory because in a case where a child has no habitual jurisdiction it allows an adult to move a child to a jurisdiction thought to be favourable to his or her case. However, in the first place, adults can do that anyway. Secondly, for better or for worse that is what the Regulation, the Conventions and the Act provide. And third, the English courts have no right under the Family Law Act to assert jurisdiction simply on the ground that they do not approve of the law or practice which would be applied in the courts of the country where the child is located. So far as this is a problem, the solution to it is not to construct an artificial habitual residence in the place which the child has left for good. It is for the English courts to be more ready than they have traditionally been to recognise that a new habitual residence can be rapidly acquired. The Council Regulation assumes that it will normally have been acquired in three months: see article 11(7); and in A v A Baroness Hale declined to assume that it could not be acquired in a single day.

77.
It should be noted that the present issue would not arise in a case where the child was wrongfully removed in breach of rights of any person's rights of custody. This is because article 10 of the Council Regulation confers jurisdiction on courts of the country where the child was habitually resident immediately before his removal. There are similar provisions in article 4 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction and article 7 of the 1996 Hague Convention. The fact that the child may have no habitual residence for a period after his removal is therefore irrelevant. The appellant's difficulty in this case is that she had no parental rights at the time of the child's departure from the United Kingdom. She was not registered as a parent at birth. There was no civil partnership, no adoption, no parental rights agreement and no court order recognising her status with regard to the child. The judge found that the respondent was not trying to escape from the jurisdiction of the English court. She was in law the child's sole parent who was absolutely entitled to exercise her parental rights by removing her to Pakistan. Although Lord Wilson characterises the removal as "secret" and "clandestine", the judge made no finding of underhand conduct which could warrant these pejorative epithets.

The Judge's findings

78.
The judge directed herself in accordance with the observations of Lord Brandon in In re J, so far as these were approved and explained by the Supreme Court in A v A and In re L. She concluded that the child was too young to have a habitual residence other than that of the woman who had always been her primary carer and on whom she was wholly dependent. That seems an obvious conclusion in the case of a five year-old child, but at the very least it was a permissible one. I do not understand the majority to dissent from it.

79.
The judge then set out at paras 27-28 her reasons for concluding that the habitual residence of both of them in the United Kingdom was lost when they left for Pakistan:

"27. The mother said she left this jurisdiction to make a new life in Pakistan. She had actually been thinking about it seriously since July of last year. She made her fact-finding trip in November following which she made a decision. She had the support of her family. They knew what she was about. She and [B] said their goodbyes to school, to the family. They left their home, packed up their possessions and the mother sent a letter with the keys of the house to the applicant. She is admittedly still paying her share of the mortgage to preserve her share of the asset, that matter has yet to be resolved between the two ladies. She had the intention to set up a new life. She had lost her job. She was finding it financially difficult to be in this country even when she was working and she had laid the ground for a new life in Pakistan. It is important to note what she did immediately upon arrival in Pakistan. Until the end of April she was unaware of the applicant's application to this court, but the mother found herself a new home and a school for the child to which they both moved in on 19 February, just 15 days after their arrival. They had previously been staying with friends. She had work already upon her arrival, at which she has continued, and she made an application for an ID card, which she obtained before she became aware of these proceedings.

28. As I have said, I am not satisfied she was running away as alleged by the applicant, and I accept her intention that she intended to create a new life for herself and for [B] in Pakistan. On that basis, she lost her habitual residence here."

Next the judge considered the perception of the child. Without making any finding about the appellant's evidence that the child wished to keep in touch with her, the judge held that even if she did, that did not mean that her habitual residence remained in the United Kingdom after 3 February 2014:

"The mother is the sole legal parent and in moving her she had planned a life away from this country. It was not a wrongful removal. She was exercising her parental responsibility. [B]'s wish to remain in touch is something that I must consider. It does not necessarily mean that the child has to remain in the country. There are many children throughout the world who remain in touch with families or members of a family or even friends when they are relocated by their parents. This is another relocation and a child wishing to remain in touch with a significant person. In my view her wish to remain in touch with the applicant does not justify making or continuing an individual habitual residence in this country when the mother has abandoned her own."

80.
This is a classic evaluative judgment on a question of fact with which this court should in principle decline to interfere, just as the Court of Appeal declined to do so. If it was legally possible for the respondent and the child to terminate their previous habitual residence in the United Kingdom before their residence in Pakistan became "habitual", then it is difficult to envisage a clearer case of it than this one. That leaves only the possibility that it might not be legally possible to create such a hiatus. But the authorities in this court which show that it is legally possible are consistent, recent and in my respectful opinion plainly right.

Inherent jurisdiction

81.
The inherent jurisdiction of the High Court with respect to children originated in an age where the civil courts had no statutory family jurisdiction. It is based on the concept of a quasi-parental relationship between the sovereign and a child of British nationality. It enables the courts to make a British child a ward of court, even if the child is outside the jurisdiction when the order is made. The continued existence of an inherent jurisdiction in an age of detailed and comprehensive statutory provision is something of an anomaly. The basis of the jurisdiction is, moreover, difficult to reconcile with the content of the statutory rules about jurisdiction. It is based on nationality, whereas the statutory rules are based on habitual residence and presence. Nonetheless, its survival was implicitly recognised by sections 1(1)(d) and 2(3) of the Family Law Act 1986, which prohibited the exercise of the jurisdiction so as to give care of a child to any person or provide for contact with or the education of a child, unless either the court had jurisdiction under the Council Regulation or the 1996 Hague Convention or, if neither of these applied, the child is present or habitually resident in the United Kingdom. Its survival in other cases was acknowledged by this court in A v A, supra, subject to the proviso that its exercise would call for "extreme circumspection" (paras 63, 65). The case-law, which fully bears out that proviso, is summarised in the judgment of the Court of Appeal, and I will not repeat that exercise here.

82.
The appellant in the present case invites the court, on the footing that there is no statutory jurisdiction, to use its inherent jurisdiction to order the return of the child to the United Kingdom. Such orders have been made in two classes of case, both of which can broadly be described as protective. The first comprises abduction cases before the enactment of a statutory jurisdiction to deal with them. The second comprises cases where the child is in need of protection against some personal

danger, for example where she has been removed for the purpose of undergoing a forced marriage or female genital mutilation. All of the modern cases fall into this last category.

83.
A dissenting judgment is not the place for a detailed examination of the ambit of the inherent jurisdiction. Nor is such an examination required in order to determine this appeal. For present purposes, it is enough to make three points.

84.
First, the jurisdiction is discretionary, and should not be overturned in the absence of some error of principle or misunderstanding of the facts, unless the judge has reached a conclusion that no judge could reasonably have reached. The judge declined to exercise the jurisdiction because the appellant had been entitled to exercise her parental rights by taking the child to Pakistan and there was no reason to regard the child as being in danger there. In those circumstances, the admitted detriment to the child in being deprived of face to face contact with the appellant could not justify requiring the respondent to bring the child back. The Court of Appeal reached the same conclusion for substantially the same reason. The situation, they said (para 53), “falls short of the exceptional gravity where it might indeed be necessary to consider the exercise of the inherent jurisdiction”. I agree with this, but on any view I think that it was a view that a judge could reasonably take.

85.
Secondly, the inherent jurisdiction should not be exercised in a manner which cuts across the statutory scheme. If, as Lady Hale and Lord Toulson suggest, the use of the inherent jurisdiction is not reserved for exceptional cases, the potential for it to cut across the statutory scheme is very considerable. I have no doubt that it would do so in this case. In the first place, it would fall to be exercised at a time when the child will have been with her mother in Pakistan for at least two years, and will probably have become habitually resident there. Secondly, it seems plain that if an application under the inherent jurisdiction had been made by, say, an aunt or a sister of the respondent, there could be no ground for acceding to it. It is necessary to make this point in order to remind ourselves that it is to protect her relationship with the child on the basis that she should be regarded as a co-parent that the appellant is invoking the inherent jurisdiction of the court. The real object of exercising it would be to bring the child within the jurisdiction of the English courts (i) so that the court could exercise the wider statutory powers which it is prevented by statute from exercising while she is in Pakistan, and (ii) so that they could do so on different and perhaps better principles than those which would apply in a court of family jurisdiction in Pakistan. Thirdly, this last point is reinforced by the consideration that the appellant’s application in the English courts is for contact and shared residence. This is not relief which the statute permits to be ordered under the inherent jurisdiction, in a case where there is no jurisdiction under the Council Regulation or the 1996 Hague Convention. I do not accept that the inherent jurisdiction can be used to circumvent principled limitations which Parliament has placed upon the jurisdiction of the court. For these reasons, in addition to those given by the judge and the Court of Appeal, I do not think that an order for the child’s return could be a proper exercise of the court’s powers.

86.
Third, if there were grounds for believing the child to be in danger, or some other extreme facts justifying the exercise of the inherent jurisdiction, it would no doubt be possible in the exercise of the court’s inherent jurisdiction to direct an independent assessment of the situation of the child in Pakistan. Unless the facts were already clear, that would be the least that a court should do before it could be satisfied that she should be compulsorily returned to this country. In the present case, that

assessment would also have to take account of the impact on the child of her removal for the second time of her life from a place where she is by now presumably settled, as well as the impact on her of the disruption of her primary carer's life which would be involved in requiring her to abandon her life and job in Pakistan to return to a country where she has no job, is estranged from her family and has no desire to reside. But we are not in that territory. The courts below have held that there are no such grounds, and we have no basis on which to disagree with them. The mere absence of statutory jurisdiction in the English courts cannot possibly be a reason for exercising the inherent jurisdiction. On the contrary, in a case like this it is a reason for not doing so.

87.
Given that the inherent jurisdiction exists to enable the English court to exercise the sovereign's protective role in relation to children, from what is it said that B needs to be protected? As I understand it, the suggestion is that she needs to be protected from the presumed unwillingness of the courts of Pakistan to recognise the status of the appellant in relation to the child in the way that the English court would now do if they had statutory jurisdiction. I cannot regard this as a peril from which the courts should "rescue" the child by the exercise of what is on any view an exceptional and exorbitant jurisdiction.

Disposition

88.
For these reasons, I would dismiss the appeal.

LORD CLARKE:

89.
In this appeal I have reached the same conclusions as Lord Sumption, essentially for the reasons he gives.

Habitual Residence

90.
Hogg J held that B lost her habitual residence here when she was taken to Pakistan and the Court of Appeal held that there was no reason to interfere with that conclusion. Hogg J is a very experienced family lawyer. So too are at least two members of the Court of Appeal, namely Munby P and Black LJ, who gave the judgment of the court to which all three members contributed. My principal reason for preferring the opinion of Lord Sumption to that of the majority is that there is, in my opinion, no principled basis for holding that the decision of Hogg J was wrong, either in law or on the facts. She was entitled to reach the conclusions which she did and the Court of Appeal were right to dismiss the appeal from her decision.

91.
In short I agree with Lord Sumption's conclusion at para 80 that Hogg J's judgment is a classic evaluative judgment on a question of fact with which this court should decline to interfere, just as the Court of Appeal declined to do.

92.
In particular, after setting out her conclusions of fact at paras 26 to 28, Hogg J was in my opinion entitled to hold (as she did at para 29) that, when the mother lost her habitual residence on leaving the United Kingdom, so did B. I agree with Lord Sumption that there is nothing wrong in principle with a finding that a former habitual residence has been lost before a new one has been obtained. All

depends upon the facts of the particular case. On the facts here I agree with him (at para 96) that it is self-evidently easier to lose a habitual residence at once than acquire a new one and that it makes no sense to regard a person as habitually resident in the United Kingdom if she is not resident at all because she has left to live permanently elsewhere. Finally, I agree with him that if, as Hogg J held here, the child had been lawfully and permanently removed from the country, the fact that there is a house in the UK which could be reoccupied or there are friends and relations to whom the child could return is irrelevant.

93.
In para 28 of the judgment in the Court of Appeal, after referring to a number of recent cases including A v A (Children: Habitual Residence) [2013] UKSC 60; [2014] AC 1, Black LJ said this:

“The European formulation of the test (to be found in Proceedings brought by A [2010] Fam 42 at para 2, as quoted in A v A at para 48) is the correct one, namely that ‘the concept of habitual residence … must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment’. The inquiry is a factual one, requiring an evaluation of all relevant circumstances in the individual case. It focuses upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It should not be glossed with legal concepts. And, as Lord Reed observed at para 18 of In re R (Children) [2015] UKSC 35; [2015] 2 WLR 1583, when the lower court has applied the correct legal principles to the relevant facts, its evaluation will not generally be open to challenge unless the conclusion which it reached was not reasonably open to it.”

I respectfully agree.

94.
Black LJ then set out her para 29, which is quoted with approval by Lord Sumption. Finally, in para 30 she expressed the view that Hogg J’s approach to habitual residence was in line with the authorities. She then specifically (and correctly) considered B’s position separately from that of her mother and concluded:

“[Hogg J] described in her judgment the situation in this country and the situation in Pakistan in such a way as to show that she had looked both at what P was leaving and what was awaiting her in Pakistan. In short, she applied the proper principles to the relevant facts and there is no reason to interfere with her finding that P lost her habitual residence here when she left for Pakistan.”

Again, I agree.

95.
For these reasons, which are essentially the same as those given by Lord Sumption, namely that neither Hogg J nor the Court of Appeal erred in fact or law, I would have dismissed the appeal on the habitual residence point.

Inherent jurisdiction

96.
I agree with Lord Sumption that the appeal on this ground should also be dismissed. I do so for essentially the same reasons as on the habitual residence point, namely that Hogg J made no error of fact or law and that the Court of Appeal correctly so held.

97.

I agree with Lady Hale and Lord Toulson that the court must approach the use of the inherent jurisdiction with great caution and circumspection for the reasons they give. However, I agree with Lord Sumption that on the facts of this case it should not use the inherent jurisdiction to order B to be returned to the jurisdiction in order to enable it to exercise its statutory jurisdiction in circumstances in which it would not otherwise have that jurisdiction. This is not to say that there may not be circumstances in which it would be appropriate for the English court in another case to consider the welfare of the child more generally without requiring his or her return to the jurisdiction, at any rate in the first instance. As ever, all will depend on the circumstances.