**Hilary Term**
**[2014] UKSC 1**
*On appeal from: [2013] EWCA Civ 1058*

# JUDGMENT

# In the matter of LC (Children)

# In the matter of LC (Children) (No 2)

**before**

**Lady Hale, Deputy President**
**Lord Wilson**
**Lord Sumption**
**Lord Toulson**
**Lord Hodge**

## JUDGMENT GIVEN ON

## 15 January 2014

**Heard on 11 November 2013**

*Father*
Frank Feehan QC
Christopher Hames

(Instructed by Goodman Ray LLP)

*Mother*
Henry Setright QC
Edward Devereux
Michael Gration
(Instructed by Dawson Cornwell)

*Child TM*
David Williams QC
Jacqueline Renton
(Instructed by The International Family Law Group LLP)

*Children LR, AG and NA*
Teertha Gupta QC
Penny Logan
(Instructed by CAFCASS Legal Services)

*Intervener – reunite International Child Abduction Centre*
James Turner QC
Katy Chokowry
(Instructed by Bindmans LLP)

**LORD WILSON (with whom Lord Toulson and Lord Hodge agree)**

1. 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.

2. The appeals are brought within proceedings issued by a mother against a father for the summary return of their four children from England to Spain pursuant 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 ("the 1985 Act").

3. The father is a UK national aged 47 and lives in the Thames Valley. The mother is a Spanish national aged 46 and lives in Madrid. The four children are T, a girl, who was born in August 2000 and is now aged 13; L, a boy, who was born in December 2002 and is now aged 11; A, a boy, who was born in November 2004 and is now aged 9; and N, a boy, who was born in December 2008 and is now aged 5. All four children were born in England. They are Spanish nationals and are presumably also UK nationals. They currently reside with the father.

4. At all times until July 2012, when the relationship between the parents broke down, the family had lived in England and had gone for holidays to Spain in order, in particular, to see the maternal grandmother and the other maternal relations. On 24 July 2012 the mother took the four children to reside in Spain. They resided in Spain until 23 December 2012, when they returned to England for what was agreed between the parents to be no more than a holiday with the father which was to end on their return to Spain on 5 January 2013. But the children did not then return to Spain. They have remained in England ever since.

5. In the mother's proceedings under the Convention for the summary return of the children to Spain, instituted on 21 January 2013, the father made an interlocutory application under rule 16.2 of the Family Procedure Rules 2010 (SI 2010/2955) for T to be made a second respondent and to be represented by a

children's guardian. On 12 April 2013 Cobb J dismissed the application. The same judge heard the mother's substantive application over three days in May 2013 and received oral evidence from the parents and from Ms Vivian, an officer in the High Court team of the Children and Family Court Advisory and Support Service ("Cafcass"). By a reserved judgment, [2013] EWHC 1383 (Fam), Cobb J explained his reasons for then ordering that all four children be forthwith returned to Spain.

6. Four issues were raised for Cobb J's determination.

7. First, the father disputed that the children had been habitually resident in Spain on the date of his retention of them in England, namely on 5 January 2013, and he therefore contended that the retention was not wrongful under article 3 of the Convention. He contended that they had not acquired a habitual residence in Spain at any time between 24 July 2012 and 5 January 2013 and, in particular, that he had not consented to their going to Spain for longer than a holiday in the summer 2012. The result (contended the father) was that they had never lost their habitual residence in England. Cobb J rejected these contentions. He found that in July 2012 the father had agreed with the mother that she should take the children to reside in Spain indefinitely and that, partly for that and partly for another reason which I will explain in paras 28 and 29, all four children had lost their habitual residence in England on or shortly after 24 July 2012, had acquired a habitual residence in Spain during the autumn 2012 and had continued to have it on 5 January 2013. The judge therefore held that the retention was wrongful under article 3.

8. Second, the father contended, pursuant to article 13 of the Convention, that the three older children objected to being returned to Spain and had attained an age and a degree of maturity at which it was appropriate to take account of their views. Cobb J upheld the contention that T objected to being returned to Spain and had attained the requisite age (then 12 years and nine months) and degree of maturity. He found, by contrast, that, although L and A had also attained an age and a degree of maturity at which it was appropriate to take account of their views, their expressed wishes not to return to Spain had the character only of preferences rather than of objections.

9. Third, the father contended, also pursuant to article 13, that there was a grave risk that the return of the children to Spain would place one or more of them in an intolerable situation. Cobb J rejected this contention.

10. Fourth, the father contended that, insofar as Cobb J might have upheld either his second or third contentions in relation to any of the children, he should

exercise the discretion thereby conferred on him by article 13 to decline to order the return of that child to Spain. Notwithstanding that he had indeed upheld the father's second contention in relation to T, Cobb J decided not to exercise his resultant discretion to decline to order her to return to Spain.

11. The father appealed to the Court of Appeal against Cobb J's order. But there were three further appellants, namely, T, L and A. Following Cobb J's order T had consulted a solicitor, who had concluded that she had sufficient understanding to give instructions in the matter; and L and A had consulted another solicitor, who had concluded that they too had sufficient understanding to give instructions. At an interlocutory hearing a single Lord Justice granted permission to all three of them to appeal against Cobb J's failure to make them parties to the proceedings. The Court of Appeal was later to express some doubt (which it put to one side) whether it was open to T to appeal against Cobb J's dismissal of an application made by the father rather than by herself. In fact, since she had been adversely affected by the dismissal, she did have the requisite status to bring an appeal: *George Wimpey UK Ltd v Tewkesbury Borough Council* [2008] EWCA Civ 12, [2008] 1 WLR 1649. But, on any view, the permitted appeal of L and A was highly problematic in that no one had suggested to Cobb J that they should become parties.

12. On 1 August 2013 the Court of Appeal heard the appeals and on 15 August 2013 it handed down its judgments, [2013] EWCA Civ 1058. Black LJ delivered the substantive judgment and Hallett and Gloster LJJ agreed with it. It is against two of the orders which the court then made that the present appeals are brought.

13. The Court of Appeal dismissed the appeals not only of L and A but also of T against Cobb J's failure (or, rather, in T's case, his refusal) to make them parties to the proceedings. T now appeals against the dismissal in relation to her. This is the subsidiary appeal before the court.

14. There were in effect three grounds of the father's appeal to the Court of Appeal.

15. First, he contended that Cobb J had been wrong to hold that the children had been habitually resident in Spain on 5 January 2013. He argued not only that the judge had been wrong to find that he had consented to their removal to Spain for longer than the summer holiday 2012; but also that, on the evidence, they had never been integrated in the Spanish environment to any significant degree and, more specifically, that the judge had failed to consider Ms Vivian's

reports of statements by the three older children to her that they had never considered that Spain had become their home.

16. The Court of Appeal rejected this first ground of appeal. It is against its refusal to set aside the judge's conclusion that the children had become habitually resident in Spain by 5 January 2013 that the father and T appeal. These are the primary appeals before the court. In rejecting the first ground the Court of Appeal held that the judge had not been wrong to find that the father had consented to the removal of the children for an indefinite period. There is no remaining issue in that specific regard: that the father consented to it is therefore now an established fact. The Court of Appeal also held that the judge had been entitled to find that the children had achieved some degree of integration in Spain; and, more specifically, that, insofar as their perceptions were relevant to their integration (which, without deciding, the court conceded was possible), Cobb J had sufficiently considered them.

17. Second, the father contended that Cobb J had been wrong to characterise the wishes of L and A not to return to Spain as only preferences rather than as objections. The Court of Appeal rejected this ground.

18. Third, the father contended that, having found that T objected to being returned to Spain and had attained the requisite age and degree of maturity, Cobb J had erred in deciding not to exercise his resultant discretion to decline to order her to return to Spain. The Court of Appeal upheld this ground. It concluded that, in exercising his discretion, the judge had failed to give sufficient weight either to the robustness of T's objections or to the fact that until July 2012 she had always lived in England.

19. The Court of Appeal's conclusion that T should not be the subject of an order for return to Spain under the Convention created a new dimension to the inquiry in relation to the three younger children. For it precipitated a need to inquire whether there was a grave risk that their return to Spain would place them in an intolerable situation in that, for the first time in their lives, they would be separated from T. The Court of Appeal concluded that the evidence before it was too limited to enable it to determine this issue and that the proceedings should be remitted to a judge of the Family Division for its determination. All three of the younger children have been joined as parties to the remitted proceedings on the basis that, as are L and A in this court, they will be represented by Ms Vivian as their guardian. The further hearing is due to begin shortly.

20. In addressing his application for permission to appeal to this court, Black LJ described the father as having been largely successful in the Court of Appeal. With respect, I do not accept that description. The difficulty for the father is that Spain is a fellow state of the European Union and that therefore, in the present proceedings, the provisions of Council Regulation (EC) No 2201/2003, commonly called Brussels II Revised ("B2R"), are grafted on to the provisions of the Convention and indeed, by article 60 of B2R and section 1(3) of the 1985 Act, take precedence over them. By recital 12 of B2R the Council observed that the best interests of a child are served by a general rule that the court of the state of her habitual residence should, in the first place, have jurisdiction to determine future arrangements for her. By recital 17 it accepted that under the Convention a state could decline to order a child's return to the state of her habitual residence in specific, duly justified, cases but then it added "however, such a decision could be replaced by a subsequent decision by the court of the member state of habitual residence of the child prior to the wrongful removal or retention". In the body of B2R this was duly achieved by a combination of article 10, which provides for the continuing jurisdiction of the state of habitual residence following a wrongful removal or retention save in circumstances immaterial to the present case, and of article 11(8) which provides:

> "Notwithstanding a judgment of non-return pursuant to article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with section 4 of Chapter III below in order to secure the return of the child."

Section 4 of Chapter III of B2R provides, by article 42(1), that, provided that the judge in the state of habitual residence shall have certified that the parties and, if appropriate, the child were given an opportunity to be heard and that he took account of the reasons for the refusal of the requested court to order the child's return under the Convention, there can be no facility for challenge in the requested state to his order for the child's return. His order "enjoys procedural autonomy": *Rinau v Rinau* (Case C-195/08PPU) [2009] Fam 51, para 63.

21. Thus B2R has added a dramatic further dimension to proceedings under the Convention in which the application is for the child's return to a fellow EU state. When, on whatever basis, it refuses an application under the Convention for return to a non-EU state, a court in England and Wales will conventionally embark (or make clear to the unsuccessful applicant that it would be willing to embark) on a merits-based inquiry into the arrangements which will best serve the welfare of the child; and it will reasonably anticipate, particularly in the light of the presence of the child here, that its decision will be fully enforceable. But when, by reference to article 13 of the Convention, it refuses an application for

a child's return to an EU state, it is aware that an order for return, immune from challenge, may nevertheless be forthcoming from that state; and that therefore the order for non-return may well provide no more than a breathing-space. Prior to making the provision in article 11(8) of B2R, the Council will no doubt have considered the extra difficulty which faces the court of habitual residence in conducting a satisfactory merits-based inquiry in circumstances in which the child is held abroad and the abducting parent, being also abroad, may decide not to participate or may be unable to fund participation. Practical concerns of this character were presumably overridden by the importance attached to the principle of the primacy of the court of habitual residence (recital 12), to the principle of mutual trust between the courts of member states (recital 21) and to the availability of a power in the court of habitual residence, in specified circumstances of fair width, to request another member state to assume jurisdiction if it considers such to be in the best interests of the child (article 15).

22. What, at all events, prompts the father and T to bring the primary appeals to this court is their aspiration to secure, in relation to all the children, or at least to T, the reversal of the judge's ascription to them of a habitual residence in Spain on 5 January 2013. For that would preclude an order of the Spanish court under article 11(8) of B2R (which, so the court is told, the mother has already evinced an intention to seek) or at any rate its enforceability in England, in relation to the children or at least to T.

23. Ms Vivian wrote two reports, following two interviews with the three older children in February and April 2013, and she gave oral evidence to Cobb J. The court's direction to her had been to report on their wishes, feelings and, if any, objections, in relation to a return to Spain, and on their degree of maturity, so that it could better appraise the father's defence under article 13. Inevitably, however, she sought to place her report on these matters in the context of what they said to her about the family's recent history.

24. Ms Vivian reported that T, then aged 12 and a half, was confident and intelligent. T (so Ms Vivian reported) had a maturity beyond her years, which seemed to reflect her innate personality rather than to have been acquired in order to enable her to cope with recent difficulties. Ms Vivian reported that L, then aged ten, was bright, thoughtful and seemingly mature for his age and that A, then aged eight, was thoughtful and quite insightful but less confident than L.

25. According to Ms Vivian, T told her that neither she nor the father had known that the mother was intending to take her and the boys to Spain until days prior to her departure in July 2012 and that it had been only when she started school in Spain that it had become clear to her that the mother intended that they should live there indefinitely. In her oral evidence the mother disputed T's

account and in my view it is important to note that Cobb J in effect rejected much of what T had said in that regard. He found that, well prior to the departure, the father, albeit reluctantly, had agreed to it and that, at least a week prior to it, T had known that she and the boys were leaving England indefinitely.

26. Then, in my view relevantly to this court's despatch of these appeals, T and the older boys made statements to Ms Vivian about their life with the mother in Spain during the following five months. Ms Vivian reported that T said that:

i) she had hated it in Spain;

ii) they had not had a home of their own but only a temporary home in the flat of the maternal grandmother;

iii) they had attended poor schools which the mother had chosen only because they had been local and convenient;

iv) the mother had been pursuing an affair and had neglected them;

v) "Spain has never been home – it is a bit unreasonable to say that"; and

vi) she could not settle in Spain.

Ms Vivian reported that L said that:

i) he had liked Spain but not as much as England;

ii) he had really liked his school in Spain – but also his school in England;

iii) they had not had a home of their own in Spain;

iv) the mother had given more attention to her boyfriend than to them; and

v) life in Spain had felt weird because he had been away from his normal home for so long.

Ms Vivian reported that A said that:

i) he had wanted to go to live in Spain but, once there, had realised that he had made the wrong decision; and

ii) he had not liked his school in Spain and had made no friends.

Ms Vivian's written summary of these statements was:

> "During their time in Spain the children have reported that they have not settled and their mother has not, by their accounts, assisted them to do so."

In her oral evidence she added:

> "it was almost like they gave Spain a go and they didn't feel like it was home to them."

27. Then Ms Vivian proceeded to address the current wishes and feelings of the three children. This part of her evidence is not of direct relevance to the present appeals. It is enough to say that T stated to Ms Vivian that she refused to go back to live in Spain and would physically resist any order that she should do so; and that L and A stated to her that, on 4 January 2013, they had hidden their passports behind a microwave in order to disable the father from sending them back to Spain on the following day and that they continued not to want to go back to Spain. It was Ms Vivian's view, which Cobb J appeared largely to accept, that the father had not sought to manipulate the children into making these statements.

28. In embarking upon his determination whether the children had become habitually resident in Spain by 5 January 2013, Cobb J suggested that the well-known tests propounded in England and Wales (in *R v Barnet London Borough Council, Ex p Nilish Shah* [1983] 2 AC 309, 343, Lord Scarman) and in the Court of Justice of the European Union ("the CJEU") (in *Mercredi v Chaffe* (Case C-497/10PPU) [2012] Fam 22, para 47) were overlapping and broadly consistent. Cobb J then proceeded to make a clear demarcation between the two older and

the two younger children. He noted that the parents had never been married; that the father had been registered on the birth certificates of each of the children; but that the amendments made to section 4 of the Children Act 1989, of which the effect was to confer parental responsibility on a father who was thus registered, took effect only in relation to registrations after 1 December 2003. Cobb J therefore correctly concluded that the father had parental responsibility for A and N but not for T nor for L.

29. Accordingly (reasoned Cobb J) the mother had the right to determine the habitual residence of T and L but English law required the father's consent to any change on her part of the habitual residence of A and N. The judge then set out his reasons for finding that the father had unconditionally consented to the acquisition by A and N of habitual residence in Spain. "In that sense", observed the judge, "it is less important for me to look at the 'integration' argument". He did however proceed to look at it and he concluded that all four children had achieved a significant degree of integration into their social and family environment in Spain. In particular he found that they had settled reasonably well into the grandmother's flat and had settled into their new schools. For these reasons he determined that by 5 January 2013 the children had become habitually resident in Spain.

30. It was a singular misfortune for Cobb J to be required to make his determination of the issue of habitual residence (and for the Court of Appeal to be required to review it) so shortly prior to this court's issue, on 9 September 2013, of its judgments in *A v A (Children: Habitual Residence)* [2013] UKSC 60, [2013] 3 WLR 761. The court there held that:

i) the test for the determination of habitual residence under the Convention, under B2R and under domestic legislation should be the same (para 35, Lady Hale);

ii) the test set out in the *Nilish Shah* case, cited above, should be abandoned (para 54(v), Lady Hale); and

iii) the test should be the one adopted by the CJEU in *Proceedings brought by A* (Case C-523/07) [2010] Fam 42, and affirmed by it in the *Mercredi* case, cited above, namely "the place which reflects some degree of integration by the child in a social and family environment" (para 54(iii) and (v), Lady Hale).

31. In April 1981 Professor Pérez-Vera wrote the Explanatory Report referable to the Convention. In para 11, in a section entitled "Object of the Convention", she explained that, whether the child was wrongfully removed from his or her state of habitual residence or was wrongfully retained outside it, the outcome was the same, namely that "the child is taken out of the family and social environment in which its life has developed". It is satisfactory that, 30 years after the Convention was adopted, in a case (*Proceedings brought by A*, cited above) unrelated to the Convention, the CJEU should have formulated a test for habitual residence, which now falls to be applied as fully to Convention proceedings as to other proceedings, in terms so intriguingly close to what its signatories had in mind.

32. At last I can begin to address the question set out in para 1.

33. I doubt whether, even by reference to the former English concept of habitual residence, Cobb J was entitled to have stated so categorically that, having sole parental responsibility for them, the mother in July 2012 "had the right to determine" the habitual residence of T, then aged almost 12, and of L, then aged nine. It is true that in *In re P (GE) (An Infant)* [1965] Ch 568, 585-586, Lord Denning MR had been similarly categorical about "the ordinary residence of a child of tender years who cannot decide for himself where to live, let us say under the age of 16". But in *In re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, 579, Lord Brandon had said that "where a child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers". J was aged two and in *In re M (Minors) (Residence Order: Jurisdiction)* [1993] 1 FLR 495, 500, Balcombe LJ therefore took Lord Brandon's proposition to apply only to young children. In my view even our old law left open and ajar the door to a conclusion that, no doubt in rare circumstances and perhaps particularly following the adoption by an older, mature, child of a residence in a different country with one parent, the latter's habitual residence there might not necessarily render the child's residence there habitual.

34. At all events what our courts are now required to do is to search for some integration on the part of the child in a social and family environment in the suggested state of habitual residence.

35. In the *Mercredi* case, cited above, the CJEU said:

> "53 The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age

> of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant.
>
> 54 As a general rule, the environment of a young child is essentially a family environment determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.
>
> 55 That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent..."

In *A v A*, cited above, this court adopted the propositions in the two latter paragraphs. Lady Hale said, at para 54:

> "(vi) The social and family environment of an infant or young child is shared with those (whether parents or others) on whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned."

36. These propositions, which are carefully expressed to apply only to infants and young children, have an echo in observations made by the High Court of Australia in *LK v Director-General, Department of Community Services* (2009) 237 CLR 582, as follows:

> "27 When speaking of the habitual residence of a child it will usually be very important to examine where the person or persons who are caring for the child live – where those persons have their habitual residence. The younger the child, the less sensible it is to speak of the place of habitual residence of the child as distinct from the place of habitual residence of the person or persons upon whom the child is immediately dependent for care and housing. But if, as the writings about the Abduction Convention and like instruments repeatedly urge, the question of habitual residence of a child is one of fact, it is important not to elevate the observation that a child looks to others for care and housing to some principle of law like the (former) law of dependent domicile of a married woman."

37. Where a child of any age goes lawfully to reside with a parent in a state in which that parent is habitually resident, it will no doubt be highly unusual for that child not to acquire habitual residence there too. The same may be said of a situation in which, perhaps after living with a member of the wider family, a child goes to reside there with both parents. But in highly unusual cases there must be room for a different conclusion; and the requirement of some integration creates room for it perfectly. No different conclusion will be reached in the case of a young child. But, where the child is older, in particular one who is an adolescent or who should be treated as an adolescent because she (or he) has the maturity of an adolescent, and perhaps also where (to take the facts of this case) the older child's residence with the parent proves to be of short duration, the inquiry into her integration in the new environment must encompass more than the surface features of her life there. I see no justification for a refusal even to consider evidence of her own state of mind during the period of her residence there. Her mind may – possibly – have been in a state of rebellious turmoil about the home chosen for her which would be inconsistent with any significant degree of integration on her part. In the debate in this court about the occasional relevance of this dimension, references have been made to the "wishes" "views" "intentions" and "decisions" of the child. But, in my opinion, none of those words is apt. What can occasionally be relevant to whether an older child shares her parent's habitual residence is her *state of mind* during the period of her residence with that parent. In the *Nilish Shah* case, cited above, in which he propounded the test recently abandoned, Lord Scarman observed, at p 344, that proof of ordinary (or habitual) residence was "ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind". Nowadays some might not accept that evidence of state of mind was not susceptible of objective proof; but, insofar as Lord Scarman's observation might be taken to exclude the relevance of a person's state of mind to her habitual residence, I suggest that this court should consign it to legal history, along with the test which he propounded.

38. It follows that my answer to the question set out in para 1 is: yes.

39. In the light of her age and of Ms Vivian's assessment of her maturity, T's assertions to Ms Vivian about her state of mind during her residence in Spain in 2012, set out in para 26 above, have at least some relevance to a determination whether her residence there was habitual. For they are relevant to whether she was integrated to some degree in a social and family environment there. But not even when, rather as a cross-check against his earlier conclusion, Cobb J turned to consider T's integration (and that of the boys) in Spain did he address her assertions to Ms Vivian. Indeed when, in a later section of his judgment, he addressed her assertions, his focus was on her hostility at that time, namely in 2013, towards a return to Spain. Nowhere did he give separate – or any – attention to what she had said about her state of mind when in Spain in 2012.

The Court of Appeal was impressed by the fact that, in refusing to grant permission to the father to appeal, Cobb J observed that "The stated wishes of the three older children to be in England now... did not affect their integration in Spain at the time". Cobb J's observation was correct. But what might have affected the integration at any rate of T was not her wishes when in England in 2013 but what she said about her state of mind when in Spain in 2012.

40. No significant criticism can be levelled at Cobb J in these respects. It is true that, in the course of his unsuccessful submission that she should be made a party to the proceedings, the father's counsel had suggested that T might have a perspective about her habitual residence different from that of the father; the judge had dismissed the suggestion as a purely speculative possibility. It is also true that, in his opening skeleton argument for the substantive hearing, the father's counsel had submitted to Cobb J that the children's own descriptions to Ms Vivian confirmed that they had never achieved integration in Spain. But no submission was made to the judge that he should scrutinise T's specific assertions to Ms Vivian about her state of mind during her residence in Spain.

41. Accordingly I would set aside the judge's conclusion that T was habitually resident in Spain on 5 January 2013 and would remit that issue for fresh consideration in the High Court alongside its forthcoming consideration of the issue relating to the boys which was remitted to it by the Court of Appeal.

42. Counsel for the father and T suggest that the court should go further and, in lieu of the judge's conclusion, should substitute a conclusion that T remained habitually resident in England on 5 January 2013. I cannot accede to the suggestion. I perceive six objections to it:

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

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

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

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

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

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

Therefore I do not agree that this court is in a position to regard T's statements to Ms Vivian as determinative of a conclusion that the mother cannot establish that T acquired a habitual residence in Spain.

43. If the issue of T's habitual residence in Spain is therefore to be remitted for determination in the High Court, should Cobb J's conclusion that the three boys were habitually resident there also be set aside so that that issue be likewise determined in the High Court? In my view this is the most difficult question posed by these appeals. When they were in Spain, none of the boys was an adolescent or had the maturity of an adolescent. It will be clear from my formulation of the question in para 1 above that in my view it is, in principle, the state of mind of *adolescent* children during their residence in a place that may affect whether it was habitual. Thus, although when considering the alleged objections of L and A to returning to Spain, Cobb J concluded that they had at least attained an age and a degree of maturity at which it was appropriate to take account of their views and although they made comments to Ms Vivian indicative of lack of integration on their part in Spain, I find it hard to imagine that a judge's exploration of their state of mind could, on its own, alter the conclusion about their integration in Spain reached by Cobb J by reference to the other evidence before him. But there is another feature in play: it is the presence of their older sister, T, in the daily life of all three of the boys. Ms Vivian described the four children as a very close sibling group. There was a solidarity in the presentation of the three older children to her. When Cobb J addressed the

integration of the children in Spain, he did so compendiously in relation to all four of them. In the fuller, more focussed, inquiry into T's habitual residence, the High Court will no doubt receive evidence about the integration in Spain of the four children as a whole. Were it to conclude that T never lost her English habitual residence, the court would need at any rate to consider whether its conclusion could sit easily alongside a conclusion that, by contrast, the three boys acquired a habitual residence in Spain. In relation to their habitual residence, might T's habitual residence in England (if such it was) be a counterweight to the obvious significance of the mother's habitual residence in Spain? It can be inconvenient for a judge at a remitted hearing to have to note that all options have not been left open to him. By a narrow margin, I find myself persuaded that the proper course is to set aside the finding of habitual residence in respect also of the three boys so that the issue can be reconsidered in relation to all four children.

44. I turn to the subsidiary appeal: did Cobb J err in exercising his discretion to decline to make T a party to the proceedings?

45. In the Court of Appeal Black LJ observed, at para 36, that welfare considerations were "by no means out of place" in a determination whether a child should be joined as a party to family proceedings. But rule 16.2 of the Family Procedure Rules 2010 (the terms of which are in substance identical to those of its predecessor, namely rule 9.5(1) of the Family Proceedings Rules 1991 (S1 1991/1247)) provides that

> "(1) The court may make a child a party to proceedings if it considers it is in the best interests of the child to do so."

On any view it is most unusual for the threshold criterion for the making of a case management decision to be a conclusion about a person's best interests. But the meaning of the rule is plain. The best interests of the child represent the threshold criterion and are not just a "primary consideration" as stated in paragraph 7.3 of Practice Direction 16A supplementary to Part 16 of the 2010 Rules. If, and only if, the court considers that it is in the best interests of the child to make her (or him) a party, the door opens upon a discretion to make her so. No doubt it is the sort of discretion, occasionally found in procedural rules, which is more theoretical than real: the nature of the threshold conclusion will almost always drive the exercise of the resultant discretion.

46. Rule 16.2, set out above, governs the grant to a child of party status in family proceedings generally. There is no special provision in Part 16 of the Rules which governs the grant to a child of party status in proceedings under the

Convention. Rule 16.4(1)(c) proceeds to provide that, without prejudice to other rules, and in particular to rule 16.6, a court which has granted party status to a child pursuant to rule 16.2 must appoint a children's guardian for her. Rule 16.6 specifies most types of private law family proceedings in which, if the court so permits or if a solicitor considers that the child is capable of giving instructions, she can be a party without acting by a guardian. But the types of proceedings there specified do not include proceedings under the Convention. I cannot discern why, if and to the extent that it is appropriate in Convention proceedings for children to be made parties, the facility for some of them to act without a guardian has been blocked. In *WF v FJ, BF and RF (Abduction: Child's Objections)* [2010] EWHC 2909 (Fam), [2011] 1 FLR 1153, Baker J, in paras 21 and 22, described the exclusion of Convention proceedings from the predecessor of rule 16.6 as "anomalous" and a "lacuna". At all events the result is that, had Cobb J made T a party to the proceedings, she would have been required to act by a guardian. Such is, however, a status which might have been conferred on her solicitor.

47. In *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, Lady Hale, with the agreement of all other members of the House, stated at para 59 that "children should be heard far more frequently in... Convention cases than has been the practice hitherto". It is clear from para 58 that, in so stating, Lady Hale had been influenced in particular by article 11(2) of B2R, which had come into force less than two years earlier and which obliged EU states to "ensure that the child is given the opportunity to be heard during [Convention] proceedings unless this appears inappropriate having regard to his or her age or degree of maturity". In the *In re D* case Lady Hale proceeded, at para 60, to suggest that the obligation to hear children of an appropriate age would in most cases be satisfied by a report by a Cafcass officer of an interview with them; would sometimes require the judge in person to talk to them; and only in a few cases would require them to be made parties and thus to be legally represented. Lady Hale added:

> "But whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented."

48. In *In re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288, Lady Hale amplified what she had said in the *In re D* case. In the *In re M* case the defendant mother had demonstrated that the children, then aged about 13 and 10, had become "settled in [their] new environment" in England for the purposes of article 12 of the Convention but the trial judge had nevertheless ordered them to be returned to Zimbabwe. Lady Hale observed in para 57 that a defence under article 12 that children had become settled in their

new environment was rare. She suggested that it was the most "child-centric" of all child abduction defences; that the separate point of view of the children alleged to have become settled was particularly important; and that (as this court is told has duly occurred) it should become routine for them to be made parties to the proceedings. One might have held an interesting debate with Lady Hale as to whether such a defence is more "child-centric" than that in which the children are said to object to being returned to the requesting state for the purposes of article 13, being a category of children to whom she also there referred and to whom, she stressed, a grant of party status should not become routine. Lady Hale concluded:

> "In all other cases [than those of alleged settlement], the question for the directions judge is whether separate representation of the child will add enough to the court's understanding of the issues that arise under the... Convention to justify the intrusion, the expense and the delay that may result. I have no difficulty in predicting that in the general run of cases it will not."

When in 2007 Lady Hale identified these factors, the threshold criterion for granting party status to a child in proceedings under the Convention was, as now, whether it was in the child's best interests to do so. The intrusion of the children into the forensic arena, which enables a number of them to adopt a directly confrontational stance towards the applicant parent, can prove very damaging to family relationships even in the long term and definitely affects their interests. So does delay in the resolution of the issue whether they should be ordered to return, albeit perhaps only temporarily, to the requesting state.

49. In what follows I must in no way be understood to suggest that it should become routine to join as parties to Convention proceedings children whose habitual residence in the requesting state is in issue. Nevertheless, as Thorpe LJ prefigured in *Cannon v Cannon* [2004] EWCA Civ 1330, [2005] 1 FLR 169, at para 55, there is an analogy between, on the one hand, an inquiry into some degree of integration of a child in the social and family environment of the requesting state during a short period of residence there and, on the other, an inquiry into a child's settlement in the environment of the requested state. To both inquiries an older child may in particular be able to contribute relevant evidence not easily given by either of the parents, namely about her state of mind during the period in question; see again the *Cannon* case, at para 61.

50. When on 6 April 2011 the Rules came into force, the opportunity was taken to supplement Part 16 with Practice Direction 16A. Guidance is there given about the circumstances in which it is appropriate to grant party status to a child

in family proceedings. The reader of it must again bear in mind that it is not focussed on Convention proceedings but much of it is directly apposite to them.

51. Thus para 7.1 of the Practice Direction makes clear that a grant to a child of party status will be made only in cases which involve an issue of significant difficulty and thus only in a minority of cases. Consideration, so it suggests, should first be given to whether an alternative course might be preferable; and the suggestion is well reflected by the court's current practice of inviting an officer in the Cafcass High Court team to see the child before it decides whether to make her a party to Convention proceedings.

52. Para 7.3 of the Practice Direction stresses that a grant to a child of party status may result in delay adverse to her welfare and of which account should therefore be taken. This factor has a particular relevance to Convention proceedings. The need for expedition is written into article 11.3 the Convention; and the aspiration, articulated in the same para, for determination within six weeks of issue is, in the case of EU states, stiffened by article 11.3 of B2R, which positively requires determination within that period save in exceptional circumstances.

53. But it is para 7.2 of the Practice Direction which is of particular significance. It offers non-prescriptive guidance about the circumstances which may justify a grant to a child of party status. The examples include, at (a) the case where a Cafcass officer favours the grant; at (d) the case where the child's views cannot adequately be communicated by a report; and at (e) the case where an older child is opposing a proposed course of action. The last example should not in my view be taken to endorse any routine grant of party status to older children objecting to their return to the requesting state in Convention proceedings. But the example most apt to the present case is at (b), namely where the child has a standpoint incapable of being represented by any of the adult parties.

54. In my view the proper despatch of the subsidiary appeal follows in the slipstream of the court's despatch of the primary appeals. What Cobb J failed to address, and what therefore requires his conclusion about T's habitual residence to be set aside, is her evidence, accurate or inaccurate, about her state of mind when in Spain in 2012. Such is evidence which, although the mother might have a valuable perspective on it, neither of the parents can give. In the language of para 7.2(b) of the Practice Direction T has a standpoint incapable of being represented by either of the adult parties. I conclude that she should have been granted party status and that the Court of Appeal should have allowed her appeal against Cobb J's refusal of it.

55. A grant of party status to a child leaves the court with a wide discretion to determine the extent of the role which she should play in the proceedings. Although, unusually in Convention proceedings, Cobb J heard oral evidence from the parents as well as from Ms Vivian, it would surely have been inappropriate for him to receive oral evidence in court from T even if she had been a party to the proceedings. It is conceivable that, had he considered that her evidence might prove determinative yet needed to be further explored, Cobb J might have invited counsel, particularly counsel for the mother, to ask age-appropriate questions of her otherwise than in court and recorded on video-tape. In all probability however, the reasonable course would have been to confine T's participation in the proceedings to

i) the adduction of a witness statement by her, or of a report by her guardian, which was focussed upon her account of her residence in Spain including of her state of mind at that time;

ii) her advocate's cross-examination of the mother; and

iii) her advocate's closing submissions on her behalf.

Whether it would have been reasonable for Cobb J to have allowed T to be present in court during the hearing I cannot tell. It would have been for the guardian to decide which of the documents filed in the proceedings should be shown to T.

56. In conclusion I stress the unusual features which give rise to the present appeals. In May 2011 Professor Lowe placed before the Hague Conference a document, No 8C, entitled "A Statistical Analysis of Applications Made in 2008 Under the [Hague] Convention". He reported that, of the applications for return made to the Central Authority of England and Wales in 2008, 108 came before the courts, of which 93 resulted in orders for return and 15 resulted in dismissal. Of the 15 dismissals, only three were founded on a conclusion that the child had not been habitually resident in the requesting state. Although some of the 93 orders were no doubt made following unsuccessful submissions to the same effect, Reunite International Child Abduction Centre, an Intervener in these appeals, confirms that issues about the child's habitual residence in Convention proceedings are relatively rare. More importantly, however, the present appeals relate in particular to *an older child* resident with a parent only for *a short time* in the suggested state of habitual residence. These are the two features which, more than any others, have precipitated my various conclusions.

**LADY HALE (with whom Lord Sumption agrees)**

57. Lord Wilson has identified the principal question raised by these appeals in relation to an adolescent child: is her state of mind relevant to whether or not she has acquired a habitual residence in the place where she is living? He has answered that question "yes" and I entirely agree with that answer. However the question cannot be restricted to adolescent children. It also arises in relation to the two younger children, L and A. They are themselves parties to this appeal and are represented by their guardian. That guardian is the same Cafcass officer, Ms Vivian, who has interviewed the children twice in the proceedings. Before this court she has argued that they were not habitually resident in Spain on the relevant date.

58. In my view, the answer to the question of principle has to be the same for all three children: their state of mind is relevant to whether or not they have acquired a habitual residence in the place where they are living. The logic which makes an adolescent's state of mind relevant applies equally to the younger children, although of course the answer to the factual question may be different in their case. The logic flows from the principles adopted by the Court of Justice of the European Union in *Proceedings brought by A* (Case C-523/07) and *Mercredi v Chaffe* (Case C-497/10PPU) and now adopted by this Court in the recent cases of *A v A* [2013] UKSC 60, [2013] 3 WLR 761 and *In re L (A Child) (Habitual Residence)* [2013] UKSC 75; [2013] 3 WLR 1597.

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

60. In the case of these three children, as of others, the question is the quality of their residence, in which all sorts of factors may be relevant. Some of these are objective: how long were they there, what were their living conditions while there, were they at school or at work, and so on? But subjective factors are also relevant: what was the reason for their being there, and what were their perceptions about being there? I agree with Lord Wilson (para 37) that "wishes", "views", "intentions" and "decisions" are not the right words, whether we are

considering the habitual residence of a child or indeed an adult. It is better to think in terms of the reasons why a person is in a particular place and his or her perception of the situation while there – their state of mind. All of these factors feed into the essential question, which is whether the child has achieved a sufficient degree of integration into a social and family environment in the country in question for his or her residence there to be termed "habitual".

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

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

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

63. The quality of a child's stay in a new environment, in which he has only recently arrived, cannot be assessed without reference to the past. Some habitual residences may be harder to lose than others and others may be harder to gain. If a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly. If a person leaves his home

country for a temporary purpose or in ambiguous circumstances, he may not lose his habitual residence there for some time, if at all, and correspondingly he will not acquire a new habitual residence until then or even later. Of course there are many permutations in between, where a person may lose one habitual residence without gaining another.

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

65. That being so, I would allow the appeal to the extent of setting aside the judge's decision that the three older children were habitually resident in Spain on the relevant date, which is 5 January 2013. On a different basis, namely that referred to by Lord Wilson in para 43 above, I would also set aside the judge's decision in relation to N: that is the need for the judge at any rate to consider whether the four children were a unit with the result that the habitual residence of any or all of the older children might impact on the habitual residence of the others. The question then arises of whether the case should be sent back to the High Court for the decision to be taken afresh or whether it is open to this Court to take the decision on the basis of the evidence before us.

*Decide or remit?*

66. We were invited by both appellants and by the guardian to decide the matter ourselves. Lord Wilson has pointed to all the reasons why we should not do so (para 42). He is, of course, right to point out that the focus of Ms Vivian's inquiries with the children was on the rather different issue of the children's objections to return. But her oral evidence was that "what all three of these children did, which is sort of unusual in my experience of doing Hague interviews, is that the children in their own ways were [talking] about Spain not really being their home, not really being their base". The children were raising the issue even if she was not. Lord Wilson is also right to point to the various

reasons for being sceptical about what T, in particular, said to Ms Vivian. However, that is something which we too can take into account. Finally, the mother placed a great deal of evidence before the judge about the children's lives in Spain (including entries from T's facebook page). But while we can take the documentary material into account, we do not have a transcript of the oral evidence which she gave.

67. My main concern has been that, if the case is sent back to the High Court, there would have to be further inquiries into the children's states of mind during their time in Spain. I have grave doubts about whether that would be a fruitful exercise. What the children spontaneously offered when they were first interviewed by Ms Vivian is much more likely to be reliable than anything they can tell her now. They have not changed their minds about where they want to be. They are intelligent and articulate children. Almost every witness, whether adult or child, engages in a certain amount of (conscious or unconscious) manipulation of their recollection of past events to meet their present interests. It would be surprising if that did not happen here. And that would be damaging to the children and to their future relationship with their mother. It would be even more damaging if they were to be called to give evidence and it is not suggested that they should be. It was unfortunate that Ms Vivian was asked to interview them a second time and the children (L in particular) were clearly uncomfortable with this. It would not be in their best interests to be interviewed a third time but it would be wrong to decide the case afresh without doing so.

68. Remitting the matter will also cause delay and further stress to all the family, which may well put further strain on the children's relationship with their mother. If the matter were governed by the best interests of the children, therefore, I would hold that it is not in their best interests for us to remit the question of their habitual residence to be decided afresh in the High Court. But this matter is governed by the interests of justice, in reaching the right result in a fair manner. I have therefore carefully considered whether it is necessary, in the interests of justice to all parties, to remit the matter.

*Some common ground*

69. The question, it will be recalled, is whether the mother has established that these four children were habitually resident in Spain on 5 January 2013, the date when they were due to fly back there after the Christmas holiday. There are several factors which are relevant to them all:

i) Their mother is Spanish, tri-lingual in Spanish, French and English. Their father is English, but lived in Spain for much of his childhood

and is bi-lingual in Spanish and English. The children are also bi-lingual. They have many maternal relatives living in Spain.

ii) They are all Spanish citizens. We have no evidence about whether they are also entitled to British citizenship, although as their father is a British citizen, this seems likely.

iii) Their parents met in Oxford in 1995 and soon began living together, originally in Oxford and latterly in a town in Oxfordshire, but they have never married. The family home is jointly owned by the father and another person.

iv) All three children were born here, T on 27 August 2000, L on 4 December 2002, and A on 2 November 2004, as was their younger brother N, who was born on 29 December 2008.

v) They lived all their lives here with their mother and father until 24 July 2012, when they flew to Spain with their mother.

vi) They all attended school here until the end of the summer term 2012. The boys were at a Roman Catholic primary school. T had also attended that school for her primary education but for the past year she attended a distinguished independent secondary school.

vii) They were accustomed to going to Spain for summer holidays with their mother and without their father.

viii) The parents' relationship had been unhappy for many years and finally broke down in the summer of 2012. The judge found that the father had (albeit reluctantly and in the hope that the situation might change) agreed to the mother taking the children to live in Spain.

ix) The mother bought one way tickets for them all in June 2012. She did not take steps to remove the children from their schools and other activities until July. She did not enrol them in Spanish schools until September. They took only two suitcases with them, leaving many possessions behind in England to be sent on later.

x) In Spain they lived with their maternal grandmother in a spacious apartment in a gated residential development in a prosperous neighbourhood near Madrid, with many of their maternal relatives near by.

xi) They attended schools in the neighbourhood and achieved good results in their first term.

xii) They were unsettled after their father visited for three days in early November, coinciding with A's birthday.

xiii) They came to England with their father for the Christmas holidays on 23 December 2012 and were due to return with him to Spain on 5 January 2013. They did not do so because the boys hid their passports behind the microwave and the father did not find them until it was too late.

xiv) The father applied for a residence order in the Oxford County Court on 10 January 2013. The mother issued these proceedings on 22 January 2013. The children were interviewed twice by Ms Vivian, whose reports are dated 28 February 2013 and 7 May 2013.

70. Against this common background, it is necessary to consider the perceptions of each of the children in turn.

*T*

71. T was 12 years and 5 months old when she first saw Ms Vivian. She struck Ms Vivian as "a confident, intelligent young girl, whose maturity seemed to me to be beyond her years. I think her mature presentation is a reflection [of] her innate intelligence and personality rather than something she has prematurely had to acquire as a coping strategy . . ." She is clearly very intelligent, as is evidenced by her winning a bursary to the school which she attended before moving to Spain. She has wanted to go to Oxford University since the age of eight. The judge concluded that she objected to returning to Spain, within the meaning of article 13 of the Hague Convention, and the Court of Appeal concluded that he should have exercised his discretion not to order her return.

72. She told Ms Vivian that "she was not sure if the reason they went to Spain was for a holiday or not, because her mother had repeatedly 'threatened we

would stay, always, we didn't believe her, or really know'." She pointed out, correctly, that her mother had contacted her school on the last day of term, 11 July, when she was off ill from school, to tell them that T was not coming back. The mother's email exchange with the school is proof of that and that the school was unhappy that they had not been given the expected term's notice. The exchange also shows that the mother had not at that stage arranged an alternative school for T in Spain. T went on to tell Ms Vivian that "when they went to Spain it 'wasn't clear to me' what the plan was. Her mother had told her they were going to stay although 'she didn't really accept it, thought it wouldn't happen'." Asked when it became clear that they had been taken to live in Spain, "she said 'when we started school, I guess, not one moment'." She told her solicitor that her mother had sent an email to the school on the last day of term to inform them that they were moving to Spain.

73. The judge pointed out that T knew that she was leaving to go to Spain at least by 17 July, as is apparent from her facebook page for that day. The judge also found that her mother organised a party for her – "it was essentially a farewell party". T does not agree with that – it was four friends round for an early birthday party. Be that as it may, it was because of the facebook page that the judge commented that "this is not consistent entirely with what T told Ms Vivian, which is that she thought she may have been going to Spain for a holiday" (para 34(v)(a)).

74. The facebook page reads: Q to T: "Are you leaving???!!!" T to Q: "Yep x". Q to T, successively: "Whn?", "Why?", "Whn r u GOIN??". T to Q: on the 24th am leaving 2 spain who told u???". "I would tell u 2 keep it secret but since its on my wall not really any point lol". Q to T: "Gossip spreads fast . . . X." T to Q: "lol I no bhut who?????????" Q to T: "Can't remember WE WILL ALL MISS U SO MUCH llxxx Will u come back?" No answer is recorded but another friend writes "Awww y r u leaving". Again no answer is recorded.

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

76. There are, of course, features about their life in Spain, emphasised in the mother's evidence, which point the other way. She was enrolled in a school, where she did reasonably well, although she herself did not think much of the

education she was receiving there compared with her education in England. She made friends. She earned pocket money by teaching children English. But she told Ms Vivian that "We have no house" – presumably because they were living with their grandmother – and Spain is her mother's home "not our home. It's not even home". Spain has "never been home, it is a bit unreasonable to say that".

77. Ms Vivian commented that "she sees her home, life and future as being in England, that is where she was born and has lived all her life except for five months . . . " She concluded:

> "T regards England as her home; it has been her home throughout her childhood and formative years until the move to Spain last year. She acknowledges that she also has family in Spain and recognises that for her mother Spain is home, but she nonetheless feels that her own roots and those of her immediate family are here in this country."

78. T said very similar things to her solicitor, that England was her home, that she has friends here and best friends that she has known for five or six years. "It's just home".

*L*

79. L was 10 years and 2 months old when he first saw Ms Vivian. He struck her as being "a bright thoughtful boy; he seems to have carefully considered his situation and his own wishes and feelings. He seemed mature for his age, but maybe this is because he is a bright boy and is easily able to convey his thoughts." He missed his mum and wanted his parents to be back together again. Unlike T, he said that he knew he was going to Spain to live before they left, his mum and dad had told him a month before they left. Like T, he said that "all those years she said that we were going one day". His view was that his father "knew but he didn't agree but didn't want to take the situation to court". But he, L, had always wanted to stay here with his friends and family.

80. He had liked it well enough in Spain, he really liked the school, but "we don't have a house or anything there". He also told Ms Chadha, the solicitor who acted for the boys before the guardian took over, that he liked his school in Spain, the teachers and most of the people in his class. But he told Ms Vivian that he liked England more "because this is where we live, our normal place and I want to live my life here". He was reluctant to come and talk to Ms Vivian a second time, but he was even clearer: "In Spain it didn't feel right or like I was at home.

When I got to England it felt cosy. Where I want to live. My house. I find it normal. A bit weird to go to another country where I have never lived for a long time." In Spain, it was "not normal. Felt like a holiday really. Felt weird that I was not at my normal home for such a long time". "When I went to Spain it didn't feel normal. I wanted to be in my normal house".

81. L told Ms Chadha that it had been his idea to hide the passports. A confirmed that it was L's idea but that he, A, had thought of hiding them behind the microwave.

*A*

82. A was aged eight years and 3 months when he first met Ms Vivian. He seemed to her "a thoughtful boy; he was quieter and less outwardly confident in his presentation than his older siblings but was able to answer my questions with clarity and careful thought." He used "we" a lot rather than "I", and she wondered whether this was because of his being influenced to a degree by T. She did think, however, that A was reporting his own feelings, but was more conflicted about taking sides with one parent.

83. He told her that when they went to Spain he knew they were going to live there. But when they got there he "realised my actual life is here, where I was born". Unlike L, he had not liked his school in Spain, he had not made friends. He told the solicitor, Ms Chadha, that he had been bullied there, that the boys in his class were "hitting" him but he did not want to hit the boys back. L confirmed this.

84. A told Ms Vivian that he wanted to "stay where we live. Not going to another place where we don't like or feel it. We want to go where our home is". Home meant "the place where we were born and living in".

*Discussion*

85. Ms Vivian did not get any sense that the children had been prevailed upon to remain here by their father. She thought that T had had a degree of influence on her brothers (in oral evidence she referred to T as a "slightly bossy older sister"). But this did not diminish the authenticity of the boys' views in her mind. There seemed to be different accounts of the arrangements when they went to Spain in July 2012, but they felt that the decision had been taken by their mother without taking account of their wishes and feelings. They reported that they had not settled during their time in Spain and their mother had not helped them to do

so. This had undoubtedly "fed into their perception of Spain as not being where their home is". In her second report, she commented that their views remained consistent, both about England and about Spain: "they may well be reporting a different experience to that their mother believes they had in Spain, but that does not invalidate what they have to say about their time in Spain and the sense they have made of that experience in comparison with their lives here in this country."

86. It is very tempting to conclude from all this material that the children had not become integrated in a social and family environment during the five short months they were in Spain with their mother or (to use the term "enracinement" used by Professor Perez-Vera in para 109 of her explanatory report on the Hague Convention when commenting on article 12) taken root there. But I have to accept that the question of their habitual residence was not approached in this way by any of the parties to the hearing before Cobb J. This is scarcely surprising, as this is the first case in which the question of principle has been squarely raised. There may well be other relevant material that they would wish to put before the court. In the interests of justice, they should all be given that opportunity.

*Policy*

87. It would indeed be a matter of concern if the swift return of children to their home countries could be frustrated by disputes about their habitual residence prompted by the children's expressed wishes and feelings. Nor should children interviewed in Hague cases routinely be asked questions about their habitual residence. But in reality, as Lord Wilson explains, there are very few disputes about habitual residence. Most applications concern children who have been removed from the country where they have spent all or most of their lives by a parent who is returning to a country which she regards as home but they most definitely do not. Cases such as this, where children go to live with one parent in a country where they have never lived before and return after a few months to the country where they had always lived, are very rare. In cases concerning peripatetic families, who move from one country to another, the position may be unclear. If so, the perception of the children is at least as important as that of the adults in arriving at a correct conclusion as to the stability and degree of their integration. The relevant reality is that of the child, not the parents. This approach accords with our increasing recognition of children as people with a part to play in their own lives, rather than as passive recipients of their parents' decisions.

*Conclusion*

88. The case will therefore be remitted to the High Court to decide whether any or all of the four children were habitually resident in Spain on 5 January 2013. If it turns out that any or all of the three boys were, it will also have to be decided whether to return them to Spain when their older sister, or any of their brothers, is not to return will place them in an intolerable situation.