Michaelmas Term
[2013] UKSC 75
On appeal from: [2013] EWCA Civ 865

JUDGMENT

In the Matter of KL (A Child)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Wilson
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

4 December 2013

Heard on 18 November 2013

Appellant
Richard Harrison QC
Jennifer Perrins
Samantha Ridley
(Instructed by Bindmans LLP)

Respondent
Henry Setright QC
Michael Gration

(Instructed by Freemans Solicitors)

Intervener (Reunite International Child Abduction Centre)
Teertha Gupta QC
Edward Devereux
Michael Edwards
(Instructed by Lyons Davidson)

LADY HALE (with whom Lord Neuberger, Lord Wilson, Lord Hughes and Lord Hodge agree)

1. How should the courts of this country react when a child is brought here pursuant to an order made abroad in proceedings under the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") which is later over-turned on appeal? It might be thought that this is a somewhat rare and esoteric problem, but it could arise whenever the enforcement of the foreign order is not stayed pending an appeal. We have no means of knowing how common this combination of events is among the States party to the Convention, but it would appear from the facts of this case that it is not at all uncommon in the United States of America, the country which handles the greatest number of cases under the Convention (England and Wales being next on the list).

The facts

2. We are concerned with a little boy called K. He was born on 7 August 2006, so is now aged seven. He was born in Texas and is a citizen of the United States of America. His parents are both of Ghanaian heritage. His father is a US citizen and holds the rank of Lieutenant Colonel in the United States' Air Force. His mother came to this country from Ghana with her parents when she was aged four and has indefinite leave to remain here.

3. The parents married in Texas on 28 December 2005. The father was stationed at the Lackland Airforce Base at San Antonio at the time. He has an older son, KWE, from an earlier relationship and the family all lived together in Texas. From May to September 2007, the father was posted to Iraq and so the mother looked after K in the matrimonial home. From October to December 2007, the mother took up a short-term post in England and so the father looked after K in the matrimonial home.

4. The marriage broke up in 2008. The father issued divorce proceedings in the Texas state court in March 2008. He then learned that he was to be posted to Afghanistan from June 2008 until August 2009, so the parents agreed to temporary orders made in the Texan court. Although these gave the mother authority to determine K's residence "without regard to geographic location", they clearly envisaged that the mother and K would continue to occupy the matrimonial home in Texas. Despite this, in July 2008, the mother removed K and herself to London, where they remained until February 2010, when she was ordered to return the child to Texas for the purpose of completing the divorce proceedings. In the autumn of

2008, she applied to the immigration authorities here for K to have indefinite leave to remain, stating that she was unable to give the father notice of the application because of his deployment in Afghanistan, when in fact the agreed order provided for him to have contact with K during K's spring break in March 2009. When the time came for that contact, the mother resisted it. The father had to obtain a further order from the Texas court clarifying the position and then an order in the English court to enforce it. According to the United States Court of Appeals, the mother also gave conflicting accounts of her intentions, stating to the English authorities that she intended to remain here and to the Texan court that she hoped to maintain permanent residence in the US.

5. A Texan divorce decree was granted in July 2009, as appears from the judgment of the Court of Appeals because the mother had said that unless she was divorced and given custody, K was due to be deported from the UK imminently (there was nothing in the record to support this statement, which is implausible in the extreme). This was always without prejudice to the father's right to claim custody on his return from Afghanistan, and in fact the decree was vacated in August. A welfare-based custody hearing took place on 1 and 2 March 2010. Both parties were represented and the proceedings were governed by the best interests of the child. The mother raised no objection to the court's jurisdiction. The judge decided that it was in K's best interests that his father should have the exclusive right to designate his primary residence. Clearly, she cannot have been too concerned that by then K had been living with his mother in London since July 2008. She concluded that the father was the parent who would best promote the child's relationship with the other parent. In her words, "my great concern is that the testimony I have heard here today, to a certain extent, does not speak as loud as the actions do". She found that there was a risk of international child abduction by the mother. The mother had taken or kept K away in violation of the father's right of possession or access; she had engaged in plans and activities to facilitate K's removal from the US while the father was in Afghanistan; she had strong ties to Ghana, a country which was not party to the Convention; she had no strong ties to the US and had undergone a change in status with the US immigration authorities which would adversely affect her ability to remain there; she had testified that she was not obliged to abide by the Texas court order; she had resisted the clear terms of the Texan access order; she would interfere with the father's rights as custodian. The order provided for K to have contact with his mother, for the mother to pay the costs of his international travel in lieu of child support, and for her to post a $25,000 bond as security for K's return.

6. After the hearing, K remained living with his father in Texas from March 2010 until August 2011, but spending his summer vacation in England and Christmas and New Year with the mother. The mother lodged an appeal against the Texan court's order but that appeal was never heard. Instead, the mother applied to the United States Federal District Court for an order under the

Convention. She alleged that K had been habitually resident in England in March 2010 and that by acting upon the Texan court order the father was wrongfully retaining him in Texas. In a decision described by Thorpe LJ in the Court of Appeal as "bizarre in the extreme", the District Court accepted this argument and ordered the father to deliver K and his passport to the mother immediately so that she could return with him to England. That order was communicated to the parties on Wednesday 10 August 2011. K was in fact having contact with his mother then. The father delivered K's passport to her on Friday 12 August and she and K flew to England on Sunday 14 August. They have lived here ever since.

7. The father did not apply for a stay of the District Court's order but he did lodge an appeal with the US Court of Appeals for the Fifth Circuit. That appeal was eventually determined on 31 July 2012. The mother did not contest the substance of the father's appeal. She merely argued that it was moot, given that the return order had been put into effect. The Court of Appeals rejected that argument. They held that the mother had consented to K's retention in the United States because she had consented to the Texan court's deciding the case. They also held that K had still been habitually resident in the United States in March 2010; their approach to this question is not without interest:

> "We join the majority of circuits that 'have adopted an approach that begins with the parents' shared intent or settled purpose regarding their child's residence'. *Nicolson*, 605 F 3d at 104 & n 2 (collecting cases). This approach does not ignore the child's experience, but rather gives greater weight to the parents' subjective intentions relative to the child's age. For example, parents' intentions should be dispositive where, as here, the child is so young that 'he or she cannot possibly decide the issue of residency.' *Whiting*, 391 F 3d at 548-49 (citing English case that looked to parents' intentions because the child was 'two and one-half years old at the time of her abduction'). In such cases, the threshold test is whether both parents intended for the child to 'abandon the [habitual residence] left behind'. *Mozes*, 239 F 3d at 1075, see also *Whiting*, 391 F 3d at 549-50."

The record clearly established that K's presence in the UK was to last for a limited duration, that the father never agreed to any other arrangement, and that there were no circumstances to justify departing from the courts' general practice of finding no change in habitual residence in such cases. Hence by acting upon the Texan court's order the father was not wrongfully retaining K in breach of the mother's rights of custody. The District Court's order was vacated.

8. On 29 August 2012, the District Court made an order requiring the mother to return K to his father in the United States and thereafter to comply with the terms of the Texan court's order. The order of 29 August 2012 remains in force and the mother is in breach of it.

9. The mother filed an appeal to the United States Supreme Court against the decision of the Court of Appeals, asking that her case be consolidated with that of *Chafin v Chafin*, which raised the same issue of whether such appeals were moot. Her case was not consolidated with *Chafin*, but held in abeyance pending the outcome. *Chafin* was in fact decided by the Supreme Court in February 2013: *Chafin v Chafin* 568 US ___ (2013). The Court held that such appeals were not moot. Giving the unanimous opinion of the court, Roberts CJ pointed out that if they were held to be moot, courts would be more likely to grant stays as a matter of course, to prevent the loss of any right to appeal. This would "conflict with the Convention's mandate of prompt return to a child's country of habitual residence". Routine stays might also increase the number of appeals: "If losing parents were effectively guaranteed a stay, it seems likely that more would appeal, a scenario that would undermine the goal of prompt return and the best interests of children who should in fact be returned". Instead, courts should apply the traditional stay factors, thus ensuring "that each case will receive the individualised treatment necessary for appropriate consideration of the child's best interests". Importantly, courts at both district and appellate level both could and should take steps to decide these cases as expeditiously as possible. Many courts already did so, but "cases in American courts often take over two years from filing to resolution".

10. Ginsburg J, with whom Scalia and Breyer JJ joined, filed a concurring opinion. She agreed that "stays, even of short duration should not be granted 'as a matter of course,' for they inevitably entail loss of 'precious months when [the child] could have been readjusting to life in her country of residence'". She drew attention to the system in this country, where permission to appeal is required and will only be granted where there is a real prospect of success. Although stays are not automatic, they are usually granted if permission is granted, and appeals are then fast-tracked. She commented that "By rendering a return order effectively final absent leave to appeal, the rules governing Convention proceedings in England and Wales aim for speedy implementation without turning away appellants whose pleas may have merit. And by providing for stays when an appeal is well founded, the system reduces the risk of rival custody proceedings". She made a plea for rule-makers and legislators to consider introducing such a scheme in the US.

11. Meanwhile, while the US District Court's original order still stood, there were Children Act proceedings here. On 23 November 2011, the mother obtained a residence order on a summary basis, the father not accepting that the English courts had jurisdiction pending his appeal in the US. However, he did later take

part for the purpose of gaining orders for contact with K during 2012. He made it clear throughout that he was pursuing an appeal in the US with a view to securing the return of his son.

12. Once he had succeeded in the US Court of Appeals, the father issued two applications here under the Convention. In the first, issued in August 2012, he asserted that the mother's removal of K following the order in August 2011 had itself been wrongful. His argument was that the Court of Appeals' decision setting aside the District Court's order had retrospectively rendered the mother's removal wrongful. That argument was rejected by Sir Peter Singer in the High Court and by the Court of Appeal and this court has refused him permission to pursue it here.

13. In his second application, issued in September 2012, he asserted that the mother's retention of K in this country after the District Court's order of 29 August 2012 was wrongful. That contention depends upon whether K was still habitually resident in Texas on that date. The father alternatively asserted that the court should exercise its inherent jurisdiction to return the child even if not required to do so under the terms of the Convention. Although he considers it in K's best interests to return to live with him, he recognised that the mother might wish to apply to the Texan court to modify its order of March 2010. He therefore offered undertakings that would enable the mother to live in Texas independently of the father whilst K could divide his time between them in a shared care arrangement pending the decision of the Texan court.

14. The case was listed for hearing before Sir Peter Singer for five days beginning on 10 December 2012. Before the hearing, K was twice interviewed by a Cafcass officer in order to discover his wishes and feelings (his mother did not defend the proceedings on the basis that K objected to returning to the USA). In the first interview, K expressed warm feelings towards his father and his time in America and stated that "wherever people say I have to live I don't mind. I'll just do it". The Cafcass officer felt that his feelings were confused and lacked coherence. She was then asked to see him again. This time he wanted to cross out where he had said that he would be "happy" to go back to the USA. Instead he dictated "I want to say I don't mind if I stay in England". "I don't want to go to the USA but my dad can come to England and I can see him." The officer commented:

> "I suggest that his wishes and feelings reported above provide ample evidence of his confusion, sense of other people's expectations of him, and his inability to differentiate between spontaneously arising feelings and more considered views on situations which at his age he struggles to formulate. Hence in my view it would not be advisable to place too much reliance what K had to say."

15. She found his change of mind worrying and concluded that his expressed thoughts and feelings could not reliably be taken as an objection to return. When considering whether he should be separately represented, she commented that "His change of heart could suggest that he may have been susceptible to his mother's wishes and feelings after discussion with her and this could cast doubt on her ability to put forward K's interests as distinct from her own". Her overall conclusion was:

> "Young children experience the world as an environment of relationships and the overwhelming conclusion I draw from the information I have gleaned is that this is a young child who is finding it impossible to please both parents and is feeling far too much responsibility for trying to resolve the acrimony between them. He is clearly affected by the corrosive conflict that has been going on for some time. I suggest that at his young age his wishes and feelings are not the focus of the legal arguments involved in this application to the court."

16. Sir Peter Singer gave judgment on 17 January 2013 dismissing both the father's applications: [2013] EWHC 49 (Fam); the father's appeal to the Court of Appeal was dismissed on 16 July 2013: [2013] EWCA Civ 865; the father was given permission to appeal to this court on each of the grounds in his second application.

Habitual residence

17. The mother's failure to comply with the order of 29 August 2012 is clearly a breach of the father's rights of custody in US law. However, that is not enough for him to succeed in this application. It is not at all uncommon for there to be competing custody orders made in different jurisdictions, as there are here. Under the Convention, the tie-breaker is the habitual residence of the child. As the preamble to the Convention states, it was the desire of the States parties "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence". Article 3 provides that:

> "The removal or the retention of a child is to be considered wrongful where - (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention. . . ."

Hence it is common ground that the father can only succeed in his application under the Convention if K was habitually resident in the United States on either 31 July or 29 August 2012 when the mother's disobedience of the Texan order became wrongful.

18. The Convention does not define the concept of habitual residence and it is clear that not all the states parties would apply an identical test. However, member states of the European Union (apart from Denmark) are also parties to Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, commonly known as the Brussels II Revised Regulation ("the Regulation"). This lays down a uniform jurisdictional scheme as between Member States. This Court held in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 60, [2013] 3 WLR 761, that the provisions giving the courts of a member state jurisdiction also apply where there is an alternative jurisdiction in a non-member state such as the United States. Hence for that purpose the courts of England and Wales should apply the concept of habitual residence as explained by the Court of Justice of the European Union in the cases of *Proceedings brought by A* (Case C-523/07) [2010] Fam 42 and *Mercredi v Chaffe* (Case C-497/10 PPU) [2012] Fam 22.

19. *A v A* was not a Hague Convention case. Nevertheless, it is common ground between the parties to this case, which include not only the mother and father but also Reunite International Child Abduction Centre (the leading non-governmental organisation in the United Kingdom specialising in child abduction and the movement of children across international borders), that the same test should apply in Hague Convention proceedings. There are two good reasons for this. The first is that the Regulation also deals with how child abduction cases are to be dealt with as between member states of the European Union. The second is that the various international conventions dealing with children, including this one, formed part of the legislative history of the Regulation. As Advocate-General Kokott explained in *Proceedings brought by A*, this presumed "a uniform understanding of the concept of habitual residence".

20. The essential features of the test adopted both by the CJEU and by this Court are that habitual residence is a question of fact which "should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce" (*A v A*, para 54). In both *Proceedings brought by A* and *Mercredi v Chaffe*, the operative part of the judgment of the CJEU stated that the concept "corresponds to the place which reflects some degree of integration by the child in a social and family environment". In *A*, the CJEU continued,

> "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."

In *Mercredi*, the CJEU also pointed out, at para 55, that:

> "An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where . . . the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the court's case law, such as the reasons for the move by the child's mother to another member state, the languages known to the mother or again her geographic and family origins may become relevant."

21. Several further points can be taken from *A v A*. There is no legal rule, akin to that in the law of domicile, that a child automatically takes the habitual residence of his parents. The proposition of Lord Brandon of Oakbrook in *In re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, that a young child in the sole lawful custody of his mother will necessarily have the same habitual residence as she does, is to be regarded as a helpful generalisation of fact, which will usually but not invariably be true, rather than a proposition of law (see *A v A*, paras 44 and 73). As Lord Hughes pointed out, Lord Brandon cannot have intended it as such without destroying his first proposition, which was that habitual residence is a question of fact, to be decided in the light of all the circumstances.

22. Both Lord Hughes and I also questioned whether it was necessary to maintain the rule, hitherto firmly established in English law, that (where both parents have equal status in relation to the child) one parent could not unilaterally change the habitual residence of a child (see *In re S (Minors) (Child Abduction: Wrongful Retention)* [1994] Fam 70, approved by the Court of Appeal in *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887). As the US Court of Appeals for the Ninth Circuit pointed out in *In re the application of Mozes*, 239 F 3d 1067 (9th Cir 2001), at 1081, such a bright line rule certainly furthers the policy of discouraging child abductions, but if not carefully qualified it is capable of leading to absurd results (referring to EM Clive, "The Concept of Habitual Residence" [1997] *Juridical Review* 137, at 145). The court continued:

> "Habitual residence is intended to be a description of a factual state of affairs, and a child can lose its [sic] habitual attachment to a place even without a parent's consent. Even when there is no settled intent on the part of the parents to abandon the child's prior habitual residence, courts should find a change in habitual residence if 'the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place' [referring to the Scottish case of *Zenel v Haddow* 1993 SLT 975]."

23. Nevertheless, it is clear that parental intent does play a part in establishing or changing the habitual residence of a child: not parental intent in relation to habitual residence as a legal concept, but parental intent in relation to the reasons for a child's leaving one country and going to stay in another. This will have to be factored in, along with all the other relevant factors, in deciding whether a move from one country to another has a sufficient degree of stability to amount to a change of habitual residence.

24. Mr Richard Harrison QC, for the father, is happy to accept that there is no rule that a child is habitually resident where the parent with custody is resident. He argues that in a case like this, where the child is permitted to live in a foreign country pursuant to an order which is under appeal, the child does not acquire the habitual residence of the parent with whom he is living until the appeal is determined. He urges that there are strong policy reasons for adopting this approach, so that orders made in child abduction cases can be speedily implemented, but without prejudice to the re-return of the child should the order turn out to have been wrongly made. He also cites from *Mozes*, at pp 1078-1079:

> "A more difficult question is when evidence of acclimatization should suffice to establish a child's habitual residence, despite uncertain or contrary parental intent. Most agree that, given enough time and positive experience, a child's life may become so firmly embedded in the new country as to make it [sic] habitually resident even though there be lingering parental intentions to the contrary [referring again to Clive, *loc cit*, at p 145]. The question is how readily courts should reach the conclusion that this has occurred. . . . Despite the superficial appeal of focusing primarily on the child's contacts in the new country, however, we conclude that, in the absence of settled parental intent, courts should be slow to infer from such contacts that an earlier habitual residence has been abandoned."

That approach is, of course, consistent with the approach of the United States Court of Appeals for the Fifth Circuit in this case (see para 7 above).

25. The problem with Mr Harrison's argument is that it too is seeking to place a legal gloss on the factual concept. The fact of the matter is that the mother brought K to this country pursuant to the order of a court permitting her to do so. The English "rule" against unilateral changes could not apply in such circumstances – clearly a child's residence may change in the teeth of the opposition of one parent if this is permitted by order of a court. The same would apply to any assumption that a shared parental intent is generally required before the child's integration or acclimatisation results in a change of habitual residence, at least where the court order contemplates a permanent or long term move.

26. On the other hand, the fact that the child's residence is precarious may prevent it from acquiring the necessary quality of stability. But in this case every other factor points the other way. The mother was coming home. This was where she had lived and worked before her short-lived marriage to the father. This was where she intended to stay. This was where she had a child by another relationship, KWA, now aged two, who lives with her and K. So neither she nor K will have perceived the return here as in any way temporary. From K's point of view, this was where he had lived for some twenty months before his return to the United States in March 2010. This is where he became integrated into a social and family environment during the eleven and a half months in which he lived here before the US Court of Appeals' judgment of 31 July 2012. Against all those powerful factors in favour of the child's integration or acclimatisation, there is only his father's fervent desire, of which K may very well have been aware, that he should return to live in the United States.

27. Looked at from the point of view of the child, therefore, the judge was entitled to hold that he had become habitually resident in England and Wales by 29 August 2012. It is not for us to say whether the United States Court of Appeals was wrong to hold that he was still habitually resident in the United States during the period after his mother brought him to live here while his father was serving in Afghanistan. The situation was inherently unstable and the mother both represented to the Texan court that she hoped to maintain permanent residence in the United States and accepted its jurisdiction. I also recognise that courts in other jurisdictions might decline to hold that eleven months' precarious residence here was sufficient integration or acclimatisation to change the habitual residence established in his country of birth.

Inherent Jurisdiction

28. Article 18 of the Convention provides that its provisions on return of children "do not limit the power of a judicial or administrative authority to order the return of the child at any time". The High Court has power to exercise its inherent jurisdiction in relation to children by virtue of the child's habitual

residence or presence here: Family Law Act 1986, ss 2(3) and 3(1). The welfare of the child is the court's paramount consideration: Children Act 1989, s 1(1). But this does not mean that the court is obliged in every case to conduct a full-blown welfare-based inquiry into where the child should live. Long before the Hague Convention was adopted, the inherent jurisdiction was used to secure the prompt return of a child who had been wrongfully removed from his home country: see *In re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC 80, paras 26, 27, and the cases cited therein. Furthermore, it has long been established that, in the interests of international comity, the existence of an order made by a foreign court of competent jurisdiction is a relevant factor. As the Judicial Committee of the Privy Council put it in the Canadian case of *McKee v McKee* [1951] AC 352, 364:

> "Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, although in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case."

29. In this case, Sir Peter Singer posed himself the following question, at para 63 of his judgment:

> "So the question becomes whether I can on the information presently available to this court reasonably conclude that to leave his mother and London for his father and San Antonio would, at this point, be in his best interests."

He answered that question thus in para 65:

> "This is not a case where I would begin to feel justified in making what would be a peremptory return order. I have heard evidence from neither party nor from any witness. I have no Cafcass report directed, as I would need as the barest minimum, to the degree to which KL is secure and settled in his current situation, to ascertain whether he thrives and what he may lack, and importantly to provide some assessment of the likely impact upon him of a move from M to F and from London to Texas."

30. Mr Harrison complains that the judge asked himself the wrong question. The father obviously wants K to move to live with him, but that is not what he

immediately proposes. He proposes that K should return to Texas, with his mother, so that the Texan court can consider any application which the mother may make for the modification of its order of 2 March 2010. The father's evidence was that such an application could be decided within less than three months. In the meantime, the father offers undertakings which would enable the parents to live separately in Texas but to share the care of their son between them. If the outcome were that K returned to live with his father, that would be because it was in his long term best interests to do so.

31. The Court of Appeal acknowledged that "ideally Sir Peter would have referred to the protective undertakings and the extent to which they would have resulted in mother and child returning together" (para 54), but then introduced considerations relating to the mother and her younger child contained in a statement the admissibility of which had not been formally determined; more importantly, they did not address the essential point that Sir Peter had asked himself the wrong question.

32. That being the case, it is open to this court to ask itself the correct question: is it in K's best interests to remain in this country so that the dispute between his parents is decided here or to return to Texas so that the dispute can be decided there? As the judge heard no oral evidence, we are also in as good a position as he was to answer it.

33. Although the question comes before the court in an application to invoke the inherent jurisdiction, it might have come before the court in the shape of an application under section 5 of the Family Law Act 1986 to refuse an order or to stay the English proceedings on the ground that the question has already been determined, or that it is more appropriate for it to be determined, in proceedings in another jurisdiction. That was taken to be the position in *Re K (Abduction: Consent: Forum Conveniens)* [1995] 2 FLR 211, 215, in which the facts were remarkably similar to those in this case. Although the circumstances of each individual child and his family are different, it is worth recalling that the Court of Appeal stressed how similar were the approach and the procedure of the Texan and the English courts in these cases.

34. In favour of K's remaining here is the fact that he has now been living here with his mother and younger brother for over two years. He is at school here and apparently doing well. Although he is obviously confused and upset by the conflict between his parents, and his conflict of loyalties to them, there is no reason to suppose that he is unhappy here. The evidence as to his current home and school situation is readily available here and no doubt the evidence as to his prospective home and school situation in Texas would be available to a Cafcass reporter,

perhaps with the assistance of Children and Families Across Borders (formerly International Social Service).

35. In favour of his returning to Texas is the fact that he is a Texan child. His parents were married there and he was born there. He has an older half-brother who is now at University in the United States. He also has a large extended family living in the United States. He has spent three years and seven months of his life living there, most recently in the sole "possession" (as they put it in Texas) of his father, who has facilitated contact with his mother. He is used to travelling between here and the United States and to changes in parental care. It is clear from his interview with the Cafcass officer that he has fond memories of his time in the United States. The evidence as to what his home and school situation would be if he were to return to live there will be readily available and no doubt the evidence as to his current home and school situation would be available there through the same sort of machinery. The view of the Cafcass officer, albeit in the context of a Convention application, was that this is a case in which K is experiencing such a conflict of loyalties that too much weight should not be given to his wishes and feelings. But no doubt the Texan court would be in just as good a position to investigate these as would the English court.

36. The crucial factor, in my view, is that this is a Texan child who is currently being denied a proper opportunity to develop a relationship with his father and with his country of birth. For as long as the Texan order remains in force, his mother is most unlikely to allow, let alone to encourage, him to spend his vacations in America with his father. Whilst conflicting orders remain in force, he is effectively denied access to his country of origin. Nor has his mother been exactly enthusiastic about contact here. The best chance that K has of developing a proper relationship with both his parents, and with the country whose nationality he holds, is for the Texas court to consider where his best interests lie in the long term. It is necessary to restore the synthesis between the two jurisdictions, which the mother's actions have distorted.

37. Despite the passage of time, there is not the slightest reason to consider that K would suffer any significant harm by returning to Texas on the basis proposed by the father. Indeed, the mother did not defend the Convention proceedings on the basis either of his objections or of a risk of harm should he be returned (although she did suggest that he had been settled here so long that to return would place him in an intolerable situation). Had it not been for our decision on habitual residence – which I accept that courts in some jurisdictions might consider debateable, it would have been our duty to return K to Texas under the Convention.

38. I would therefore allow this appeal and order the return of the child to San Antonio forthwith on the basis of the undertakings offered by his father. But

should the mother choose not to avail herself of the opportunity to return with her son, the order for his return will stand. The parties are invited to submit a draft order before this judgment is formally handed down.