IN PRIVATE

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IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Friday, 2nd May 2014

BEFORE:

MR JUSTICE MOYLAN

BETWEEN:

AN ENGLISH LOCAL AUTHORITY

Applicant

- and -

(1) SW, by her Litigation Friend, the OFFICIAL SOLICITOR
(2) A SCOTTISH LOCAL AUTHORITY

- and -

(3) RP and LC

Respondents

(Habitual Residence under the Mental Capacity Act 2005)

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(Official Shorthand Writers to the Court)

MR HARROP-GRIFFITHS (instructed by an **English Local Authority**) appeared on behalf of the Applicant

MR REES (instructed by **Ben Hoare Bell LLP**) appeared on behalf of the First Respondent

MR SPAIN (instructed by a **Scottish Local Authority**) appeared on behalf of the Second Respondent

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No of words: 9367
No of folios: 131

Judgment

IN PRIVATE

This judgment was delivered in private. The Judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

1. MR JUSTICE MOYLAN: The issue in this case is where an adult ("SW"), who lacks capacity, is habitually resident. This is for the purposes of determining whether the English court has jurisdiction to deal with applications under the Mental Capacity Act 2005 ("the MCA").

2. The parties to the proceedings are an English Local Authority ("ELA") represented by Mr Harrop-Griffiths; SW, acting through the Official Solicitor, represented by Mr Rees; and a Scottish Local Authority ("SLA") represented by Mr Spain.

3. SW's mother and stepfather are parties to the proceedings but they have not been present or represented at any hearing, including the hearing before me. They have written a letter to the ELA which I have read. SW has attended part of the hearing.

4. The parties' respective positions are as follows. The Official Solicitor submits that SW is habitually resident in England and Wales. The ELA and the SLA submit that she is habitually resident in Scotland.

History

5. The background circumstances are as follows. SW is aged 36. She was born and lived in Scotland until 2009. In 2006 she sustained hypoxic brain injury following a hypoglycaemic attack. When she was in a rehabilitation unit at a hospital in Scotland and subject to a compulsory treatment order under the Mental Health (Care and Treatment Act) (Scotland) Act 2003 she sustained further, serious, injuries.

6. SW remained in hospital in Scotland until July 2009. Her discharge from hospital was delayed for a considerable period of time because it proved difficult to find a place which was acceptable to SW and which was suitable to accommodate her.

7. In early 2009 a rehabilitation facility in England was identified. This was visited by SW with her social worker. SW's mother also visited. According to one of the social worker's statements, filed for the purposes of these proceedings, "everyone was in agreement that this placement was suitable for" SW. SW herself contacted the rehabilitation facility in England to find out whether there was a vacancy.

8. The manner in which SW's move to England was effected was as follows. In July 2009 SW moved from the hospital in Scotland to a hospital in England under a compulsory treatment order. She then moved, it seems immediately, to the rehabilitation facility under a community treatment order. It is clear from the evidence that SW wanted to move to this facility, although formally it was undertaken pursuant to treatment orders as I have described.

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9. The community treatment order made in England lapsed prior to SW moving to her present home in December 2010. I deal with SW's current circumstances later in this judgment.

10. SW's care is jointly funded by Scottish public authorities. This will continue regardless of my decision. She has also continued to have an allocated social worker from Scotland. SW is subject to financial guardianship orders made by the Scottish courts under which financial guardians have been appointed.

English Proceedings

11. The current proceedings were commenced when there appeared to be a real prospect of SW's mother and stepfather removing SW from her current home and taking her back to Scotland, in circumstances where there was a significant prospect that her health would be put at risk because they could not adequately care for her. The application has proceeded, and interim orders have been made, on the basis that, even if SW is not habitually resident in England, this court has jurisdiction under the MCA 2005, schedule 3, para. 7(1)(c) because SW is present in England and Wales and the matter has been urgent.

12. The application was supported by a report from a clinical psychologist which stated that SW lacked capacity to make decisions about where she should live and her care needs. A further report has been obtained for the purposes of these proceedings from another clinical psychologist. In her opinion SW suffered an acquired brain injury which has resulted in "deficits of memory and executive functioning". SW's cognitive functioning continues to be severely impaired, particularly in these areas. She is unable to weigh up information relevant to making an informed decision about where she should live. The psychologist saw no evidence of SW having the ability to weigh one piece of information against another. Her opinions were expressed in concrete and inflexible terms. In the psychologist's opinion, SW also has no insight into her care needs. The psychologist concludes that SW lacks the capacity to decide where she should live.

13. The evidence establishes that, as a result of her injuries, SW is not able to care for herself without significant support. She is also extremely vulnerable socially.

14. It is clear from the evidence that SW lacks the capacity to decide where to live and the true nature of her care needs. She does not appreciate the level of support and assistance which she, in fact, needs.

15. Interim orders have been made, but the issue remains as to whether substantive jurisdiction rests with the English court or with the Scottish court. Proceedings before the Scottish court have been stayed pending the determination of this issue by the English court. The interim orders provide that it is in SW's best interests for her to reside in her current home and that members of staff may take reasonable and proportionate measures to prevent her from leaving and to return her there. It also declared that any deprivation of liberty is authorised under the MCA.

16. The evidence: in addition to the expert reports, to which I have referred, the evidence comprises statements from social workers, from the solicitor instructed by the Official Solicitor, who has provided accounts of his meetings with SW, and a statement from

SW herself. I propose only to summarise the effect of this evidence in the course of my judgment.

Current Circumstances

17. Turning now to SW's current circumstances: SW progressed well following moving to live in the rehabilitation facility in England. She began to express a wish for more independence. Those responsible for supporting her looked for an alternative home and found her present accommodation. This is specialist supported accommodation. It does not appear that any other alternatives were found or offered to SW. When seen by her solicitor for the purposes of these proceedings, SW told him that she had agreed to move because she wanted to leave where she was. She either stayed there or moved to her current home, and she wanted to move.

18. SW moved to her current home in December 2010. She has her own flat which is one of a number of separate units; she is a licensee and there is 24 hour support available. SW has remained living there since December 2010, save for a short period at the end of 2011 when she was detained for assessment under section 2 of the Mental Health Act 1983. Her accommodation comprises a one bedroom flat. It is described by her solicitor as "well lived in, with a lot of [SW's] personal possessions visible". In her own statement, SW describes herself as being independent in her flat. She also describes going out, including to an exercise class and a skills for work course. She goes out on her own for short periods; if it is for longer periods she is accompanied by a member of staff. SW is in a relationship with someone who also lives in one of the other flats. Their relationship appears to have commenced at the end of 2012.

19. Since moving to England, SW has had very few visits from her immediate family, who all live in Scotland. She has also made very few visits to Scotland. The reasons for this are contained in the written evidence and are not as a result of any obstacles being put in the way of such visits taking place. SW speaks to her mother and stepfather by telephone and also has contact with a sibling through Facebook.

20. At some point – it is not entirely clear from the evidence when – SW began expressing a wish to move from her current accommodation. At different times she has expressed different views about where she would like to live. She has identified a number of places in England and also in Scotland. Her reasons for moving have also varied, although the two principal reasons appear to be that she does not like the area in which she is currently living and she wants to move to a place where she can live more independently and with less support. The latter reflects the fact that SW has very poor insight into her care needs and wrongly believes she only requires limited support.

21. SW has expressed her wish to move in strong terms. More recently she has said she does not want to live in Scotland. When seen by the psychologist, for the purposes of preparing her report for these proceedings, SW "repeatedly and consistently expressed a wish to remain living in England and not to return to Scotland, while also saying that she did not like where she is currently living".

22. The support staff at SW's home say that she gets on well with them and the other residents. She enjoys the various activities she participates in, when focused on them.

23. When asked by her solicitor in March 2013, "Where is home?", SW replied "I would have to say here these days". She told him in January 2014, "I am getting my life together in England. I want to continue to get better. I am starting to get a life of my own." She also said that she wanted to move from where she is living as soon as possible, but not back to Scotland.

Legal Framework

24. As with a number of other domestic statutes and international instruments, the foundation of jurisdiction is habitual residence. Looking first at the Hague Convention on the International Protection of Adults 2000 ("the 2000 Convention"), Article 5 provides (1):

> "(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the adult have jurisdiction to take measures directed to the protection of the adult's person or property.
> (2) In case of a change of the adult's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction."

This Article, in its own terms, contemplates an adult within the scope of the Convention moving habitual residence from one Contracting State to another. The United Kingdom has ratified the 2000 Convention, but only in respect of Scotland.

25. Section 63 of the MCA 2005 provides:

> "Schedule 3 –
> (a) gives effect in England and Wales to the Convention … (insofar as this Act does not otherwise do so)".

The majority of Schedule 3 came into force on 1st October 2007, although a number of its provisions are not yet in force pursuant to Schedule 3, paragraph 35 and Article 57 of the Convention. Schedule 3 Part 2, paragraph 7, is in force; it provides:

> "Scope of jurisdiction
>
> 7(1) The court may exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to—.
> (a) an adult habitually resident in England and Wales,
> …
> (d) an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him.
>
> (2) An adult present in England and Wales is to be treated for the purposes of this paragraph as habitually resident there if—.
> (a) his habitual residence cannot be ascertained"

26. The Explanatory Report on the 2000 Convention by Paul Lagarde contains the following:

> "The Convention follows the general structure of the Convention of 19 October 1996 and adopts on many points the same solutions. This is not surprising, as both Conventions were essentially negotiated by the same governmental experts, whose specific task, as already indicated, was to consider whether the solutions adopted by the 1996 Convention could be extended to the protection of adults."

The 1996 Convention, to which he is referring, is the Hague Child Protection Convention.

27. When dealing with Article 5, the Explanatory Report states, in paragraph 49:

> "This paragraph repeats word for word paragraph 1 of Article 5 of the Convention on the Protection of Children. The principal jurisdiction of the authorities of the Contracting State of the habitual residence of the adult did not give rise to any difficulty and was accepted unanimously. No definition was given of habitual residence which, despite the important legal consequences attaching to it, should remain a factual concept. The drawback of providing any quantitative or qualitative definition of 'habitual residence' in one convention, would be to cast doubt on the interpretation of this expression in numerous other conventions in which it is used."

Paragraph 50:

> "True still to the Convention on the Protection of Children, the Commission with equal unanimity accepted that, in the event of a change in the habitual residence of the adult to another Contracting State, jurisdiction passes to the authorities of the State of the new habitual residence …
>
> The change of habitual residence implies both the loss of the former habitual residence and the acquisition of a new habitual residence. It may be that a certain lapse of time exists between these two elements, but the acquisition of this new habitual residence may also be instantaneous on the simple hypothesis of a move of the adult concerned when this has occurred on a long-term if not final basis. This is then a question of fact, which it is for the authorities called upon to make a decision to assess."

28. I have been referred to a number of authorities, starting with Re MN [2010] EWHC 1926 Fam. In that case Hedley J considered the issue of habitual residence and how it should be addressed by the court. MN, who lacked capacity, had been moved from California to England by her niece who had been appointed MN's agent under an Advance Health Care Directive signed in California. One of the issues in the case was

whether this Directive gave the niece authority to move MN to a new home, and in particular to a new home in another country.

29. Hedley J decided that, if the Directive did not authorise the niece to move MN from her home in California to a new home in England, MN would remain habitually resident in California. This was subject to the caveat that "there was general acceptance (by counsel) of the fact that the mere passage of time, if sufficiently long, could effect a change of habitual residence even if the original removal was wrongful" (paragraph 21). In the circumstances of that case, no one sought to contend that a sufficient length of time had elapsed for this to apply. MN had been in England for 12 months.

30. If the Directive did authorise such a move Hedley J indicated that he was "likely to conclude that MN is now habitually resident in England and Wales" (paragraph 38).

31. In paragraphs 22 and 23 Hedley J said:

> "22. It follows that in my judgment the question of authority to remove is the key in this case to the question of habitual residence. Habitual residence is an undefined term and in English authorities it is regarded as a question of fact to be determined in the individual circumstances of the case. It is well recognised in English law that the removal of a child from one jurisdiction to another by one parent without the consent of the other is wrongful and is not effective to change habitual residence — see e.g. Re PJ [2009) 2 FLR 1051 (CA). It seems to me that the wrongful removal (in this case without authority under the Directive whether because Part 3 is not engaged or the decision was not made in good faith) of an incapacitated adult should have the same consequence and should leave the courts of the country from which she was taken free to take protective measures. Thus in this case were the removal 'wrongful', I would hold that MN was habitually resident in California at the date of Judge Cain's orders.
>
> 23. If, however, the removal were a proper and lawful exercise of authority under the Directive, different considerations arise. The position in April 2010 was that MN had been living with her niece in England and Wales on the basis that the niece was providing her with a permanent home. There is no evidence other than that MN is content and well cared for there and indeed may lose or even have lost any clear recollection of living on her own in California. In those circumstances it seems to me most probable that MN will have become habitually resident in England and Wales and this court will be required to accept and exercise a full welfare jurisdiction under the Act pursuant to paragraph7(l)(a) of Schedule 3."

32. The next decision is A v A (Children: Habitual Residence) [2014] 1 FLR 111. In the course of her judgment, Lady Hale makes clear that the test to be applied when

determining habitual residence is that adopted by the Court of Justice of the European Union. The Supreme Court was considering the habitual residence of a minor child who had been born in Pakistan and had never been present in England. Under the heading "Is there jurisdiction under Article 8 of the Regulation?" - the Regulation being Brussels IIa, namely Council Regulation (EC) No 2201/2013 - Lady Hale says:

> "34. Jurisdiction under article 8 depends upon where the child is habitually resident. It has hitherto been thought (see, for example, Dicey, Morris and Collins on The Conflict of Laws, 15th Edition (2012), Rules 17(2) and 18(2); Clarke Hall and Morrison on Children, paras 234 and 236) that the concept of habitual residence, as developed by the courts of England and Wales for the purposes of both the 1986 Act and the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Hague Child Abduction Convention"), is different from the concept of habitual residence as interpreted by the Court of Justice of the European Union for the purposes of the Regulation. Very recently, in DL v EL [2013] EWCA Civ 865, at para 48, the Court of Appeal has expressed the view that "there is now no distinction to be drawn" between the test adopted in each of those three contexts. As we are dealing only with habitual residence under the Regulation, it is not strictly necessary for us to resolve that debate.
>
> 35. Nevertheless, it is highly desirable that the same test be adopted and that, if there is any difference, it is that adopted by the Court of Justice. There are several reasons for this. First, the Law Commissions recommended the adoption of "habitual residence" in part because it had been widely used in international conventions, including the Council of Europe Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (1981) Cmnd 8155 and the Hague Child Abduction Convention, and was likely to be recognised abroad: see Law Com No 138, para 4.15. As Advocate General Kokott pointed out in Proceedings brought by A (Case C-523/07) [2010] Fam 42, various international conventions, in particular the Hague Convention of the Protection of Minors 1961, the Hague Convention on the Protection of Children 1996 which superseded it, and the Hague Convention on the Civil Aspects of International Child Abduction 1980, formed part of the legislative history of the Regulation. In part, the Regulation supersedes them. In part, they operate alongside one another. The 'fields of application of the various instruments must be consistently demarcated from one another'. This presumed a 'uniform understanding of the concept of habitual residence' (para AG23). Thus it would appear that the purpose of both the 1986 Act and the Regulation was to adopt a concept which would apply across the board.

36. Secondly, as both the Law Commissions and the Advocate General pointed out, that concept was to be distinguished from 'the legalistic concept of domicile' (para AG3 1). As Professor Perez-Vera put it in her Explanatory Report on the Hague Child Abduction Convention:

> '66. . . . We shall not dwell at this point upon the notion of habitual residence, a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile.'

…

37. Thirdly, however, as Rhona Schuz has put it 'Many courts have been unable to resist the temptation to "legalise" the concept' ('Habitual residence of children under the Hague Child Abduction Convention – theory and practice' (2001) 13 CFLQ 1, at 4). In particular, the courts in England and Wales have supplied their own test, derived from the test of 'ordinary residence' regarded by the House of Lords in R v Barnet London Borough Council, ex p Shah [1983] 2 AC 309 as settled law, itself derived from taxation statutes. Lord Scarman defined it thus, at 343:

> 'Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.'

(See, for example, Re M (Abduction: Habitual Residence) [1996] 1 FLR 887; Al-Habtoor v Fotheringham [2001] 1 FLR 951; Re R (Abduction: Habitual Residence) [2004] 1 FLR 216; Re P-J (Children) (Abduction: Consent) [2010] 1 WLR 1237; Re H-K (Habitual Residence) [2012] 1 FLR 436).

38. This test has at least two disadvantages. In the first place, the Law Commissions deliberately adopted 'habitual' rather than 'ordinary' residence, because the latter frequently occurred in tax and immigration statutes and they thought that its use in the wholly different context of family law was a potential source of confusion (Law Com No 138, para 4.15). Furthermore, the reference to adopting an abode 'voluntarily and for settled purposes' is not readily applicable to a child, who usually has little choice about where he lives and no settled purpose, other than survival, in living there. If this test is adopted, the focus inevitably shifts from the actual situation of the child to the intentions of his parents.

> 39. Fourthly, and perhaps for that reason, the English courts have been tempted to overlay the factual concept of habitual residence with legal constructs. The most important of these is the 'rule' that where two parents have parental responsibility for a child, one cannot change the child's habitual residence unilaterally…"

33. In the course of her judgment Lady Hale refers to two decisions of the Court of Justice, Proceedings brought by A [2010] Fam 42 and Mercredi v Chaffe [2012] Fam 22. These decisions make clear that habitual residence is an issue of fact to be distinguished from the legalistic concept of domicile.

34. In Proceedings brought by A, Advocate General Kokott considered that the definition given by the Court of Justice to the term "habitual residence" in other fields of law could not be transposed to the determination of the habitual residence of a child. The former definition, from previous decisions, was: "the place of habitual residence is that in which the [person] concerned has established, with the intention that it should be of lasting character, the permanent or habitual centre of his interest" (paragraph 33). In the Advocate General's opinion this placed too much emphasis on the intention of the person concerned for it to be suitable to be applied to the habitual residence of a child. This might be suitable for adults but was not suitable for children because: "At least in the case of younger children … it is not the child's own will that is decisive but that of the parents" which may diverge (paragraph 36).

35. The Advocate General concludes that the concept of habitual residence in Article 8(1) of Brussels IIa: "should therefore be understood as corresponding to the actual centre of interests of the child" (paragraph 38). All factors must be taken into account when this is being determined.

36. She then identifies and analyses two factors "which may in particular be significant" in that case. They were, "the duration and regularity of residence and the child's familial and social integration" (paragraph 40). In respect of the former, she says, at paragraph 41:

> "To distinguish habitual from mere temporary presence, residence must normally be of a certain duration. Council Regulation (EC) No 2201/2003 does not prescribe a particular limit in this connection. When residence is sufficiently permanent depends instead on the circumstances of the individual case."

In respect of the latter she states "the stability which distinguishes habitual residence from mere presence also depends on the familial and social integration of the child" (paragraph 47).

37. The Court of Justice agreed that its case law relating to the concept of habitual residence in other areas of European Union law could not be directly transposed. They also agreed that a decision on habitual residence is to be determined "on the basis" (paragraph 37) of all the circumstances of the case adding that:

> "38. In addition to the physical presence of the child in a member state, other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment."

38. Pausing there, both the Advocate General and the Court provide that habitual residence requires physical presence. No other specific fact need be established. What a court must assess, when determining habitual residence, are those facts in the case which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment. This assessment is directed towards distinguishing habitual residence from temporary or intermittent presence or residence.

39. Examples of such facts are given in paragraphs 39, 40 and 41 of the judgment:

> "39 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.
>
> 40 As the Advocate General pointed out in para 44 of her Opinion, the parents' intention to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that State.
>
> 41 By contrast, the fact that the children are staying in a Member State where, for a short period, they carry on a peripatetic life, is liable to constitute an indicator that they do not habitually reside in that State."

40. The Court's judgment does not expressly incorporate the Attorney General's reference to the child's centre of life (paragraph 31) or centre of interests (paragraph 38). Instead the court, in the operative part of its judgment, refers only to the degree of integration (as set in paragraph 44 of the judgment). However, this is clearly merely a summary of what is set out in paragraphs 38-41, as is made clear in paragraph 42, where the court states: "In the light of the criteria laid down in paragraphs 38 to 41 of this judgment and according to an overall assessment, it is for the national court to establish the place of the children's habitual residence."

41. In Mercredi v Chaffe the CJEU focuses again, in the operative part of its judgment, on the degree of integration. However, in addition, at paragraphs 48-55 the court repeats,

with some modification, the factors referred to in Proceedings brought by A. To quote certain passages from Mercredi v Chaffe:

> "[48] Among the tests which should be applied by the national court to establish the place where a child is habitually resident, particular mention should be made of the conditions and reasons for the child's stay on the territory of a Member State, and the child's nationality….
>
> [49] As the court explained, moreover, in para 38 of Proceedings brought by A, in order to determine where a child is habitually resident, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent"

These include the nature of the intention of the person with parental responsibility and of any tangible steps taken by that person, such as purchasing accommodation.

42. The CJEU also focuses on the need to distinguish between habitual residence and "mere" temporary presence, as explained in paragraph 51:

> "the former must as a general rule have a certain duration which reflects an adequate degree of permanence. … Before habitual residence can be transferred to the host state, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence …"

As can be seen, in Mercredi v Chaffe the court specifically incorporates the phrase centre of interests.

43. In DL v EL [2013] FLR 163 Sir Peter Singer, sitting as a deputy High Court judge, pointed to the differences between the French and English texts of the judgment in Mercredi v Chaffe, in particular the use in the French of the word "stabilité" and in the English of the word "permanence". His analysis was endorsed by the Court of Appeal in L v C (Abduction Convention - Effect of Reversal of Return Order on Appeal) [2014] 1 FLR 570. Lady Hale's judgment in A v A at paragraph 51 also refers to Sir Peter Singer's analysis. In passing, I note that stability *is* used in Advocate General Kokott's opinion, as referred to above, and by Lady Hale in In the matter of KL [2013] UK SC 75, paragraph 26 (in addition to the words "integration or acclimatisation").

44. Returning to Lady Hale's judgment in A v A:

> "54. Drawing the threads together, therefore:
>
> i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin

to that whereby a child automatically takes the domicile of his parents.

ii) It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.

iii) The test adopted by the European Court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.

iv) It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.

v) In my view, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from R v Barnet London Borough Council, ex p Shah should be abandoned when deciding the habitual residence of a child.

vi) The social and family environment of an infant or young child is shared with those (whether parents or others) upon 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.

vii) The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.

viii) As the Advocate General pointed out in para AG45 and the court confirmed in para 43 of Proceedings brought by A, it is possible that a child may have no country of habitual residence at a particular point in time."

45. The next case is In the Matter of PO [2013] EWHC 3932 (COP). In that case Sir James Munby P. reiterated that "habitual residence is in essence a question of fact" (paragraph 17). He then considered, in part by reference to Re MN, the difference in effect between a lawful and an unlawful move.

46. PO had been habitually resident in England and Wales, living in her own home. Two of her children, GO and RO, were her financial attorneys. In April 2012 GO moved PO

to Scotland, first to his own home and then to a care home. One party contended that PO was habitually resident in Scotland:

> "23. … First, he submits, this was on a proper view of the facts far from a case of adult kidnapping of the kind considered in Re HM or Re MN. I agree. Secondly, he points to the time that has elapsed since PO first arrived in Scotland. Thirdly, he points to the evidence, which I accept, that PO is settled in her care home in Scotland and, seemingly, expressing her contentment at being there. Fourthly, he points to the evidence, which again I accept, that PO is not now expressing a desire to return either to her own home or to Worcestershire."

47. Against this it was argued that PO's removal from England had been wrongful and, further, that she was not sufficiently settled in Scotland for her to be habitually resident there. In support of the removal being wrongful it was submitted:

> "25. … (a) that PO's wish at the time was to remain at home, (b) that GO, RO and MP "had no authority" to remove PO from her home and acted unilaterally, (c) that they did not seek the "involvement" of Worcestershire County Council, (d) that they did not seek the involvement of Inverclyde Council until some two weeks later, and (e) that their actions were driven in significant part by their dispute with JO."

48. Munby P. assumed (a) to be correct and agreed that points (b), (c) and (d) were factually accurate. He then continued in paragraph 26:

> "But where does this take [counsel]? This was not a kidnapping. It was not some high-handed action undertaken for some ulterior motive. It was, on the contrary, something reasonably and sensibly undertaken by, or in agreement with, three of PO's four children in what they saw as her best interests. They had authority – the authority conferred on them by the doctrine of necessity – to act as they did, and the fact that JO was of a different opinion did not rob them of that authority. Nor did they need the concurrence of or need to involve either Worcestershire County Council or Inverclyde Council."

49. Accordingly, the President rejected the assertion that PO had been wrongfully removed to Scotland. He then addressed the submission that PO was not sufficiently settled in Scotland to be habitually resident there:

> "27. In relation to the second part of her submission, [counsel] points in particular to the facts that PO has been in Scotland for only some fifteen months, that her move to Scotland had originally been seen by GO as temporary, that the evidence as to PO's current wishes and feelings is not as clear cut as Mr Ruck Keene would have me accept, and that as recently as December 2012 the Sheriff was treating PO as *not* habitually

> resident in Scotland. Accepting all of this, the fact is that PO has been in Scotland for some time and that she is settled in her care home. In all the circumstances she is not, in my judgment, habitually resident in England and Wales and I am not compelled by the Sheriff's view to decide otherwise."

50. The final case to which I propose to refer is In the matter of LC (Children) [2014] UK SC 1, in which the Supreme Court decided that the court could have regard to the state of mind of a child when determining her habitual residence. At the start of his judgment Lord Wilson, with whom Lord Toulson and Lord Hodge agreed, said:

> "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?"

51. In paragraph 37 Lord Wilson said:

> "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."

52. Lady Hale, with whom Lord Sumption agreed, phrases the question as follows (paragraph 59): "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?"; adding that, "It is not a question of intention". She then continues in paragraph 60:

> "… 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."

Submissions

53. Turning now to the parties' submissions. The applicant ELA submits that the test for habitual residence under the MCA should be the same, suitably adapted, as that under Brussels IIa as set out in the judgments of the CJEU and the Supreme Court. Applying this test it is submitted that SW is habitually resident in Scotland. Quoting from Mr Harrop-Griffiths' written submissions:

> "Assuming the focus for the factual enquiry is the degree of integration (or putting down roots) the Local Authority submits that an important issue is the extent to which this court should take into account the reasons why an adult is living in a particular place, in balance with the extent to which it should take into account his or her perception."

54. As for the reasons why SW is living in England, Mr Harrop-Griffiths points to the fact that she is in England because she has been placed here and kept here by public authorities. In addition, the current interim orders indicate that there is an element of compulsion in SW's current residence.

55. The core of Mr Harrop-Griffiths' case is that, because SW is not settled, in that she does not like the area in which she is living or her home itself, she is not integrated in England. She has not put down sufficient roots to effect a change in her habitual residence. Added to this, SW is only in England because there was, and perhaps still is, nowhere suitable for her to live in Scotland. She is required to remain where she is because it is in her best interests.

56. Having regard to the above factors, Mr Harrop-Griffiths submits that the length of time SW has lived in England and her current expressed preference to live in England (albeit a different part) are not sufficient to make her habitually resident here.

57. The SLA also submits that SW is habitually resident in Scotland. Mr Spain submits that SW is not settled or integrated in England. In reality her placements have been governed by the decisions of state authorities. SW's views have been taken into account, insofar as possible, but, he submits, at most SW has been compliant with those decisions or has tolerated the accommodation provided for her.

58. Mr Rees, on behalf of SW, submits that she is habitually resident in England. He submits that no direct equivalence should be drawn between cases dealing with the habitual residence of children and with the habitual residence of an adult who lacks

capacity to decide where to live. Factors which may be important or determinative in the case of a child – parental intention, broader family environment – will have no parallel in many cases relating to an adult who lacks capacity.

59. In particular, Mr Rees submits that the CJEU's test in Proceedings brought by A and Mercredi v Chaffe, namely the place which reflects some degree of integration by the child in a social or family environment, is not directly applicable. He argues that the degree of settlement or integration required to establish habitual residence must depend very much on the individual circumstances of the case and that integration, in particular, into a familial structure may not be relevant.

60. He acknowledges and accepts that the adult's state of mind will, or may, be relevant, although the weight which can be applied to this factor will clearly significantly vary. In that respect, he submits that the criticism of the test in Ex parte Shah, namely the concept of adopting an abode voluntarily and for settled purposes, is apt also to its possible application to the determination of habitual residence under the MCA.

61. Mr Rees relies on the following facts, in particular, as pointing towards SW being habitually resident in England: a) SW's move to live in England was lawful and was not limited in duration; b) SW wanted to move to England, to her previous home and to her present accommodation; c) SW has been living in England for nearly five years and has been living in her own flat under a licence for three-and-a-half years; d) when asked by her solicitor "Where is home?", she replied "I would have to say here"; e) SW has made a home for herself at her present flat; f) although SW has said she wants to move, on a day-to-day level she is settled at her present home; g) the evidence of SW's state of mind indicates that she is integrated in England.

62. The factors which, he submits, point against SW being habitually resident in England are: a) SW's initial move to England was affected by a public authority under a compulsory order, although the move, as I have described, was in part at SW's request and was with her agreement; b) SW has expressed her dissatisfaction with her current home and its location and her wish to move.

63. Mr Rees submits that the cases advanced by both Local Authorities place too much emphasis on SW's state of mind, and in particular her dissatisfaction with the area in which she is living. The focus should be on her circumstances, on her situation, and that focus, he submits, leads to the inevitable conclusion that SW is habitually resident in England.

Discussion

64. Given the close links, in particular between the 2000 Convention and the 1996 Child Protection Convention, as explained in the Lagarde Report; given the relationship between the 2000 Convention and the MCA; and for general policy considerations as referred to by Lady Hale in A v A, it is clear to me that the definition of "habitual residence" under the MCA should be the same as that applied in other family law instruments, including BIIa. Further, BIIa is also closely linked to the 1996 Convention, as explained in Proceedings brought by A.

65. In my view, it must be right that the approach to the issue of habitual residence under BIIa should be the same as that under the MCA. I have not been directly referred to

other judgments from the Court of Justice or domestically which address the issue of habitual residence including those which refer to the test of "centre of interests". However, this phrase is incorporated in the judgment of Mercredi v Chaffe, as referred to above. Accordingly, whilst, inevitably, different factors will be relevant and will bear differential weight, the overarching approach should be consistent across all international family law instruments, including under the 1996 Child Protection Convention and in respect of children under BIIa. Any other approach would, in my view, be inconsistent with the points made in the Lagarde Report, especially in paragraph 49.

66. I do not, therefore, accept Mr Rees's submission that the approach established by the CJEU, as adopted by the Supreme Court, is not applicable. I agree with Mr Harrop-Griffiths that the test should be the same, suitably applied, as that under Brussels IIa as referred to above. If a different approach was to be taken as between adults and children, habitual residence would not even be applied consistently within BIIa. It is plain that different factors, as in any case, will or may have differing degrees of relevance. But, in my view, the overarching test should be the same.

67. However, I agree with Mr Rees's submission that the Local Authorities have adopted too narrow a focus when addressing the circumstances of this case. It is clearly important, given its critical place in so many international instruments, that the determination of habitual residence is kept as free as possible from analytical complexities or constructs. It is a question of fact. In my view, the Local Authorities in the present case have focused unduly on whether SW is integrated, in the sense of settled, by reference to whether she is happy living where she has been. Reduced to their key elements they submit that, given SW's placements in England have to varying extents been determined for her and given she does not like living where she is, SW is not habitually resident in this jurisdiction because she has never become sufficiently integrated.

68. Although the Supreme Court refers, in both A v A and Re LC, to the test or question as being whether there is some or sufficient degree of integration in a social and family environment, I do not accept that this was intended to narrow the court's focus to this issue alone as an issue of fact. It is not a free-standing, determinative factor, and in particular not to the exclusion of all other factors. In my view, this would not be consistent with the broad assessment identified as being necessary by the CJEU. As the Court said, in Proceedings brought by A, the national court must conduct an "overall assessment" in the light of the factors referred to in paragraphs 38-41.

69. In Mercredi v Chaffe the Court of Justice said that the place of habitual residence "must be established, taking account of all the circumstances of fact specific to each individual case" (paragraph 47). These include the conditions and reasons for the stay, its duration, and other factors which make clear that the person's presence is not in any way temporary or intermittent. Factors which, as Lady Hale said in Re LC (paragraph 59), address whether the residence has acquired "the necessary degree of stability".

70. Further, integration, as an issue of fact, can be an emotive and loaded word. It is not difficult to think of examples of an adult who is not integrated at all in a family environment and only tenuously integrated in a social environment but who is undoubtedly habitually resident in the country where they are living. Integration as an

issue of fact can also raise difficulties when a court is determining the habitual residence of a person who lacks capacity. As Mr Rees submits, there is a wide range of potential factual situations which will impact on the court's ability to establish a person's state of mind or perception and the weight which can properly be given to it.

71. To repeat what Lady Hale said in A v A, at paragraph 54(vii): "The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce". Another way, in my view, of expressing this might be that the court should not lose sight of the wood for the trees. I say this because, standing back for a moment, it might be thought surprising that it might be argued that someone who has been living, largely voluntarily, in England for nearly five years, and for the last three-and-a-half years in their own flat, was not habitually resident here.

72. I would suggest that the phrase "degree of integration", as with centre of interests, is an overarching summary or question rather than the sole, or even necessarily the primary, *factor* in the determination of habitual residence. Otherwise, it would become a legal construct in place of the essential issue which is, of course, that of habitual residence. This is not to say that the degree of integration and a person's state of mind are not relevant; they are clearly factors to which appropriate weight must be given when the court is undertaking a broad assessment of all the circumstances of the case. The broad assessment which is required properly to determine whether the quality of residence is such that it has become habitual in that it has the necessary degree of stability in order to distinguish it from mere presence or temporary or intermittent residence. This means a sufficient, or some, degree of integration, not, I suggest, as a limited factual assessment, but as a question to be answered by reference to the factors, suitably applied, referred to by the CJEU and the Supreme Court.

Determination

73. Turning then to the circumstances of the present case. As SW has been living in England since July 2009 and has been living in her own flat since December 2010, in my view there would need to be some compelling countervailing factors in order for me to determine that she is not habitually resident in England.

74. I accept that SW's move to England was pursuant to a compulsory treatment order and that, since then, her place of residence, while seeking to meet her wishes as much as possible, has very largely been governed by the relevant authority's decision as to what would suitable and by what has been available. I also accept that SW has expressed her dislike of the area in which she lives and her wish to move somewhere else. However, I do not consider that these factors come close to counterbalancing the effect of SW's long residence in England especially when combined with the matters referred to by Mr Rees (paragraph 61 above).

75. By virtue of its duration, SW's residence has, in my view, acquired what might be termed effective "stability", in the sense used by the Court of Justice. Many people would rather not be living where they are and might wish fervently to live somewhere else. However, at least after a person has been living in one place for a significant period of time it will be difficult not to come to the conclusion that they are sufficiently integrated into their environment, whatever its composition, for them to be habitually resident there. In the present case, any other conclusion would, in my view, be placing

far too much weight on an assessment on SW's state of mind and the extent to which she feels settled. Accordingly, in my judgment SW is habitually resident in this jurisdiction for the purposes of the Mental Capacity Act 2005.