Neutral Citation Number: [2014] EWHC 3597 (Fam)

Case No: IL14C00138

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/10/2014

Before :

MS. JUSTICE RUSSELL

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Between :

London Borough of Lambeth	**Applicant**
- and -	
JO	**1st Respondent**
- and –	
KP	**2nd Respondent**
- and –	
SE	**3rd Respondent**
- and –	
DD	**4th Respondent**
- and -	
SV	**5th – 8th Respondents**
- and –	
JP	
- and –	
Tr E	
- and -	
Ty E	
(by their Children's Guardian)	

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Jane Cross QC & Ayeesha Bhutta (instructed by **Lambeth Council Law**) for the **Applicant**
1st Respondent was not represented
Richard Harris (instructed by TV Edwards for the 2nd Respondent)
Henry Setright QC & Janet Plange (instructed by Thompson &Co Sols) for the 3rd Respondent
Piers Pressdee QC & Malcolm MacDonald (instructed by Lawrence & Co) for the 4th Respondent
Janet Bazley QC & Daisy Hughes (instructed by Crighton Partners) for the 5th – 8th Respondents
Marcus Scott-Manderson QC & Emeka Pipi (Instructed by Jeff – Leonard Sols) for the Nigerian High Commission

Hearing dates: 22nd to 24th and 29th October 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MS. JUSTICE RUSSELL

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 children 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.

Ms. Justice Russell :

Introduction

1. The case before this court is one arising out of care proceedings brought by the London Borough of Lambeth (the local authority) concerning 4 children, SV (a girl) born on the 26th March 2002 who is 12 years and 7 months old, JP (a boy) born 7th October 2003 who recently had his 11th birthday, TR (a girl) born 17th July 2010 who is 4 years and 3 months old and TY (a girl) born 4th March 2014 who is now just 7 months old (they are the 5th-8th Respondents respectively). The children all have the same father (the 3rd Respondent - SE). The two older children have different mothers JO and KP, respectively. The whereabouts of JO remain unknown despite attempts by the local authority to locate her and she has played no part in these proceedings. KP (J's mother) has been represented throughout but she has had a limited role in the applications before me which related solely to issues of jurisdiction in respect of the youngest two, Tr and Ty whose mother is a Nigerian citizen and who, it is accepted, is habitually resident in Nigeria. The question arises as to the jurisdiction of this court to hear proceedings regarding Tr and Ty. If they are not habitually resident (although present) in England and Wales does the court have jurisdiction to hear and decide matters regarding their placement and welfare?

2. The children all have connections with Nigeria and England as their father (E) came to live in the UK from Nigeria in 1999. The two older children SV and JP were born in England and have always lived here; there is no dispute that they are habitually resident in this jurisdiction. The youngest two have a mother (the 4th Respondent D) a Nigerian national who resides mainly in Nigeria. D and E were married in Nigeria in 2008 and remain married. They see their family as consisting of themselves, as parents, and the four children as their children. Tr was born here and has lived with her mother in Nigeria for the greater part of her short life, Ty was born here shortly after the public law proceedings commenced and she has never been to Nigeria.

Care proceedings - jurisdiction

3. The care proceedings were commenced on 4th March 2014 after the three older children were removed by the police, on 3rd March, exercising their protective powers following disclosure by the children of physical chastisement. Ty and her mother were placed in a mother and baby placement after she was born, along with Tr. Tr was initially placed in foster care but late joined her D and TY in the mother and baby placement. On the 14th March the local authority were granted interim care orders. There is a final hearing of the care proceedings listed in the Family Court before a district judge on the 3rd November 2014.

4. On 22nd April 2014 D issued an application for a declaration as to jurisdiction to enable her to return to Nigeria with Tr and Ty and directions were given on 25th April 2014 by District Judge Gordon-Saker for the issues regarding jurisdiction to be put before a judge of the Family Division on 20th May 2014, however, on 12th May 2014 D informed the court that she did not seek to challenge the jurisdiction of court and no longer sought a declaration to that effect, having previously done so, as is recorded on

the face of that order. The case progressed without any dispute as to jurisdiction with further hearings on 13th June and 7th July 2014, when the case was set down for final hearing in November, until 12th August 2014 when D made an application for urgent directions to reconsider the issue of the court's jurisdiction to make orders in respect of Tr and Ty as a result of, and relying on, the decision of the Court of Appeal in *Re F (A Child)* [2014] EWCA Civ 789. The matter came before Her Honour Judge Cox who transferred it to a High Court Judge for hearing. On the 3rd September 2014 directions were made by Mr Justice Baker for this hearing to take place.

5. On 2nd April 2014 D's solicitors wrote to the Nigerian High Commission regarding her case and the order of the 25th April 2014 recorded that the High Commission would respond by the 28th April 2014. There was, apparently, no response from the High Commission. When the question of jurisdiction was raised again Her Honour Judge Cox ordered (on the 22nd August 2014) that the local authority and D's solicitors file correspondence with the High Commission with the court. On the 3rd September Mr Justice Baker ordered that local authority liaise with the Nigerian High Commission and ordered that the court order should be disclosed to the High Commission and that they be invited to respond. When the case first came before me on the 19th September 2014 there had been no response from the High Commission so the court ordered that further documents could be disclosed (provided that a named person had responsibility for the case) and that a further letter was to be sent to the Nigerian High Commission setting out the issues before the court in respect of jurisdiction and inviting them to respond and/or attend court to make representations. The High Commission was informed of the date of the IRH which was the 10th October 2014. The High Commission did not attend the IRH nor was there any correspondence received from them.

6. The High Commission attended the hearing on the 22nd October and were represented by Mr. Emeka Pipi. The court did not allow the three week adjournment which counsel sought as the fact finding and final hearing was due to take place during that time period which concerned all four children and the considerable delay which would be caused by adjourning that hearing would manifestly not be in the children's interests. Moreover it would have caused a delay in the possible return to Nigeria of D accompanied by Tr and Ty; to have acceded to such an application would not have been proportionate to the needs of the parties, the allocation of court resources and the costs involved. The court was able, with the assistance of counsel, to list the matter for an extra day on the 29th October 2014, to provide additional time for leading counsel to be instructed and make submissions on the question of jurisdiction. Counsel for the High Commission set out their preliminary position that Nigeria sought the "return of the children to Nigeria" as it wished to stand by its nationals, the mother and children being Nigerian and she their primary carer.

7. As set out in the order of the 3rd September 2014, the key issues in relation to jurisdiction were whether Tr and Ty are habitually resident in the UK, Nigeria or have no habitual residence. Whether the court has jurisdiction to continue to conduct a fact finding hearing in respect of those two children and make interim or other orders concerning them. Whether if the court lacks substantive jurisdiction the court can still conduct fact finding. Whether there is any alternate jurisdiction based on nationality, the inherent jurisdiction or some other factor. In essence what the court is being asked

to decide is whether it has substantive or temporary and protective jurisdiction in respect of the two youngest children.

8. The court heard argument about the issues from the local authority who brought the proceedings, through their leading counsel, from D and E, from those representing the children through their guardian and from counsel instructed by the Nigerian High Commission who produced a written response from Mr. Scott-Manderson QC and set out the preparations that were being put in motion to provide for protective measures and monitoring of the children and their mother in Nigeria. I heard the oral evidence of D and E about their own and the children's residence and integration in Nigeria and in this jurisdiction. This court did not hear any evidence about the allegations which led to the public law proceedings.

9. The immediate import of the decision of this court and any practical effects on the care proceedings have been substantially ameliorated by the pragmatic and helpful approach of those representing D and the local authority's position and the care plans in respect of Tr and Ty. The local authority plan is that Tr and Ty remain in their mother's care and return to Nigeria with her. D has agreed, whatever the decision of the court, to remain in this jurisdiction and in the mother and baby placement until the conclusion of the fact finding and final hearing which starts next Monday, 3rd November 2014. She will give evidence at that hearing in respect of the allegations made by JP and Tr as to her excessive physical chastisement of S, JP and Tr which will allow fact finding to take place and for consideration of the future care and placement of all four siblings. This court does, however, have to conduct limited fact finding in respect of the habitual residence of the two youngest children.

10. The parties' positions in respect of jurisdiction. I hope I do no disservice to the highly competent and thorough skeleton arguments advanced by each party by setting their positions out in brief here. All agree that Council Regulation 2201/2003 (BIIR or the Regulation) applies in respect of jurisdiction in public law cases in England and Wales. Following the Supreme Court decisions of *Re I (A Child) (Contact Application: Jurisdiction)*[2009] UKSC 10, [2010] AC 319 and *A v A (Children: Habitual Residence)* [2013] UKSC 60, and by virtue of the amendments to the Family Law Act 1986, the Regulation applies to jurisdictional issues between England and Wales and non-Member States, in this case Nigeria. Through counsel D strongly asserts that this court does not have substantive jurisdiction under Article 8 in respect of Tr because Tr is habitually resident in Nigeria. It is conceded that as a baby born in England who has never lived in or been to Nigeria, the situation in respect of Ty's habitual residence is not so clear, however it is not conceded that the court has any residual or other jurisdiction either under Art 13 or Art 20. On behalf of E Mr Setright QC took a more neutral and pragmatic approach to the points of law, which the court found of considerable assistance.

11. The local authority conceded that Tr was habitually resident in Nigeria; their position in respect of Ty was that she was not habitually resident in the UK or Nigeria and that it was not possible for the court to reach a conclusion properly given that it is a situation analogous to the fourth child in the case of *A v A* which has been identified in the Supreme Court as Baroness Hale as requiring reference to the EUCJ. It was their case that such a reference in this case would be disproportionate, not least, as there are alternative routes to deal with Ty's situation under Article 13 as she was and is present in the jurisdiction and the local authority further argued that the court

retained provisional jurisdiction under Article 20 to continue to take provisional, protective measures.

12. On behalf of the children it was submitted that Tr's habitual residence was not Nigeria as the factual circumstances from her perspective, particularly the strong familial connections she had with the UK meant she was habitually resident in England and that the court had substantive jurisdiction under Article 8. Alternatively it was argued that she had no habitual residence such was the transient nature of her presence in each jurisdiction and the court had jurisdiction under Article 13 (presence). On behalf of the children it was argued that if the court found that there was no jurisdiction under Articles 8 or 13 then a residual jurisdiction could be determined under Article 14 by applying the law of England and Wales, the common law or inherent jurisdiction and based on the children's nationality. The children's representatives had obtained expert advice that Tr had British nationality which was based on information about her father's immigration status supplied by him which proved to be false, a matter to which I shall return. It was submitted that Ty was not habitually resident in Nigeria and was either habitually resident in the UK or had no habitual residence and, if the latter, there is jurisdiction by virtue of the baby's presence in the jurisdiction and/or jurisdiction to take protective measures. It was also argued that the court may have residual jurisdiction under Article 14 as in the case of *A v A* based on her nationality.

13. The Nigerian High Commission, in its written response, confirmed the position that the Federal Republic sought the return of the children to Nigeria and asserted legal jurisdiction in Nigeria over the children on the basis of their habitual residence and nationality. In the observations set out in the written response it was accepted that Article 8 of the Regulation governed the question of jurisdiction; based on the habitual residence of the subject children at the time the court was seised of the case. The document helpfully made observations regarding the factual test to be applied when the court considers habitual residence; and the application of Articles, 12, 13, 14 and 20 and the relevant case law.

The background to the care proceedings

14. The care proceedings were brought in March 2014 as a result of the children, JP and Tr reporting that they and SV had been physically assaulted by their parents as punishment for their behaviour at home. On 25 February 2014 JP, was seen at school to have a bruise on his face and he told his teacher that he had been hit by his father. As a result E was arrested and bailed with conditions that he did not have direct or indirect contact with Joseph or live at the family home. The following day, 26 February 2014, on medical examination of JP was found to have redness on his face and upper arms consistent with his allegations. On 27 February 2014 JP alleged other assaults by D, saying that she had hit him, as well as his sisters, SV and Tr, including hitting them with a wooden spoon. An ABE interview took place on 28 February 2014 when JP repeated his allegations against his father (E) and D.

15. On medical examination of Tr on 28 February 2014, she told the examining doctor that D had hit her and her sister SV with a wooden stick. No significant marks or bruises were identified during the examination. On 3 March 2014, a medical examination was conducted of SV however because she has significant disabilities she is not able to communicate verbally. Three bruises on her right thigh, which

appeared to be recent, raised concern. The local authority asked E and D to agree to the four children being accommodated so that further assessments could be carried out but they would not agree.

16. As a result the police exercised their emergency protection powers on 3 March 2014 and the children were accommodated by the local authority. On 4 March 2014, D gave birth to Ty. The local authority was granted emergency protection orders in respect of all four children on the 5 March. On 7 March 2014, D and Ty were discharged from hospital to a mother and baby placement and D was interviewed by the police. By the 5th March 2014 protective measures had been taken and the family court was seised of this case as the application for care orders followed on without delay and interim care orders were made on the 14th March 2014. On the 19th March 2014 E accepted a police caution in relation to an assault on JP. D continues to deny that she has assaulted any of the children.

Background and evidence

17. It was submitted by Ms Bazley QC on behalf of the children's guardian that the children's background is complicated and is not clear. The court entirely agrees with the latter part of that proposition. I heard from both parents and I found their evidence to be largely unconvincing, self-serving and contradictory; I shall return to this later. D's statement of evidence in support of her contention that Tr is habitually resident in Nigeria was barely three pages long and lacking in detail about Tr's life and integration into a social and family life in Nigeria. I have no sense of her home, her daily life and who cares for her when her mother is working and at college. E's statement of evidence was even shorter, not quite two pages long and bereft of detail as to his role in Tr's life and that of her older half siblings. Yet both parents assured me that theirs is a family unit and a united family and that D was mother to all the children. I was told that they had, in significant part, decided to have children so that SV and JP could experience having younger siblings introduced into the family and that SV in particular would enjoy having a baby join her family.

18. D and E had known each other in Nigeria before he came to the UK in 1999 and kept up their friendship. It is not clear to me, even after hearing from them directly when their relationship developed beyond friendship. D says that she travelled to the UK in June 2006 and spent "some time" with E, SV and JP. In late 2007 E travelled to Nigeria with JP. D and E had a traditional marriage in early in 2008 during this visit. I was told by them in oral evidence that they saw D as being the new mother to the children and the family unit. D and E have described their marriage as perfect and family life in similarly glowing terms, but, again there is been little by way of detail or description of their family life, their home and the relationships of the children with their parents or each other. The facts that I set out here are based on the limited evidence of the parents only as there is little or no supporting evidence which has been put before the court.

19. It is incumbent upon the family court to keep in mind the children of this family and their joint and individual circumstances, and not simply because their inter-sibling relationships have direct relevance to the question of social and familial integration and habitual residence. It is not necessary to set the histories of the 2 older children out in detail. SV (who is 12 years old) has been described by her social worker (statement of Jocelyn Cruywagen dated 10th March 2014) as having significant and

severe learning difficulties, as a result of chromosome abnormality, developmental delay, rethrognathia, impaired vision and no speech. She is a very vulnerable child who despite her difficulties is able to communicate and participate in activities at home and at school. JP is now 11. He has had behavioural difficulties which, in the opinion of the expert psychologist instructed in the proceedings, have arisen as a result of instability in his up-bringing. There is no dispute that the older two SV and JP are habitually resident in England and that the court has jurisdiction to hear any application in respect of their future placement and welfare.

20. D returned to the UK for a period of weeks twice in 2009, in June and in October to visit E and the children. D travelled to London in May 2010 to give birth to Tr (now 4) July 2010. Tr was taken to Nigeria by her mother about two months after she was born. E travelled to Nigeria with SV in April 2011 for a few weeks. He returned to Nigeria in December 2011 and came back to the UK in January 2012. E travelled to Nigeria in December 2012 for a period of a few weeks. In June 2013 Tr and D travelled to the UK and stayed for two weeks. They returned in October for Tr's paternal aunt's wedding. Tr was brought to the UK by her mother pregnant with Ty in January 2014. According to a letter filed by her mother as part of her evidence she had been taken out of nursery school until the end of March 2014.

21. When in Nigeria Tr lived in Ibadan with her mother in a rented flat. Her mother continued to go to college and to work. She put Tr in full-time nursery at the age of one year which meant her going to the school at 6:45 in the morning and not returning home until 5 in the late afternoon. I was told that the return time varied but that as she was brought back by bus which had to go on a round trip to drop off other children it was often at 5 although she finished at school in the early afternoon some time after 2. D told the court that she has two sisters who live with her but it was not clear how much of the time they were there and what role they played in Tr's life as one was said to be at a residential school and another had been undertaking her national service. D's father was also said to live in the flat, but, again the details are not clear as he also spends time in his home town when he stays with D's married sisters. D said that in-laws, who were not identified, come round, mostly to bring food. Before Tr was in nursery and if the nursery is on holiday her mother takes her to college or to work with her and would intend do the same with Ty.

22. There is limited evidence before this court about how the siblings interact with each other when together and some evidence that there have been difficulties in their relationships, however it is the evidence of D that the older children accepted her as their mother and that she has a perfect relationship with them. She said "we are in every way a family unit" and that she planned to continue to be a mother to all the children. D told me she was planning to continue to spend some time in London and was planning a church wedding here. She told me that she did not want to live in the UK.

23. <u>The parents' evidence.</u> That, then, is the evidence regarding Tr and Ty as I have been able to establish it from the parents' evidence. There is no other evidence upon which I can consider the facts as to the residence of the child Tr, in Nigeria and England (she has not lived in or visited any other jurisdiction). The evidence which I have read and heard has not given me a full picture of Tr's life as I have indicated above when setting it out. Moreover I was troubled by the oral evidence of both D and E.

24. In respect of D's evidence there were contradictions in her written and oral evidence; she said, for example that she implied that she lived alone in her first statement (4th April 2014) saying that "my father and younger sisters would also come and stay with us to support me with caring for Tr and Ty." She repeated this sentence in her second statement. Then in her oral evidence she was adamant that her father and sisters lived with her and told me that "I said I had lived alone as my sisters had gone back to school." D said that the first statement of the social worker was wrong and that she had told the social worker that she lived with her sisters and her father. I did not hear from the social worker but note that the statement of the social worker concurs with what D said in her two written statements.

25. D said in her first statement that in January 2014 that her husband and she had agreed that "in order to keep family unity I should give birth to our second child in the UK so as to give the children an opportunity to welcome the new baby. Tr and I came to the UK on return/pre-booked tickets in January 2014 with the intention to return to Nigeria at the end of March 2014." D exhibited her tickets. She repeated this in her second statement dated 8th October 2014. In her oral evidence she said that these statements were not true and that she had intended to return to Nigeria in February 2014 so that the baby would be born in Nigeria and had hidden that intention do so from her husband. She told the court that she had been unable to travel because of the advanced stage of her pregnancy. The letter from the school confirmed that Tr was to be absent until the 28th of April 2014, and in her written evidence D said that the school had said that Tr must return in April or she may fall behind her peers there was no evidence from the school to this effect and quite what Tr then still only 3 years old would fall behind in was not explained or set out.

26. D told the court that she had been misreported, misrepresented and misunderstood in the reports and statements prepared by professionals, including an independent social worker, in the care proceedings. I did not hear from these witnesses, but again I note that none of these complaints were made by D in the statements of evidence filed with the court. D denied that there had been any intention on her part for Ty to be born in the UK and that no advantage would come about as a result such as an application for British nationality. In contrast E said, in cross-examination that he wanted Ty to be born here; "my intention was that Ty should have the advantage that Tr had…" She denied that the children may move to the UK in the future as has been suggested by her husband to the ISW and said it would be up to them.

27. I do not accept D's evidence in respect of her intentions regarding her intention to return to Nigeria to give birth to her baby there; she is an experienced traveller and would know she could not travel much beyond the time she did in January so it would not have come as a surprise if indeed she was advised in February that she could not travel. There is no evidence of such advice being given to her. Secondly, the evidence from the nursery/school was that Tr would be absent until the end of March which is consistent with her own written evidence. Thirdly, whether she perceived it as such or not Ty's father considered it to be an advantage to the baby to be born in the UK and she had planned for the birth to take place in London. Indeed she agreed in response to a question put by Ms Bazley counsel for the guardian that there were advantages to being born in the UK.

28. More troubling is the paucity of the description of Tr's life in Nigeria coupled with little or no evidence about Tr's place in her family and her perception of where her

home is, who cares for her for most of the day, who she mixes with and the centre of her world. I accept that D intended to return to Nigeria at the end of April with Tr and Ty and that the time spent in London was not open ended or indefinite. Equally I accept that D intended to return in the future, with the two children, to spend time with their father and siblings in the family unit. Having heard from D I find it most unlikely that she allowed herself to be misunderstood by anyone interviewing her and therefore, it seems to be more likely than not that she and Tr lived on their own for the greater part of their time in Ibadan as set out in D's written evidence. D told me that she and E were in constant communication, usually twice a day. She said the children were part of one family, over two countries; "it is the way we live as a family". They would continue to call on the phone every day. That SV and JP regarded Tr as their sister and that they were "together" and very close.

29. Similarly when considering E's evidence his oral evidence parted substantially from the evidence contained in his written statements. At this hearing, contrary to what had been agreed on his behalf earlier when the letter of instruction was sent for the preparation of an expert report on immigration, E said that he had been given indefinite leave to remain in 2010 not 2005. E told the court he had found another passport recently and would bring it to court the next day (24th October 2014) although he had been ordered to file and serve copies of his and Tr's passports on the 22nd August 2014 by HHJ Cox. There was no explanation given of where and how his passport had materialised. E denied knowing that specialist immigration advice had been sought, I do not accept this he has been represented by experienced solicitors and counsel throughout the proceedings.

30. E agreed that D is mother to all the children; that he was happy with her and that they did regard her as their mother. He later went on to say that "they would form a family even though [D] was living in Nigeria" and that D regards herself as their mum "step doesn't come into it." He said it was fine to live in two countries; "that is our choice and [I'm] very much content with it."

31. He denied telling the ISW that he wanted the two youngest children to come to live in the UK when they were older, saying that he wanted the children to have a Nigerian lifestyle and education and to look after him in Nigeria when he was old. E said that the social workers had an ulterior motive that was personal to him and had called him a playboy. He denied telling social workers that there were advantages of the lifestyle in the UK, that it was "completely wrong, I did not say it". None of this evidence was contained in his statements and I do not accept it, not only was it not in this statement the manner in which he gave his evidence was unconvincing and somewhat glib. It had the flavour of evidence manufactured to suit his case and bolster the evidence of D.

32. When asked about Tr's life in Nigeria he had very little to add to the limited picture given by her mother. He told the court that of D's two younger sisters one lives at college and the other had just finished National Service and had been away for a year, which corroborates what D had said in her written evidence. He was untroubled, indeed laughed, at the thought of Tr being on a bus for up to three hours a day after nursery and said there were escorts on the bus employed by the school. Neither parent gave any details of who else was on the bus with Tr for most of the afternoon.

33. E said that he had known that D wanted to go back to give birth to the baby in Nigeria, although she did not tell him. He had made arrangements to see the GP who advised against travel as the pregnancy was in an advanced stage. Having said there were complications he changed his evidence and said that there was a subsequent visit to King's College Hospital and that there was an infection that "might need antibiotics"; it was not a complication. This was in direct contradiction to his statement (dated 17th October 2014 predating his oral evidence by 6 days) which said "Tr then travelled to the UK with [D] on the 19th January 2014 for the birth of Ty. There was never any intention for them to reside in the UK but to return to Nigeria following the birth of Ty. This is evidenced by the booked return tickets to Nigeria." There was no mention in his statement of any discussion with D during which, he told me in oral evidence, he had told D she could go back subject to medical advice. I reject his oral evidence in respect of D's intentions.

34. E told me that it was his intention that Ty should have the advantage that Tr had had being born in the UK. That is in keeping with his previous evidence and I accept it was his intention; an intention which it is more likely than not had been shared with D. He told the court that the family unit has a home in London and a home in Nigeria and that both apply. E said he could travel to the USA on his British passport (having been naturalised as a British citizen in 2013) but he was not thinking of leaving London. I accept that he intends to remain in the UK and that his two youngest children will continue to spend time with him here. He wants SV and JP to return home and the family unit to be reunited. E told me they would see Tr and Ty and his wife as often as they could afford it.

35. This family has members with Nigerian and members with British nationality. The father E now has British nationality, the mother D is a Nigerian national and Tr and Ty have Nigerian nationality. Ty is likely to have British nationality as well. Habitual residence is not based on nationality and as it is the matter which I have to decide first I shall go no further with the question of nationality at this stage.

Law governing jurisdiction

36. There is no dispute about the law to be applied in this case as set out in paragraphs 10 to 13 above. As alluded to the principles for determining habitual residence were considered by the Supreme Court in ***A v A & Another (Children: Habitual Residence) [2013] UKSC 60.*** The Court determined that habitual residence, in the context of BIIR, is: *"the place which reflects some degree of integration by the child in a social and family environment."* Baroness Hale [35] said that where the other jurisdiction is not an EU Member State, it is nevertheless: *'highly desirable that the same test be adopted and that, if there is any difference, it is that adopted by the Court of Justice.'* The determination of residence is a question of fact and I shall keep in mind summary of the principles derived from the judgments is *per* Baroness Hale as follows:

> *"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…

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."

37. With reference to the words of Lady Hale in [35] above the Court of Justice of the European Union in the cases of *A, Proceedings brought by A* Case (C-523/07) [2010] Fam 42, [2009] 2 FLR 1; *Mercredi v Chaffe* [2012] Fam 22; *C v M* Case C-376/14 PPU decided that Article 8 sets a factual test for habitual residence which takes account of <u>all</u> the circumstances of the case. The most case of *C v M* sets out the CJEU position [paragraphs 50-56]:

"50 *As regards the concept of 'habitual residence', the Court has previously stated, in interpreting Article 8 of the Regulation in the judgment in A (EU:C:2009:225) and Articles 8 and 10 of the Regulation in the judgment in Mercredi (EU:C:2010:829), that the Regulation contains no definition of that concept and has held that the meaning and scope of that concept must be determined in the light of, in particular, the objective stated in recital 12 in the preamble to the Regulation, which states that the grounds of jurisdiction established in the Regulation are shaped in* ***the light of the best interests of the child, [my emphasis]*** *in particular on the criterion of proximity (judgments in A, EU:C:2009:225, paragraphs 31 and 35, and Mercredi, EU:C:2010:829, paragraphs 44 and 46).*

51 In those judgments the Court also held that a child's habitual residence must be established by the national court, taking account of all the circumstances of fact specific to each individual case (judgments in A, EU:C:2009:225, paragraphs 37 and 44, and Mercredi, EU:C:2010:829, paragraphs 47 and 56). The Court held in that regard that, 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 and that the child's residence corresponds to the place which reflects some degree of integration in a social and family environment (judgments in A, EU:C:2009:225, paragraphs 38 and 44, and Mercredi, EU:C:2010:829, paragraphs 47, 49 and 56).

52 The Court explained that, to that end, account must be taken of, inter alia, the duration, regularity, conditions and reasons for the stay in the territory of a Member State and for 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 (judgments in A, EU:C:2009:225, paragraphs 39 and 44, and Mercredi, EU:C:2010:829, paragraphs 48, 49 and 56). The Court also held that the intention of the parents or one of them 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 that Member State, may constitute an indicator of the transfer of the child's habitual residence (see the judgments in A, EU:C:2009:225, paragraphs 40 and 44, and Mercredi, EU:C:2010:829, paragraph 50).

53 Further, in paragraphs 51 to 56 of the judgment in Mercredi (EU:C:2010:829), the Court held that the duration of a stay can serve only as an indicator, as part of the assessment of all the circumstances of fact specific to each individual case, and set out the factors which are particularly to be taken into account when the child is young.

54 The concept of the child's 'habitual residence' in Article 2(11) and in Article 11 of the Regulation cannot differ in content from that elucidated in the above mentioned judgments with regard to Articles 8 and 10 of the Regulation. Accordingly, it follows from the considerations set out in paragraphs 46 to 53 of this judgment that it is the task of the court of the Member State to which the child has been removed, when seised of an application for return on the basis of the 1980 Hague Convention and Article 11 of the Regulation, to determine whether the child was habitually resident in the Member State of origin immediately before the alleged wrongful removal or retention, taking into account all the circumstances of fact specific to the individual case, using the assessment criteria provided in those judgments.

55 When examining in particular the reasons for the child's stay in the Member State to which the child was removed and the intention of the parent who took the child there, it is important, in circumstances such as those of the main proceedings, to take into account the fact that the court judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it. Those factors are not conducive to a finding that the child's habitual residence was transferred, since that judgment was provisional and the parent concerned could not be certain, at the time of the removal, that the stay in that Member State would not be temporary.

56 Having regard to the necessity of ensuring the protection of the best interests of the child, those factors are, as part of the assessment of all the circumstances of fact specific to the individual case, to be weighed against other matters of fact which might demonstrate a degree of integration of the child in a social and family environment since her removal, such as those mentioned in paragraph 52 of this judgment and, in particular, the time which elapsed between that removal and the judgment which set aside the judgment of first instance and fixed the residence of the child at the home of the parent

living in the Member State of origin. However, the time which has passed since that judgment should not in any circumstances be taken into consideration."

38. The Supreme Court in *A v A* considered whether a child can acquire habitual residence in a country to which she has never been but did not reach a concluded view. As observed by Mr Setright and Ms Plange in their written submissions the fourth child in *A v A* is in some ways analogous to Ty in this case although that child had not been born by choice in Pakistan but through subterfuge and coercion. The majority view was that habitual residence could not be without physical presence and the point was, ultimately, left open and the Justices were not prepared to conclude the appeal without making a reference to the CJEU having indicated that it was not *acte clair* as a matter of European Union law what the position is and that, had the case turned on that issue, a reference would have been necessary. All parties agreed that such a reference in this case would be disproportionate and lead to months of delay, which given the facts of the case and placement of Ty with her mother would prove unnecessary.

39. The CJEU has considered the position on infants in *Mercredi* at 53-55:

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

54 *As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.*

55 That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, 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."

40. In *Re F (A child) [2014] EWCA Civ 789* to which I have already made reference the President set out the principles to be derived from the authorities in respect of the application of the Regulation:

i) Where BIIR applies, the courts of England and Wales do not have jurisdiction merely because the child is present within England and Wales. The basic principle, set out in Article 8(1), is that jurisdiction under BIIR is dependent upon habitual residence. It is well established by both European and domestic case-law that BIIR applies to care proceedings. It follows that the courts of England and Wales do not have jurisdiction to make a care order merely because the child is present within England and Wales. The starting point in every such case where

there is a foreign dimension is, therefore, an inquiry as to where the child is habitually resident.

ii) In determining questions of habitual residence the courts will apply the principles explained in A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening) [2013] UKSC 60, [2014] AC 1. For present purposes the key principles (para 54) are that the test of habitual residence is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned and that, as the social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent, it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.

iii) Jurisdiction under Article 8(1) depends upon where the child is habitually resident "at the time the court is seised."

iv) Since the point goes to jurisdiction it is imperative that the issue is addressed at the outset. In every care case with a foreign dimension jurisdiction must be considered at the earliest opportunity, that is, when the proceedings are issued and at the Case Management Hearing: see Nottingham City Council v LM and others [2014] EWCA Civ 152, paras 47, 58.

v) Good practice requires that in every care case with a foreign dimension the court sets out explicitly, both in its judgment and in its order, the basis upon which, in accordance with the relevant provisions of BIIR, it has either accepted or rejected jurisdiction. This is necessary to demonstrate that the court has actually addressed the issue and to identify, so there is no room for argument, the precise basis upon which the court has proceeded: see Re E, paras 35, 36.

vi) *Judges must be astute to raise the issue of jurisdiction even if it has been overlooked by the parties: Re E, para 36.*

41. In *Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions) [2014] EWHC 6 (Fam)* the President had made clear in the cases concerning children from another EU countries jurisdiction would be determined in accordance with the Regulation, Articles 8(1), 12, 13(1), 14, 17 and 20. A distillation of what he said is that except for where Article 12 or Article 14 applies, jurisdiction to make orders in care proceedings will exist only if either (i) the child is habitually resident in the UK or (ii) the habitual residence of a child 'present' in this country cannot be established.

Conclusions

42. Burden of proof. It has been submitted that it is for the local authority to establish jurisdiction, however this is not a proposition with which this court would agree. Jurisdiction is ultimately a matter for the court and not for the parties. Secondly, the President has emphasized the need for judges to be alert to the question of jurisdiction. In *Re E* (paragraph [36]) and in *Re F* (at paragraph [11 v)]) he reiterated the need for judges to be pro-active in considering jurisdiction and expanded on the need for the court to grasp the question of jurisdiction and set out in its judgment and order the basis on which it has accepted or rejected jurisdiction in accordance with the

relevant provisions of the Regulation. He went further and said it was "*necessary to demonstrate that the court actually addressed the issue and to identify, so there is no room for argument, the precise basis upon which the court has proceeded:*".

43. Thirdly the evidence in respect of habitual evidence will not always be in the possession of the local authority but will more usually be held by the parents and family members. Fourthly while the proceedings are brought by the local authority and the local authority will be required to consider the question of jurisdiction at the outset of proceedings; that requirement extends to all parties to the proceedings.

44. Habitual Residence: Tr. Tr is four years old and her family live in two different places Nigeria and London. She has close familial ties and relations in both jurisdictions. Her parents remain married and are not separated in that sense and I am told that they see the family as a unit with the parents being parents to all four siblings who, in turn, are encouraged by their parents to regard each other as siblings. She knows her father is her father and that he lives in London and she has a home here with him and her siblings. The family unit which both parents are clearly committed to, and set great store by, straddles both countries but its core is in London. She has extended paternal family here, her aunts who she knows and with whom she has spent time in London.

45. In Nigeria she has had what seems to have been an isolated existence living with her mother and spending a great deal of her time either at nursery or travelling to and from nursery. She has a close attachment to D and has spent the greatest amount of time in her short life with her mother in Nigeria. But there is more to integration than time spent in one location or another. There was not evidence before this court of the family being centred on Ibadan, rather it was centred on London where the family exists and even as a small child Tr will be aware of being part of that familial entity. A large part of the intention behind travel to London is to maintain the family unit and to make Tr part of that unit. On the evidence before this court based on D's account of the time Tr spent in Ibadan there was little or no evidence of Tr being integrated in to family life in Nigeria to the same extent, despite D living and working there. However Tr has been integrated into her nursery school and has spent time with her maternal family in Nigeria, although it is not clear how much she was integrated into that part of her family.

46. The journeys to London, though short in duration and infrequent were more than holidays or mere visits; if the parents were separated or divorced that might be the case but both told this court that theirs is a family which lives in two countries, it is the way they live as a family and that they are together and very close. The time spent in London is time spent at home, for Tr, with her father and siblings; each journey back to Nigeria is anticipation of a further journey to spend time in her London home with her mother, her father, her siblings and her father's family. I reject the submissions made on behalf of E that staying with her father as opposed to rented accommodation is of no significance. It is her home. Nor is it like a limited period of what used to be called contact, her parents are happily married and living as a couple when Tr is with them in London.

47. In addition to the authorities referred to above I have in mind the Supreme Court cases of *Re KL (A Child)* [2013] UKSC 75 and *Re LC (Children)* [2014] UKSC 1. From the former I have taken the need to consider the intention behind the time spent in each country and from the latter the need to consider habitual residence from the

point of view of the child. Or to borrow a phrase used by counsel for E, habitual residence is child-centric and not centred on the parent. Thus although I consider that family life is centred on London, and that the intention of the parties is that that should continue, from the point of view of a very small child she will have been aware in March 2014 that she lived in two places and has spent a great deal of time in Nigeria with her mother. Tr has now started school in the UK and although that because of the care proceedings I take into account the fact that Tr has said she prefers her school in London to the one in Nigeria (social worker's statement dated 17 10 2014). Unsurprisingly Tr who remains in a mother and baby placement with her mother and Ty, wants to be in her mother's care in Nigeria. I have reached the conclusion that I cannot determine Tr's habitual residence for as can be seen above she has connections with and has been integrated into family and social life in both England and Nigeria.

48. Habitual Residence: Ty. Ty has never been to Nigeria. While it is true as E said that there are people who live apart in this country and see their children once or twice a year there is a qualitative and evidential difference between separated parents and those who remain committed to their marriage or partnership. Had Ty been placed with her father as well as her mother since she was born in March then it would be a substantial argument for her habitual residence being in the UK. Instead Ty has been with her mother who is habitually resident in Nigeria. I cannot find that she is habitually resident in Nigeria on that basis alone nor that she is habitually resident in the UK on the basis of her presence: not only on the basis or current case law and European jurisprudence. I have found that her parents, both D and E, chose to have her birth take place in London and it is likely that she would be considered to have British nationality as her father is a naturalised British citizen. Moreover I am told by both her parents that the arrangements for her as part of the family would be the same as those for Tr which I have set out above. A new born baby has connections to her family over and above those of her mother and exists within her own social and family environment. Nonetheless in applying the case of *Mercredi* and subsequent authorities I accept that as an infant Ty is dependant on her mother, but also that her current residence in London corresponds to some degree and is in close proximity to her father's, and therefore her, social and family environment. It may be taking it too far, factually, to find that she is habitually resident in the UK as she is dependant on her mother as a baby of 7 months, given that the court has accepted her mother's habitual residence is Nigeria. This court cannot find she has, at this stage, a habitual residence in either country.

Jurisdiction

49. Before I turn to the question of jurisdiction I would like to thank His Excellency, the High Commissioner for Nigeria, for his assistance with this case since he became aware of it last week and instructed counsel to attend court on the 22nd October, 2014. The Nigerian authorities have made this court aware that they intend to put in place protective and safeguarding provisions to enable Tr and Ty to travel to Nigeria and live there with their mother in keeping with the plans of the local authority. From the documents they filed with the court it can be seen the preparations they are making to provide the Family Court with details of the protective and monitoring provisions that they intend to put in place when D takes Ty and Tr to Nigeria are in keeping with the

actions of another Member State in similar circumstances and are likely to meet the residual concerns of both the local authority and the guardian.

50. There is no jurisdiction under Article 12. I cannot be satisfied that all parties have accepted jurisdiction. Despite the fact that D did so in May of this year (as set out above) she had previously expressly indicated that she did not accept the court had jurisdiction and did so again in July. This case is similar to that set out in the judgment of Mr Justice Charles in *Re S (Care Jurisdiction)* [2009] were the parents, D in particular, have no real option but to participate in the care proceedings once they have been initiated. The clear message from D has always been that she wanted to go to Nigeria with her two daughters.

51. In respect of jurisdiction as I have found that habitual residence in respect of both children cannot be established in the particular circumstances of these children in this case and there is not any jurisdiction under Article 12. The children are both present in this jurisdiction and have been since the courts were seised of this case and therefore the court has jurisdiction for public law proceedings under Article 13 of the Regulation.

52. In the light of this it is not necessary for me to consider whether there is a residual jurisdiction pursuant to Article 14.

53. It is hoped that the care proceedings due to start on the 3rd November 2014 in respect of SV, JP, Tr and Ty will conclude at the beginning of the following week. Should any further issue arise in respect of jurisdiction, the case can be brought back before me as a matter of urgency.