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# Re A and D (Children) [2011] EWCA Civ 265

An appeal from the decision of the President, reported on Family Law Week as ES v AJ [2010] EWHC 1113. The President had found twins to be habitually resident in Cameroon and accordingly that he had no jurisdiction in respect of them. Appeal dismissed.

The appeal challenged the President's finding primarily on the basis that insufficient weight had been given to the lack of evidence that there was no fixed date for the twins' return or that the mother acquiesced in the twins remaining in Cameroon.

Considering the evidence as a whole the Court of Appeal found that although it was not possible to identify exactly when the children became habitually resident in Cameroon, the President was entitled to find that they were by the time of the trial in April 2010.

The Appellant also challenged the decision on jurisdiction, as the Present had not explicitly considered jurisdiction under Brussels II Revised. On considering the triple condition under the Regulation, however, the Court of Appeal was not satisfied that the father had unequivocally accepted jurisdiction, nor that the President's exercise of discretion could be said to be plainly wrong. The appeal was dismissed.

Summary by **Stephen Jarmain**, barrister, **1 Garden Court Family Law Chambers**

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Neutral Citation Number: [2011] EWCA Civ 265
Case No: B4/2010/1434
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
THE PRESIDENT, SIR NICHOLAS WALL
[2010] EWHC 1113 (Fam)
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 March 2011
Before :

LORD JUSTICE WILSON
LORD JUSTICE MUNBY
and
MR JUSTICE COLERIDGE
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**In the Matter of A and D (Children)**

**Between :**

**ES Appellant**

**- and -**

**AJ Respondent**

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Mr Stephen Cobb QC and Miss Alev Giz (instructed by Tanner and Taylor) for the Appellant (mother)
Mr Richard Clough (instructed by Truemans) for the Respondent (father)

Hearing date : 18 November 2010
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**Judgment**

**Lord Justice Munby :**
1. This is an appeal, pursuant to permission which we granted at the beginning of the hearing, from a decision of the President, Sir Nicholas Wall, on 19 May 2010.

2. The proceedings relate to twins, born in October 2007, who were taken from this country to Cameroon by their paternal grandmother in November 2008. A year later, in November 2009, the twins' mother, by then embroiled in litigation here with their father in relation to their youngest child, a boy born in July 2009, sought an order that the father disclose the whereabouts of the twins. However, it was only on 21 April 2010 that she issued her originating summons in wardship. On 20 April 2010 the father had appeared before the court. The twins were still in Cameroon. On 29 April 2010 there was a hearing before the President to determine whether (as directed by an order made on 27 April 2010) the twins were habitually resident in Cameroon. The President heard evidence from both the father and the mother. On 19 May 2010 he handed down the judgment from which the mother now appeals: **[2010] EWHC 1113 (Fam)**. The President found that the twins were habitually resident in Cameroon and that the English High Court accordingly had no jurisdiction in respect of them. He dismissed the originating summons and refused the mother permission to appeal. The mother issued her notice of appeal a few days out of time on 11 June 2010.

3. The appeal came on for hearing before us on 18 November 2010. The mother was represented by Mr Stephen Cobb QC (who had not appeared below) and Miss Alev Giz. The father was represented, as below, by Mr Richard Clough. The mother applied not merely for permission to appeal (which, as I have said, we gave) but also for permission to adduce fresh evidence in the form of two additional affidavits she had sworn. In relation to the first, Mr Clough having mounted no opposition, we gave permission. In relation to the second, which had been served only on the morning and which seemed to us to be of only marginal significance, we refused permission. We allowed Mr Cobb

permission to refer to an email from the father sent to the mother on 15 June 2010 which although referred to had not been exhibited to the first of the two affidavits. At the end of the hearing we reserved judgment.

4. In accordance with the way in which the case had been presented to him by counsel, the President treated the central question as being whether the twins are habitually resident in England and Wales. He said (para [2]) that

"Under the Family Law Act 1986 I only have jurisdiction to make the orders sought by the mother if either (a) the twins are physically present in England and Wales (which plainly they are not); or (b) if they are habitually resident in England and Wales."

That no doubt reflected the way in which the arguments had been put, though it is not, as we shall see, an entirely accurate statement of the effect of the 1986 Act.

5. As summarised by the President in his judgment, the mother's case before him was that the twins had been wrongly removed from the jurisdiction and had accordingly never lost their habitual residence here which, it was common ground, they had had immediately before removal. The father's case was that over the period between November 2008 and May 2010 the twins had become habitually resident in Cameroon; alternatively, that even if the twins remained habitually resident here the court should, as an exercise of discretion, refuse to make an order for their return, because of the time which they had spent in Cameroon and what was described as the mother's agreement that they should go there in the first place and her "subsequent acquiescence" in their remaining there.

6. Having set out the background facts, the President directed himself by reference to what Lord Brandon had said in In *re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, 578-579, and continued (para [18]) that where, as here, both parents have parental responsibility:

"it is well established that one parent cannot unilaterally change the habitual residence: it requires agreement between the parents or, at the very least, the acquiescence by [one] in the altered arrangements brought about by the other."

There is, and can be, no suggestion that the President misdirected himself in law. What are under challenge are his findings of fact.

7. Given the way in which the issues had been framed the President appropriately turned to consider first the question of whether the removal of the twins in November 2008 had been with or without the mother's consent.

8. He summarised the mother's case as follows (para [8]):

"The mother's case is that the dispatch of the twins to the Cameroons was done without her consent and contrary to her wishes. She accepts that she accompanied the children to the airport and that she saw them off. She explains this by saying that she had been presented with a fait accompli and was unable to prevent the father and his mother

removing the children. The mother also says that she could not travel because she did not have a British passport and that the mother was holding her Cameroons passport."

The father's case (para [9]) was:

"that the decision to send the children to the Cameroons was consensual; that his mother's house was on the point of being re-possessed; that the parties, who were both working but had lost their jobs, were not in a financial position to care for the twins, and that it was therefore expedient to send the twins abroad for a time, until their parents' financial position improved."

9. Having, as I have noted, heard oral evidence from both the mother and the father, the President said this (paras [20]-[21]):

"Since habitual residence itself constitutes a finding of fact, it is necessary for me to examine the decision in November 2008 to send the twins to the Cameroons. Furthermore, as this seemed to me critical to an understanding of the current situation, I heard oral evidence from each of the parties about it.

Having done so, I am quite satisfied that there was an agreement between the mother and the father to send the twins to the Cameroons in November 2008. Whilst the father may have been the originator of the scheme, I reject the mother's evidence that the children were sent to the Cameroons in the teeth of her opposition. I find as a fact that she agreed to the children going."

10. It followed that the removal of the twins to the Cameroons was neither unlawful nor wrongful.

11. The President then turned to consider next the question of what had been agreed at the time by the father and the mother. He said (paras [22]-[24]):

"I also find as a fact that the agreement between the twins' parents was far less hard edged than either now asserts. Whilst it may well have been their mutual intention that the children should return to their care after a few months – for example in the spring of 2009, their return, in my judgement, was dependent upon their parents' situation. Thus if all had been going well, and had the parents finally decided to make their future in England, then the twins would have returned.

I find, however, that there was no fixed date for the twins' return and that the arrangement was an open ended one which enabled the wider family (including the mother's family) to care for the twins until their parents were in a position to do so. Such family arrangements are by no means uncommon or inappropriate.

I am equally satisfied, and so find, that the parents themselves were uncertain about where the family would ultimately reside."

12. He continued by looking (paras [25]-[26]) at subsequent events:

"Both the father and his mother assert that the mother is fully aware of the children's whereabouts, and the father asserts that the mother has been in regular contact with the children. I accept that evidence. He also asserts that whilst in May 2009 he was contemplating sending for the children, his current plan is to work in the Cameroons as a sound engineer and for the children to "attend private day school in Cameroon starting in September". Once again I find that evidence credible.

In any event, these statements all confirm my view that the parents' plans for their children were inchoate following the agreed removal to the Cameroons in November 2008. I am thus satisfied that there was an agreement to send the children to the Cameroons in November 2008, and that it was open-ended."

13. He expressed his conclusions as follows (paras [27]-[28]):

"I am, however, entirely satisfied that on the unusual facts of this case, and due largely to the open-ended and uncertain nature of the parents' plan, the twins are currently resident in the Cameroons, and that this court has no jurisdiction over them. That is where they are living and, in my judgment, "the ordinary and natural meaning of the two words" habitual residence aptly covers the twins' situation in the Cameroons. This, of course, does not leave the mother without a remedy, but if she wishes to pursue it in relation to the twins, she must do so in the Cameroons. I reject her evidence both that it is impracticable for her to do so, and that she would not obtain a fair hearing in that jurisdiction.

For the mother it is argued that there was a fixed agreement for the twins' return in the spring of 2009, and that it is not open to the father unilaterally to change the twins' English habitual residence. For the reasons I have already given, I do not think that there was such an agreement, and I do not think that the father has unilaterally changed the children's habitual residence: I find as a fact that over the period of 18 months during which the twins have been living with their paternal grandmother they have acquired habitual residence in the Cameroons."

14. That, of course, sufficed to dispose of the case. However, the President went on to consider what was to be done on the assumption that he was wrong on the question of habitual residence. He said (para [29]) it was not a case in which he would exercise his discretion to make a peremptory order in the mother's favour:

"In this respect I am influenced not merely by the length of time which the twins have spent in the Cameroons, (some 18 months) but by the mother's failure promptly to pursue the remedies open to her. Whilst no judge would wish to be critical of a parent who is given bad advice, the fact remains that the mother is an educated woman, who sought advice as long ago as 17 November 2008, when she was "going through some matrimonial problems". The fact that proceedings relating to the twins were not issued until April 2010 cannot be entirely explained by poor advice and delays in obtaining public funding."

15. He accordingly dismissed the originating summons, saying (para [30]) that if the parents could not agree about the future of the twins it must be decided by the courts of

Cameroon.

16. I return to the question of habitual residence.

17. Mr Cobb realistically acknowledges the steepness of the hill he has to climb. A finding of habitual residence is essentially a finding of fact and the President, who had the benefit of hearing both parties give oral evidence, was in a uniquely good position to assess the evidence and to make findings of fact; he recognises, as he puts it, that in this respect the President had a special advantage over this court. Nonetheless, he submits, in a carefully analysed and attractively presented argument, that the President was wrong. I do not agree.

18. In the first place, he submits, the President was wrong in his finding that the mother agreed to the twins being taken to Cameroon. His argument amounts to little more than that the President rejected the mother's evidence. So he did, but Mr Cobb has wholly failed to demonstrate even the beginnings of any compelling argument going to show that the President was wrong. This was a simple issue of primary fact, on which the President had heard the oral evidence of the two protagonists. In my judgment it was plainly open to him to find as he did. I reject this ground of appeal.

19. Linked to this is his argument that the President failed to consider that the agreement was not willingly given by the mother. Mr Cobb points to what he says was a history of domestic violence, the mother's fear that her position in this country was precarious and her evidence that, particularly in the light of advice she had received from the CAB, she felt powerless to prevent the departure of the twins. There is, in my judgment, no real substance in this complaint. The President was well aware of, and referred in his judgment to, the mother's allegations of domestic violence and to the advice which she actually received from the CAB. So it was against that background that he had to consider her oral evidence. In all the circumstances he was, in my judgment, entitled to conclude, as he did, that she voluntarily agreed to the twins going.

20. Mr Cobb's real complaints are directed at the next step in the President's reasoning. His arguments can be summarised as follows:

i) The President failed to consider that the agreement was in any event conditional upon the return of the children in February 2009. Linked to this are the submissions, first, that there was no evidence upon which the President could find that there was no fixed date for the twins' return and that the arrangement was an open ended one, the parents being uncertain about where the family would ultimately reside, and, second, that there was no permissible basis for a finding – plainly wrong, Mr Cobb submits – that the twins' return was dependent upon their parents' situation.

ii) The President was wrong to find that the mother had acquiesced in the twins remaining in Cameroon.

21. The real heart of Mr Cobb's case is the first of these complaints. He points to a number of features in (and I emphasise) the father's case which he relies upon:

i) The recital in the order of 27 April 2010 that at the hearing on 20 April 2010 "the [father] who appeared in person informed [counsel for the mother] that the removal of the children on the 26.11.2008 was agreed to be for a 3 month period and that he had always proposed to return them".

ii) The father's evidence in cross-examination (Transcript pages 43-44; see also the unhappily imperfect recording of what the father's counsel had earlier said to the President: Transcript, page 12):

"Q. Mr [A], you say initially your plan was that the children would go to the Cameroon for three months
A. Yes
Q. You assured [E] that they would be back by February 2009, did you not?
A. I didn't assure her. I said they would be back.
Q. She says she asked you specifically when, and you said February.
A. I said within three months they should be back.
Q. Which I think would be about February.
A. Okay."

iii) The father's further evidence in cross-examination (Transcript page44):

"Q. [E] left you on the 29th April. After that, you decided, without any discussion with [E], you decided that the children should remain in Cameroon.
A. It was a decision that was made because there was no form of co-operation on [E]'s part for the children's return, and the way I looked at the situation she had basically abandoned – she walked out and left us.
Q. She left you. She did not leave the children who were not there.
A. She could have contacted me about the children, or could have contacted the children if she really wanted to.
Q. She says she was never allowed to speak directly to her children. Your mother would not allow it.
A. That's not true."

iv) Mr Clough's concession on behalf of the father (Transcript page 49):

"My Lord, although there is a large factual dispute, I have to concede that, even on the father's case, the original moving of the children to the Cameroon was done for a limited period only on the agreement of both parents and accordingly, at that stage, their habitual residence remained in England and Wales. I also have to concede that it was not open to the father unilaterally to decide that the children should remain indefinitely in Cameroon and thereby change the habitual residence."

v) The email dated 15 June 2010 sent by the father to the mother in which he said:

"I am protecting [the twins] from the people you have surrounded yourself with. If they were not about, the twins would have been with you a long time ago. YOU are there mother without a doubt, but you are surrounded by "beings" I do not want our children associated with."

22. In this connection Mr Cobb also points to:

i) A letter from the local authority dated 20 January 2010 which records that during a core assessment in 2009 the mother reported that in November 2008 the father and his mother promised to return the twins to their mother in the United Kingdom in February 2009.

ii) The mother's evidence (Transcript page 21) that the father told her at the airport that "the children back [sic] very soon, in February, because I was crying. He told me, "Don't worry. They will come back in February"."

23. Mr Cobb further submits that the President's conclusion that the parents were uncertain about where the family would ultimately reside was inconsistent with the father's evidence that he intended that they would live as a family in this country, the mother's assertion that both she and the father wished to remain in this country and her wish, following the separation in April 2009, to remain here and have the twins back here.

24. In relation to the question of acquiescence Mr Cobb suggests that what the mother said to the CAB was not as plain as the President thought. And he points to her actions in complaining to the police in April 2009 that the twins had been taken to Cameroon "against her will", in seeking legal advice in June 2009, in then seeking public funding (and appealing against its refusal) and in referring, during the proceedings in relation to the youngest child, to the circumstances of the twins' removal and then, as I have said, seeking an order for disclosure of their whereabouts. Mr Cobb also points out that in the spring and summer of 2009 the mother was having a difficult pregnancy. He suggests that she was not well advised in late 2009. The fact is, he submits, that at no stage, whether before or after, did the mother explicitly, clearly and unequivocally agree to the twins remaining in Cameroon beyond February 2009. He refers in this connection to ***Re P-J (Abduction: Habitual Residence: Consent)*** **[2009] EWCA Civ 588, [2009] 2 FLR 1051**, para [48], a case under the Hague Convention which, I have to say, seems to me to be of little assistance in the context with which we are here concerned.

25. The fresh evidence relied upon by Mr Cobb, in particular the email of 15 June 2010, does not, in my judgment, advance his case. The critical passage in the email he relies upon is directed more to the question of whether the twins should be in the mother's care at all rather than with the question of whether they should be in this country or in Cameroon. The appeal turns on whether the President was justified in the light of all the evidence he read and heard to conclude as he did. In my judgment, and despite everything pressed upon us by Mr Cobb, he was.

26. It is important to remember the question which the President was considering. It was simply this: As at April 2010, were the twins habitually resident in this country or in Cameroon? So, in answering that question the President had to have regard to all the evidence, including everything which, in accordance with his findings, had happened between November 2008 and April 2010. For the purposes of forensic analysis, both before the President and in this court, it is no doubt appropriate and convenient to analyse

the history stage by stage, but this must not blind us to the single and essentially simple question the President had to answer.

27. The key finding on which the whole of his subsequent analysis turned was that the mother had agreed to the twins going to Cameroon. That finding is unassailable. Was the President entitled to go on to make his further findings, in particular that there was no fixed date for the twins' return and that the arrangement was open-ended? The crux of this is whether the President was entitled to come to these conclusions despite the materials which I have summarised in paragraph [21] above. In my judgment he was.

28. It is quite clear that the father referred, both at the airport and subsequently, to the twins returning and, moreover, returning in February 2009. That much is irrefutable and thus far I am able to go with Mr Cobb. Moreover, on at least one occasion – at court on 20 April 2010 – it seems that the father used the language of 'agreement.' But this did not compel the President to find that there was an agreement to this effect. He had to consider the evidence as a whole. And in this connection it is important to remember that the mother's entire case was that there was no agreement of any sort at all – no agreement even that the twins should go to Cameroon – and that the father's oral evidence was couched not in terms of his having agreed this particular point with the mother but rather of him simply saying what he said.

29. Moreover, in assessing whether there was any, and if so what, agreement on the point, the President was entitled to have regard not merely to events in November 2008 but to events thereafter and, in particular, events after February 2009. Indeed, and this is a separate point, even if there had been such an agreement it would not have been conclusive of the question the President had to decide, for much of importance happened after February 2009.

30. Mr Clough repeats before us the closing submissions he made to the President (Transcript page 49), submissions which put into its proper context the concession upon which Mr Cobb relies:

"I think all I can argue is that, on the father's case, the mother detached herself from the situation, for whatever reason. She was not communicating her wishes one way or the other. The fact was that the children remained for longer and longer in Cameroon with their grandmother. Until now we have the extraordinary situation that two-and-a-half year old children have spent the greater part of their lives – certainly in terms of their conscious lives, almost its entirety – not living with either parent in the country of their birth, but living with their grandmother in Cameroon.

In these circumstances I would submit that what has happened as a matter of fact is that their habitual residence has now changed to that of Cameroon.

It is a combination of children initially going there by consent, without their habitual residence going with them, until such time as by, firstly, the father's active decision and by the mother's inactive decision, that the children acquire the habitual residence of where they are actually living and being brought up."

31. Before us Mr Clough's submissions fall into two parts. First, that having found that the mother did agree to the twins going to Cameroon, and having thus rejected the mother's evidence, the President was entitled to prefer the father's evidence as to the terms of the arrangement. The President, he submits, was perfectly entitled to find that the arrangement was open-ended, given that no return travel arrangements had been made and that an alternative family home needed to be found, as well as the financial wherewithal to fund it. (Both parents had lost their jobs and the family home was subject to re-possession.) The evidence, he says, wholly supported the finding that the agreed period for the twins to live in Cameroon was for as long as it took for the right circumstances to be attained. Three months was, he submits, no more than an optimistic guide. Second, he submits that whatever the agreement or understanding was in November 2008, the circumstances changed entirely when the parents not only separated but ceased to be in communication with each other. The anticipated new home and secure incomes never materialised; moreover the mother took no effective steps to challenge the twins remaining in Cameroon. She knew, at least approximately, where they were but did nothing to locate them. In the circumstances, he says, it was open to the President to conclude on the facts as he had properly found them that the twins' habitual residence had become Cameroon.

32. I agree with the thrust of these submissions and with the conclusion at which Mr Clough would have us arrive. The question for the President, to repeat, was whether by April 2010 the twins had become habitually resident in Cameroon. The question for us is whether, on the basis of such facts as he had properly found, the President was entitled to conclude that they had. Given what had happened in November 2008, given that the twins were not returned in February 2009, and given what had happened (or, in the case of the mother, not happened) thereafter, and why, the President in my judgment was entitled to find that by April 2010 the twins were no longer habitually resident in this country. It may be difficult to define some specific point at which the twins ceased to be habitually resident in this country, for in a case such as this the loss of one habitual residence and the acquisition of another is the result of a process operating over time – here a period of almost 18 months – as events, some unforeseen, gradually unfold. But there is no need to be able to identify some specific point in time.

33. Accordingly, I would dismiss the mother's appeal on the question of habitual residence.

34. Although, in the light of this conclusion the point no longer arises, I turn to consider briefly the other matter canvassed before the President, the exercise of discretion. Mr Cobb submits that the President was wrong on a key issue: the mother, he says, was not having any contact with the twins. There was, he submits, no reason for the President to disbelieve her evidence on the point; and the father did not assert that she was, only, as we have seen, that she could if she wished. Mr Cobb further submits that the President was wrong – I note that he does not assert that the President was plainly wrong – in rejecting her evidence that it would be "impracticable" for her to litigate in Cameroon. This is to ignore, the says, the mother's lack of means to travel to Cameroon or to instruct local lawyers and the fact, accepted by the father, that she would have no access to public

funding for representation there. More generally, Mr Cobb criticises the brevity of the reasons given by the President in explaining how he would have exercised his discretion.

35. Mr Clough says simply that the President specifically considered which would be the appropriate forum to consider the twins' future and was acting well within the ambit of his discretion in deciding it was Cameroon.

36. I am unpersuaded that there any grounds upon which we could properly interfere. I do not accept Mr Cobb's proposition that the President's exercise of discretion was vitiated by any material factual misunderstanding. The President may have been wrong about contact, but this error did not, in my judgment, materially affect his exercise of discretion. And the brevity of the President's reasons is understandable given that, on his findings, the issue simply did not arise. Were we to interfere we should, in my judgment, be doing the very thing against which Lord Hoffmann warned us in *Piglowska v Piglowski* [1999] 1 WLR 1360.

37. The remaining issue involves a matter that was not canvassed at all before the President. Mr Cobb refers to *Norwich Corporation v Norwich Electric Tramways Company Limited* [1906] KB 119 as authority that this should not debar him taking the point, since it goes to jurisdiction. I agree.

38. Mr Cobb, who, to repeat, did not appear before the President, observes that the jurisdiction of the court in a case such as this is to be determined in accordance with section 2 of the Family Law Act 1986. He submits that, consistently with that provision, the President in fact had jurisdiction in accordance with Article 12 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, commonly known as Brussels II revised, and which I shall refer to as the Council Regulation.

39. There is no need to set out the relevant provisions of the 1986 Act. So far as material for present purposes, it is enough to observe that jurisdiction in a case such as this depends primarily upon whether the Council Regulation applies: see section 2(1)(a) and 2(3)(a). Only if the Council Regulation does not apply does the court have jurisdiction if (I put the matter generally) the child is either habitually resident in England and Wales or present in England and Wales: see sections 2(1)(b), 2(3)(b) and 3(1). So, contrary to the approach which the President was invited to adopt, the correct approach was to ask, as the President never did, whether the Council Regulation applied.

40. The relevant provisions in the Council Regulation are to be found in Articles 8 and 12. So far as material for present purposes Article 8 provides that:

"The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised."

So far as material for present purposes Article 12 provides that:

"3 The courts of a Member State shall also have jurisdiction in relation to parental responsibility … where:

(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State; and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

4 Where the child has his or her habitual residence in the territory of a third State which is not a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question."

41. It is quite clear that Article 12 is not confined to cases where the parties are citizens of or resident in a Member State, nor is it confined to cases where the question of forum arises as between two Member States. Thus it is neither here nor there that in the present case the twins are not in the jurisdiction and that the forum issue arises as between this country and Cameroon: see In ***re I (A Child) (Contact Application: Jurisdiction) (Centre for Family Law and Practice and another intervening)*** **[2009] UKSC 10, [2010] 1 AC 319, [2010] 1 FLR 361**, para [17].

42. As will be appreciated, Article 12.3 requires a triple condition to be satisfied if the court is to have jurisdiction. The child must have a "substantial connection" and the parties – here the father – must have "accepted" the jurisdiction "in an unequivocal manner" and the jurisdiction must be "in the best interests of the child". I shall consider these in turn.

43. The "substantial connection" requirement is plainly met. Although both the father and the mother originate from Cameroon, the twins were born in this county, have British passports and were habitually resident here in November 2008: cf, In *re I*, para [21].

44. Did the father "unequivocally" accept the jurisdiction of the English court? Mr Cobb submits that he did. He relies on three factors. First, he says that the father raised no objection to the jurisdiction at any stage of the proceedings: not on 20 April 2010, not on 27 April 2010 nor on 29 April 2010. Second, he points to a passage in the father's witness statement of 27 April 2010 where he (the father) sets out his proposals and the reasons why he says the twins should remain in Cameroon; this canvassing by the father of the merits of the case and his discussion of the twins' welfare amounts, says Mr Cobb, to an acceptance of the court's jurisdiction. Third, he points to what Mr Clough said on his behalf in the Position Statement he lodged for the hearing before the President:

"Even if the court determines the children are now habitually resident in Cameroon it would still have jurisdiction to determine issues relating to the welfare of the children if it

considered it convenient to do so as Cameroon is not a signatory to the Hague Convention."

45. There is nothing in his last point. The proposition as there set out is simply wrong as a matter of law and, as Mr Clough explained to the President (Transcript page 49), was, by an error on his part, put the wrong way round:

"I got it the wrong way round. If your Lordship determines that the children are habitually resident still in this country and, therefore, the Court has jurisdiction, it is my reading of the House of Lords case of *Re J*, a 2005 decision … that where the Court is dealing with a non-Convention country, if habitual residence is determined to be England and Wales, the Court nonetheless can decide on welfare ground (i) that the children should remain in the country where they currently are, and (ii) can decide which is the most convenient forum to determine their welfare."

In the circumstances it cannot fairly be held against the father.

46. There is no need for us here to embark upon a consideration of the difficult question, which much troubled the Supreme Court in In *re I*, as to what is meant by the words "at the time the court is seised" in Article 12.3. Irrespective of the correct answer to that question, the matters relied by Mr Cobb do not, in my judgment, demonstrate an "unequivocal" acceptance of the court's jurisdiction, whether taken in isolation or together. The acceptance need not be "express" – it may be "otherwise" – but it must be "unequivocal". How can it be said that the father was unequivocally accepting the jurisdiction, when the entire debate before the President was on the question – the jurisdictional question – of whether or not the twins were habitually resident here? On this simple ground, as it seems to me, the attempt to bring this case within Article 12.3 necessarily founders.

47. So far as concerns the third condition, since Cameroon is not a Hague Convention state, the father can rely upon the "deeming" provision in Article 12.4. But the 'deeming' provision is only a presumption; it is not irrebuttable: In re I, paras [37], [50]. Mr Cobb contends for this being the appropriate jurisdiction given that both parents are here, have legal representation here and can litigate here, that there is no legal aid in Cameroon and that there are facilities for the court here to commission welfare enquiries in Cameroon. Moreover, he says, the President failed to consider whether, even if it would not be right to order a summary return, it would nonetheless be appropriate to undertake a welfare enquiry in this jurisdiction in relation to the twins' future. In answer to a question from my Lord, Lord Justice Wilson, Mr Cobb rejected the suggestion that on this issue the case stands or falls on the correctness of the President's decision in relation to discretion. As a matter of principle that may be right, but as a matter of fact there was, if I may say so, much force in my Lord's point.

48. There is no need for an extended discussion of how the court's discretion under Articles 12.3 and 12.4 might be exercised here. Given our decision on the second condition, the point no longer arises. It suffices to say that, in my judgment, on the particular facts of this case, had the point arisen for decision the reasons which the

President gave as a matter of domestic law for exercising his discretion in favour of Cameroon as being the appropriate forum would in all probability justify a similar conclusion under the Council Regulation.

49. Be that as it may, for the reasons I have given this appeal must in my judgment be dismissed.

50. I have had the advantage of reading in draft the judgment of my Lord, Mr Justice Coleridge, and agree with everything he says.

**Mr Justice Coleridge :**
51. I agree completely with both the reasoning and conclusions of Lord Justice Munby. The President was being called upon to make a specific finding of fact. In this case it was in relation to the question of the twins' habitual residence on the basis, as the President found, of "unusual facts". Such a task falls to a first instance judge in this and other contexts daily.

52. Having read and, crucially, heard the parties' evidence, the President concluded that neither the mother's version of events nor the father's version represented the entirety of the factual position at the time. He, therefore, reached a conclusion on the facts not wholly in line with either version.

53. He found that, whereas there had been an agreement to send the children to Cameroon, the length of their stay there was "open ended", to be decided in the light of later events and after the children had arrived. So over the ensuing months the originally somewhat blurred picture gradually coalesced and became clearer; the "inchoate" factual position solidified so that by the time of the hearing, and with the benefit of hindsight, the Court could find that habitual residence had, by then, become established.

54. In my judgment, a fact finding judge is always entitled to consider version A put forward by one side and also version B put forward by the other and reach version C which represents a selection from or a mix or hybrid of the two competing versions. Such a course is always open to him providing the judge explains, by reference to the evidence, how and why he reaches a conclusion different from that contended for by either side.

55. In this case the President did precisely that; he explained why in the end he reached his own factual conclusions (see especially paras [22]-[24] and [26] already cited by my Lord: "I also find as a fact that the agreement between the twins' parents was far less hard edged than either now asserts" [my emphasis] and "these statements all confirm my view that the parents' plans for their children were inchoate following the agreed removal to the Cameroons in November 2008. I am thus satisfied that there was an agreement to send the children … and that it was open ended.").

56. If I may respectfully say so I cannot fault either the President's approach or his conclusions.

**Lord Justice Wilson :**
57. I agree with both judgments.