[2009] UKSC 10
On appeal from: [2009] EWCA Civ 965

JUDGMENT

I (A Child)

before

Lord Hope, Deputy President
Lady Hale
Lord Collins
Lord Kerr
Lord Clarke

JUDGMENT GIVEN ON
1 December 2009
Heard on 12 and 13 October 2009

Appellant (MY): Jonathan Baker QC, Edward Devereux (Instructed by Bindmans LLP)

Respondent (WI): Alison H Russell QC, Divya Bhatia (Instructed by Mullinger Banks Solicitors)

Respondent (QI): Judith Charlton (Instructed by Edwards Duthie)

Interveners (Reunite International Child Abduction Centre and the Centre for Family Law and Practice): Henry Setright QC, Teertha Gupta (Instructed by Dawson Cornwell)

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LADY HALE

1. The first and principal question before us is whether the parties' right of "prorogation", to "opt in" to the jurisdiction of an EU country which would not otherwise have jurisdiction to determine a child's future, contained in article 12 of Council Regulation (EC) No 2201/2003 ("Brussels II Revised"), can apply to a child who is habitually resident outside the European Union. If the answer to that question is "yes", then the second question is whether that is what has happened in this case. That depends both upon the interpretation of the criteria for opting in and upon an evaluation of what these parties did. The first question is a good deal easier to answer than the second.

The facts

2. The child in question was born on 27 July 2000 and is now aged nine. He was born in this country and is a British citizen. His mother originates from India but has lived in this country for many years. His father originates from Pakistan. Both are British citizens. They married in Pakistan on 28 October 1999 and later lived together in this country. They separated in September 2002 and divorced in 2003. As is common, no orders were made about the child in the course of the divorce proceedings.

3. In this case there were already care proceedings on foot about the child. He was taken to hospital on 1 November 2001 and found to have several fractures to his arms. The local authority began proceedings on 6 November 2001 and a "split" hearing was directed. At the

fact-finding hearing in May 2002, District Judge Brasse found that the injuries were non-accidental and that the father had caused them. However, at the welfare hearing in December 2002, he reviewed that finding in the light of the new evidence which had emerged during the welfare inquiries and decided that the mother had been responsible. At the final hearing on 22 May 2003, he made an order that the child should live with his father and have supervised contact with his mother in accordance with an agreement made between the local authority and the mother. He also made a supervision order for 12 months. That concluded the care proceedings.

4. It is an automatic condition of all residence orders that the child is not to be taken out of the jurisdiction without either the written consent of every person who has parental responsibility for the child or the leave of the court: Children Act 1989, s 13(1). In mid 2004 the father applied for leave to take the child to live in Pakistan with the father's mother and sister. On 16 September 2004, Hedley J granted that leave. At the same time, the father (who was represented by counsel at the hearing) gave the conventional undertaking to return the child to this jurisdiction when ordered to do so by the court. The order also provided for interim contact with the mother until the child left the jurisdiction.

5. The father took him to Pakistan on 22 December 2004 and he has lived there ever since. It is common ground that, whatever the precise legal test to be applied, he is now habitually resident in Pakistan. His father returned to this country some months later. His mother has visited him in Pakistan and he has visited his parents here.

6. The relevant parts of the Brussels II Revised Regulation applied from 1 March 2005.

7. On 31 October 2007 the mother, acting in person, issued an application in the Principal Registry of the Family Division for a "contact and prohibition" order, seeking to enforce "telephone contact and as much contact as possible" and to stop the paternal grandparents encouraging the child to call them "mum" and "dad". It is common ground between the parties that this is when the relevant proceedings began for the purposes of the jurisdictional questions before us.

8. At the first directions hearing on 5 November 2007, both parties attended, acting in person, and the matter was adjourned to a conciliation hearing on 12 December 2007. Again, both attended that hearing acting in person and an agreed order for contact was made. Among other things, the father agreed to facilitate the child visiting the UK if possible on an annual basis during his school holidays and seeing his mother then. On 15 April 2008, the mother issued a further application, seeking to "enforce and vary" the contact order so as to ensure that the child was in the UK to facilitate contact and a local authority assessment of the possibility of unsupervised contact.

9. The matter eventually came before Hedley J on 17 June 2008. The parties were still acting in person. At that stage it appeared "uncontentious" that the child should come back here in 2009, possibly for more than a visit; but the parties were "hopelessly divided" about 2008. Hedley J remarked that it was unusual for the Court to be retaining jurisdiction as the child was living in Pakistan, but that "the Court undoubtedly does have jurisdiction because both parties have not only submitted to the jurisdiction but have actually invoked it on a number of occasions" (para 29). He directed that CAFCASS appoint a guardian for the child. He also ordered the father to bring the child into the jurisdiction in June and July 2009, the child to have reasonable contact with the mother, and the mother to be at liberty to visit the child in

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Pakistan. She spent about three weeks there in the summer of 2008 and saw the child then but she has not seen him since. The CAFCASS guardian reported in January 2009 that his provisional view was that the child should visit this country every other year and the mother visit Pakistan in the intervening years.

10. The matter came back before the High Court on 2 March 2009. By this time both parties were legally represented. A "position statement" filed by counsel on the father's behalf stated that "The court has retained jurisdiction in this case and the father accepts the Court's jurisdiction" and that "The father accepts the court has retained jurisdiction to make orders directed towards himself in relation to contact". He had, however, changed his mind about bringing the child to this country in 2009 and undertook to issue an application to set aside Hedley J's order that he should do so. This he duly did on 4 March 2009.

11. At a directions hearing on 12 March 2009, Black J for the first time questioned whether the court did indeed have jurisdiction to make orders relating to the child. That issue was tried before HHJ Barnett, sitting as a deputy High Court judge, on 5 and 6 May 2009. It was then common ground between counsel that Brussels II Revised did not apply. On 28 May 2009 HHJ Barnett held that the court did not have jurisdiction under the Family Law Act 1986. However he also held that if the court did have jurisdiction he would not have granted a stay on the ground of forum non conveniens. The child's guardian considered that the English court was the most appropriate forum to decide the issues between the parents, both of whom were resident here.

12. The mother appealed and for the first time it was argued on her behalf that article 12 of Brussels II Revised applied. One can only feel sympathy for the Court of Appeal, confronted as they were with a novel and at first blush surprising argument. Thorpe LJ found it obvious that HHJ Barnett had reached the right result and "would have been dismayed had it been necessary to set aside his very sensible conclusion": [2009] EWCA Civ 965, para 35. The House of Lords gave permission to appeal to this Court over the long vacation.

The law

13. As amended following the implementation of Brussels II Revised, section 2 of the Family Law Act 1986 reads as follows:

> "(1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless –
>
> (a) it has jurisdiction under the Council Regulation, or
> (b) the Council Regulation does not apply but –
>
> (i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2A is satisfied, or
> (ii) the condition in section 3 of this Act is satisfied."

14. The "council regulation" is Brussels II Revised. A section 1(1)(a) order includes a "section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order". Section 2A need not concern us as there are no continuing matrimonial proceedings between the parties, nor were any orders made in connection with them. Section 3 gives jurisdiction on the basis that the child is either

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habitually resident in England and Wales on the date of the application or (if there was no application) of the order, or was present here on that date and not habitually resident in another part of the United Kingdom.

15. It will be noted that, if Brussels II Revised applies, it governs the situation. If some other EU country (excluding Denmark for this purpose) has jurisdiction under the Regulation, then this country does not. But if Brussels II Revised applies and gives this country jurisdiction, it will give jurisdiction even though the residual jurisdictional rules contained in the 1986 Act would not. Only if Brussels II Revised does not apply at all will the residual rules in the 1986 Act come into play.

16. The basic rule in Brussels II Revised governing jurisdiction in children's cases is in article 8.1:

> "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."

But that is subject to articles 9, 10 and 12. We are concerned with article 12, which deals with "Prorogation of jurisdiction". It is worth quoting article 12 in full, although articles 12.1 and 12.2 are not directly relevant in this case, because the answer to the first question must apply equally to the prorogation covered by article 12.1 as it does to the prorogation covered by article 12.3:

> "1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:
>
> (a) at least one of the spouses has parental responsibility in relation to the child; and
> (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.
>
> 2. The jurisdiction conferred in paragraph 1 shall cease as soon as:
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> (a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;
> (b) in those cases where proceedings relating to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;
> (c) the proceedings referred to in (a) and (b) have come to an end for another reason.
>
> 3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:
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> (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

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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 co-operation 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."

The first question

17. Can article 12 apply at all where the child is lawfully resident outside the European Union? In my view it clearly can. There is nothing in either article 12.1 or article 12.3 to limit jurisdiction to children who are resident within the EU. Jurisdiction in divorce, nullity and legal separation is governed by article 3 of the Regulation, which lists no less than seven different bases of jurisdiction. It is easy to think of cases in which a court in the EU will have jurisdiction under article 3 but one of the spouses and their children will be resident outside the EU. A court in England and Wales would have jurisdiction if the petitioning mother were living with the children in the USA and the respondent father were living in this country. A court in England and Wales would have jurisdiction if the petitioning father had lived here for at least a year and the respondent mother were living with the children in the USA. A court in England and Wales would have jurisdiction if the spouses were living here but their children were living in the USA. In some of these cases the spouses might well wish to accept the jurisdiction of the English court to decide matters relating to parental responsibility so that their children's future could be decided in the same jurisdiction as their status, property and finances. Professor Rauscher is quite clear that "the new rule not only applies to children residing in a Member State which is not the forum State (as Article 3 Brussels II did) but also to children residing in Non-Member States" (T Rauscher, "Parental Responsibility Cases under the new Council Regulation 'Brussels IIA'", The European Legal Forum, 1-2005, 37 – 46 at p 40). There is nothing to differentiate article 12.3 from article 12.1 in this respect.

18. This view of the matter is confirmed, if the "third State" which is referred to in article 12.4 means a "non-Member State". The term "third State" occurs only twice in Brussels II Revised. Article 61 provides that:

> "As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:
>
> (a) where the child concerned has his or her habitual residence on the territory of a Member State;
> (b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the Convention."

If "third State" in article 61 referred to some other Member State, there would be no need for paragraph (b) because paragraph (a) would cover all cases. But in any event, both article 61 and article 12.4 are looking at the relationship between the Regulation and the 1996 Hague

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Convention. 16 countries have so far ratified that Convention, half within and half outside the EU (the UK has signed but not ratified; Pakistan has done neither). If the child is habitually resident in “a third State” which is a party to the 1996 Convention, the Regulation applies to the recognition and enforcement in one Member State of a judgment given in another Member State. If the child is habitually resident in a third State which is not a party to the Convention, article 12.4 lays down a presumption that it will be in the interests of the child for the EU State to assume jurisdiction if the parties have agreed to accept it. All of this makes sense if the “third State” lies outside the EU but would add nothing if it lies within it. Indeed, why limit the presumption in article 12.4 to the rare case where there are three EU States involved but not apply it to the more common situation where there are two? Nor does the reference in article 12.4 to the impossibility of holding proceedings in the “third State” make much sense within the EU. Professor Rauscher predicts that “Most cases under Article 12(3) will probably feature strange situations of habitual residence particularly with children being nationals of a Member State but residing farther abroad in countries with unreliable judicial structures” (loc cit, p 41).

19. There is no case law on the meaning of “third State” in Brussels II Revised. For what it is worth, the Practice Guide to the Regulation states that the option of voluntarily accepting the jurisdiction of a Member State “is not limited to situations where the child is habitually resident within the territory of a Member State” (p 45). Reunite have helpfully also drawn our attention to other sources emanating from the EU which define the term to mean a State outside the EU: see, for example, the Community Research and Development Information Service (CORDIS), which uses the term “Third State” to mean a state that is neither a Member State nor an Associated State.

20. This merely reinforces the conclusion arrived at on ordinary principles of construction that article 12 can apply to children who are habitually resident outside the EU.

The second question

21. The second question is whether the criteria in article 12.3 are made out. Paragraph (a) of article 12.3 requires that the child have a substantial connection with the Member State in question, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that State or that the child is a national of that State. This is clearly satisfied in this case. At the time these proceedings began, both parents were habitually resident in the United Kingdom and the child was and is a British national.

22. More complicated questions arise under paragraph (b) of article 12.3. This can be broken down into two components: first, that “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 second, that the jurisdiction of the court “is in the best interests of the child”. Each of these raises interesting subsidiary questions.

“At the time the court is seised”

23. The most difficult questions are posed by the words “at the time the court is seised”. The first is whether they refer to a moment in time or, as held by the Court of Appeal, to any time while the proceedings are continuing. As a general proposition, it should be clear at any particular point during the proceedings, and preferably from the outset, whether or not the court has jurisdiction. Certainly a party who has once accepted jurisdiction should not be able to withdraw it at any time before the conclusion of the case. Acceptance of jurisdiction must

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include acceptance of the court's decision whatever it may be. Otherwise there would be no point in submitting to the court's jurisdiction.

24. It is clear from article 16 that a court is seised at a particular moment in time. This provides that:

> "A court shall be deemed to be seised:
>
> (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent; or
> (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court."

From this it is clear that the time of seisin is fixed when the document initiating the proceedings is lodged with the court or, if it has to be served before lodging, is received by the authority responsible for service, although in each case the court may not actually be seised if the applicant does not take the steps required to inform either the respondent or the court. There has to be a fixed time of seisin for the purpose of the rule in article 19, that the court "second seised" of divorce, separation or nullity proceedings shall decline jurisdiction in favour of the court "first seised".

25. There was some debate about what constituted "the proceedings" in this case. In one sense, no order about the upbringing of a child is ever final. The parties can always agree to make different arrangements or bring the matter back to court for the court to do so. But the reality in this case was that there were care proceedings brought by the local authority in 2002 which were concluded by the residence, contact and supervision orders made in 2003. There were then private law proceedings brought by the father to enable him to take the child abroad to live which were concluded by the orders made by Hedley J on 16 September 2004. There were then new proceedings brought by the mother in 2007, the object of which was to make provision for her contact with the child which had not been done in the 2004 order. It is common ground between the parties that these are "the proceedings" for this purpose and in my view that is correct. It follows, therefore, that the court became seised of this matter on 31 October 2007.

26. But the next question is "what do those words describe?" Do they, as had been assumed by all before the hearing in this Court, describe the time at which the parties have accepted jurisdiction? Or do they, as proposed by Mr Setright QC on behalf of the interveners Reunite, describe the parties whose acceptance is required? In other words, does article 12.3(b) mean "the jurisdiction of the courts was accepted when the proceedings began by all those who were then parties"? Or does it mean "the jurisdiction of the courts has been accepted at any time after the proceedings have begun by all those who were parties when they began"?

27. There is much to be said for Mr Setright's interpretation, both linguistically and in practice. He draws our attention to the German text of article 12.3(b), which begins "alle Parteien des Verfahrens zum Zeitpunkt der Anrufung des Gerichts . . .

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". However, given what to us is the reverse word order of most German sentences, it would be unwise to place too much reliance upon this. The French, Italian and Spanish texts follow the same word order as the English and are therefore equally ambiguous. Another linguistic clue could be the particular tense used in the English text. "Has been accepted" is more consistent with the possibility of later acceptance of jurisdiction. If it had been intended to limit acceptance to the exact time of seisin, it would have been more natural to use the words "was accepted".

Once again, however, it might be unwise to place too much reliance upon the precise tense chosen in the English text, given that other European languages do not have the same variety of ways of referring to something which has happened in the past.

28. The practical attraction of Mr Setright's argument is that this interpretation would enable the court considering whether there has been unequivocal acceptance of jurisdiction to take into account the parties' conduct after as well as before the proceedings have begun. Given that the court may be seised before the respondent knows anything about the proceedings (as may well have happened here), it should be possible for the respondent to accept jurisdiction expressly or in an unequivocal manner by the way in which he reacts to the proceedings when he learns about them. If the respondent is indeed content to accept the jurisdiction of the court it should be possible for him to indicate that, either expressly or by his conduct, even though he had not addressed his mind to the matter before the court became seised. Otherwise the scope of both article 12.1 and article 12.3 would be limited (in the vast majority of cases) to cases where there was a written agreement in place when the proceedings were instituted. Admittedly, this was said by the Court of Appeal in ***Bush v Bush*** [2008] EWCA Civ 865, [2008] 2 FLR 1437, at para 53, to be the "paradigm case" but there is no reason why it should be virtually the only case. Prorogation of jurisdiction under article 17 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 was limited to agreements in writing or in a form which accords with the practice of the international trade or commerce in question. Prorogation under article 12 is not so limited. It is clearly contemplated that conduct other than express agreement can constitute unequivocal acceptance of the jurisdiction. Furthermore, as Lord Collins demonstrates at paragraph 53, there is no reason in principle why there should not be acceptance of jurisdiction after the proceedings have began.

29. Professor Rauscher accepts that jurisdiction must be accepted at the time the court is seised but argues that too literal an interpretation would render article 12.1

> "almost useless. The parties to a divorce proceeding won't even think about jurisdiction as to parental responsibility before the court is seised. Therefore a more liberal interpretation is advisable. The wording should probably be understood in the sense of 'at the time the court has been seised', thereby excluding any binding prorogation before the case has been brought to court." (p 40)

So now we have a suggestion that prior agreement is not the paradigm case and the parties' conduct once the proceedings have begun is what matters. After all, the parallel with agreements under the Brussels Convention is not close in matrimonial and family cases, where it is less common (and in some cases not possible) to have a binding agreement between spouses or parents before proceedings have begun.

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30. There is, however, another way of achieving much the same result. Article 16 fixes which is first in time for priority purposes under article 19. But it contains within itself the possibility that apparent seisin may not mature into actual seisin unless the applicant later effects service or lodges the document with the court. Whether this is regarded as a condition defeasant makes no difference: the result in the actual decision depends upon what happens later. It might be possible to take a similar approach to prorogation, so that the apparent seisin when the application is lodged does not mature into actual seisin until the respondent is served and has an opportunity to indicate whether or not he accepts jurisdiction. This too would be consistent with the English use of "has been" rather than "was".

31. As will become apparent shortly, we do not need to resolve this question in this particular case, because we have unequivocal acceptance of the jurisdiction both before and after the proceedings were begun. Moreover, it may not matter much in practice. Even if the words "at the time the court is seised" qualify the parties' acceptance, and refer only to the precise date when the proceedings are initiated rather than to once they have begun, the court is entitled to look at the parties' conduct after the proceedings have begun in order to decide whether they had accepted jurisdiction at the time the proceedings did begin. There is nothing unusual about this. Courts often take into account later behaviour as evidence of an earlier state of affairs.

32. Whichever is the correct interpretation, the acceptance in question must be that of the parties to the proceedings at the time when the court is seised. Later parties cannot come along and upset the agreement which the original parties have made. In this case, as it happens, the child was later made a party to the proceedings. Brussels II Revised rightly places great stress on the importance of the voice of the child in proceedings about his future: see paragraph 19 of the Preamble and article 11.2 dealing with the return of children under the Hague Convention on the Civil Aspects of International Child Abduction 1980. But the way in which the child is heard will depend upon national procedures. As was made plain by the House of Lords in ***In re D (A Child) (Abduction: Rights of Custody)*** [2006] UKHL 51, [2007] 1 AC 619, para 60, there are different ways of doing this, ranging from full scale legal representation of the child, through independent expert reporting, to a face to face interview with the judge. It is not usually necessary for the child to become a full party to proceedings between his parents, although of course it can and should be done in an appropriate case. The participation of the child is aimed at helping the court decide what outcome to the proceedings will be in the best interests of the child. It is usually less relevant to questions of jurisdiction.

Acceptance

33. The father expressly accepted the court's jurisdiction in the position statement put before the court by his counsel for the hearing on 2 March 2009. This is scarcely surprising, as all his conduct up until that time had been consistent with this stance. He appeared before the court in response to the mother's application. He participated in a conciliation appointment on 12 December 2007 and consented to the order then made. He participated in the hearing before Hedley J on 17 June 2008. At that stage he was acting in person. But the solicitors who had appeared for him in the care proceedings and their aftermath then came on the record for the purpose of his application to set aside Hedley J's order that he bring the child back into the jurisdiction in 2009. No objection was then taken to the court's jurisdiction. Far from it. Counsel was instructed for the hearing before the Deputy High Court Judge on 2 March 2009 and expressly accepted jurisdiction on his behalf.

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34. All of this conduct indicates his acceptance of jurisdiction both expressly and in an unequivocal manner from the outset of the proceedings. He recanted only when the court itself indicated that there might not be any basis upon which there could be jurisdiction. But there was also a binding prior acceptance. On 16 September 2004, with the benefit of legal advice, he gave an undertaking to the court to return the child to this jurisdiction when called upon to do so. The object of the proceedings was to enable him to take the child to live in Pakistan and thus lawfully to establish a habitual residence outside the jurisdiction. Yet at the same time he was undertaking to bring the child back when required by the court to do so. This inevitably involved accepting the court's jurisdiction to make an order in relation, not only to him, but to the child.

35. In my view, the jurisdiction of the English courts has been accepted by the father, both expressly and otherwise in an unequivocal manner. This is so whatever interpretation is placed upon article 12.3, but the diversity of views expressed by this court indicates that the interpretation is not acte clair and may have to be the subject of a reference to the European Court of Justice in another case. But I would favour an interpretation which catered both for a binding acceptance before the proceedings began and for an unequivocal acceptance once they had begun.

"In the best interests of the child"

36. The final requirement in article 12.3 is that the jurisdiction of the English courts should be in the best interests of the child. Nothing turns, in my view, on the difference between "the best interests of the child" in article 12.3, "the superior interests of the child" in article 12.1 and "the child's interest" in article 12.4. They must mean the same thing, which is that it is in the child's interests for the case to be determined in the courts of this country rather than elsewhere. This question is quite different from the substantive question in the proceedings, which is "what outcome to these proceedings will be in the best interests of the child?" It will not depend upon a profound investigation of the child's situation and upbringing but upon the sort of considerations which come into play when deciding upon the most appropriate forum. The fact that the parties have submitted to the jurisdiction and are both habitually resident within it is clearly relevant though by no means the only factor.

37. In this case there are two reasons to conclude that the exercise of jurisdiction in this country would be in the child's interests. The first is the presumption in article 12.4. Although expressed as a "deeming" provision, no-one suggests that this is irrebuttable. But it makes sense. If the child is habitually resident in a country outside the EU which, like Pakistan, is not a party to the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, then even if the EU country in question is a party to that Convention, there would be no provision for recognition and enforcement of one another's orders. If, therefore, the parties have accepted the jurisdiction of an EU State, it makes sense for that State to determine the issue. The difficulty or otherwise of holding the proceedings in the third State in question are obviously relevant. It is not suggested that it would be impossible to hold these proceedings in Pakistan, but while neither party has had difficulty with the proceedings here, the mother would certainly face difficulties litigating in Pakistan.

38. The other factor in this case is the very proper stance taken by the child's guardian ad litem. When the issue of forum non conveniens was ventilated before HHJ Barnett in the High Court, the guardian took the view that on balance it would be better for the case to be heard here. The nub of the issue is the contact which the child should have with his mother in

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this country. Any continuing risks associated with that contact will be better assessed here and any safeguards will need to be put in place here. Inquiries in Pakistan can be made through international social services or other agencies.

39. Of course, the difficulties of enforcement must also be taken into account. But it must be borne in mind that contact orders have always been enforced in personam, against the person to whom they are addressed. Unlike residence orders, they are not enforced by the physical transport of the child from one place to another. The court is bound to view with some scepticism the protestations of a father, who has the benefit of an order that the child is to live with him, that he will be unable in practice to secure the child's compliance with an order for contact with the mother. It may be so but it is not very likely.

40. But this is to anticipate the outcome of the court's investigation into what will be in the best interests of this child as he grows up. Is he to make a clean break from the past and be cut off from his mother and his mother's family indefinitely? Or should he be enabled to have a relationship with both sides of his heritage and in due course to form his own opinions of his mother? If the latter, how practically can that be facilitated? All of that lies in the future. There are many conclusions which the court hearing this case might reach. Among them is an order that it would be better for the child to make no order at all: Children Act 1989, s 1(5). But this is not a refusal of jurisdiction (cf *Owusu v Jackson* (Case C-281/02) [2005] QB 801). It is a positive conclusion, reached after the court has exercised its jurisdiction to hear and determine the case, that in all the circumstances it will be better for the child to make no further order about his future. It is impossible at this stage to speculate upon how likely that will be.

The Pakistan Protocol

41. Thorpe LJ was understandably troubled about the implications for the "Pakistan Protocol" if the English courts were to accept jurisdiction in respect of a child who was habitually resident in Pakistan. We have had the benefit of an intervention from Reunite, an organisation with great knowledge and experience in the field of international child abduction, and represented by lawyers who also have knowledge and experience of how these things work on the ground.

42. The UK-Pakistan Judicial Protocol on Children Matters is not an international agreement between States. It is an understanding first reached in January 2003 between the then President of the Family Division of the High Court in England and Wales and the then Chief Justice of the Supreme Court of Pakistan, supplemented in September 2003 by guidelines for judicial co-operation to which Judges from the Court of Session in Scotland and the High Court in Northern Ireland were also party. It was agreed that "in normal circumstances the welfare of a child is best determined by the courts of the country of the child's habitual/ordinary residence" (para 1). Hence, if a child is wrongfully removed from his country of ordinary residence, the courts of the country to which he is taken should not ordinarily exercise jurisdiction save for the purpose of sending the child back (para 2). The same should apply if a child is brought from one country to the other for the purposes of contact, and is then wrongfully retained (para 3). This very largely reflects the principal provisions of the Hague Convention on Child Abduction.

43. Neither of the two substantive paragraphs is directly applicable to this case. There has been no abduction or wrongful retention. We are concerned only with a very limited exception, in far from "normal" circumstances, to the general statement in paragraph 1. The

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two can, as Mr Setright pointed out, complement one another. The courts in Pakistan might welcome the fact that the courts in England had investigated the situation here and put in place safeguards which would enable the child to visit his mother and other members of his family in this country in safety. The Protocol would operate to secure his prompt return to Pakistan after any such visit. Alternatively, the court in this country might, after beginning its investigation, conclude that, had this been a case within the EU, it would have been appropriate to invoke the procedure in article 15 of Brussels II Revised, for requesting the courts of another Member State which is "better placed to hear the case" to assume jurisdiction. The Protocol, with the associated Guidelines for judicial co-operation, provides the ideal vehicle for achieving this outside the EU. In the view of Reunite, therefore, far from undermining the Protocol, article 12 can work harmoniously with it.

44. In any event, it has to be acknowledged that the proper interpretation of the Brussels II Revised Regulation cannot be affected by the terms of a private agreement between the judiciaries of one Member State and a non-Member State.

Conclusion
45. For these reasons, therefore, I would allow this appeal and declare that the courts of England and Wales have jurisdiction in this case.

LORD HOPE
46. I agree with Lady Hale that the appeal should be allowed, for the reasons given by her and by Lord Collins.

LORD COLLINS
47. I agree with Lady Hale that the appeal should be allowed and that the declaration proposed by her should be made.

48. There is something to be said for the view that the proceedings began with the father's application in mid-2004 for leave to take the child to live in Pakistan. If that view were right, then the proceedings would have commenced before the Brussels II Revised Regulation (Council Regulation (EC) 2201/2203) became applicable in March 2005. The then existing Brussels II Regulation (Council Regulation (EC) 1347/2000) did not deal with matters of parental responsibility outside the context of matrimonial proceedings, and the court would have had jurisdiction on the basis of the then habitual residence or presence of the child in England: Family Law Act 1986, sections 2 and 3. But as a matter of English law, the mother's application in 2007, was treated, and is to be treated, as a new proceeding. Since it was issued after the Brussels II Revised Regulation became applicable, there must be a basis of jurisdiction in that Regulation.

49. The general rule under the Brussels II Revised Regulation is that the Member State in which the child has his or her habitual residence has jurisdiction in matters of parental responsibility: Article 8(1). In the present case it is common ground that the child is habitually resident in Pakistan, where his residence reflects "integration in a social and family environment": In re A (Case C-523/07) [2009] 2 FLR 1, at para 38. Consequently, the English court will have jurisdiction only if one of the exceptions to the general rule applies.

50. The only potentially relevant exception is in Article 12 (which is set out in full by Lady Hale at para 16). Article 12 deals with prorogation of jurisdiction in matters of parental responsibility both in matrimonial proceedings and in separate proceedings. These are not

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matrimonial proceedings, and the only available basis of jurisdiction, if any, is in Article 12(3). Where there has been a submission to the jurisdiction within the terms of Article 12(3), the court will have jurisdiction if it "is in the best interests of the child". Where the child has his or her habitual residence in the territory of a "third State" which is not a party to the Hague Convention of 1996, jurisdiction under Article 12 "shall be deemed to be in the child's interest", in particular if it is impossible to hold proceedings in the third State in question: Article 12(4). There is no significance in the difference between "best interests" in Article 12(3) and "superior interests" in Article 12(1). Other language versions use the identical term for both: supérieur in French, superiore in Italian, and superior in Spanish. It is also plain from the context and from other language versions that "shall be deemed" means no more than "shall be presumed" and that the presumption is rebuttable: est présumée/si presume/se presumirà. Lady Hale has shown that "third State" means a State which is not a Member State for the purposes of the Brussels II Revised Regulation. On Article 12(4) see Professor Alegria Borrás, in Brussels II bis: its Impact and Application in the Member States (ed. Boele-Woelki and Gonzales Beilfuss, 2007), 3 at 14-15.

51. The question is whether "the jurisdiction of the [English court] has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised…". The difficulty arises from the use of the words "at the time the court is seised." Does the use of those words in the place in which they occur mean that it is necessary that the acceptance of jurisdiction by all parties must take place, or must have taken place, at the time the court is seised, which by Article 16 is, in a case of this kind, "the time when the document instituting the proceedings … is lodged with the court ..."? Or are those words intended simply to identify the parties "at the time the court is seised" whose acceptance of jurisdiction is required, as the German version of the Regulation (but not the English, French, Italian, or Spanish versions) suggests?

52. The answer to this question must be found in the light of Article 12 as a whole in the context of the Regulation as a whole, and in the light of the instruments which preceded it.

53. The Brussels Convention and the Brussels I Regulation (Council Regulation (EC) 44/2001) each contain sections on prorogation of jurisdiction by prior agreement (Article 17 and 23 respectively) and by appearance after the proceedings have commenced (Articles 18 and 24). They both show that, as is obvious, there is no reason in principle why there should not be acceptance of jurisdiction after the commencement, or service, of proceedings.

54. The basic rule of jurisdiction in the 1996 Hague Convention is the habitual residence of the child; but where the courts of a Contracting State are exercising jurisdiction in matrimonial proceedings, they may take measures directed to the protection of a child habitually resident in another Contracting State if

> "a at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and b the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child." (Article 10) 55. A draft Convention on jurisdiction and the recognition and enforcement of judgments in matrimonial matters was approved by the EU Council on 28 May 1998 ([1998] OJ C221), but was superseded by the Brussels II Regulation in 2000. Neither the draft Convention nor the Brussels II Regulation contained provision for matters of

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parental responsibility outside the context of matrimonial proceedings. Article 3(2) of the draft Convention (in the same terms as what became Article 3 of the Brussels II Regulation) provides that the courts of a Member State have jurisdiction in relation to matters of parental responsibility where the child is habitually resident in another Member State and "(a) at least one of the spouses has parental responsibility in relation to the child and, (b) the jurisdiction of the courts has been accepted by the spouses and is in the best interests of the child."

56. This provision was modelled on Article 10(1) of the Hague Convention: see the Report by Professor Alegria Borrás on the draft Convention, para 38. It is therefore apparent that there was no suggestion that the acceptance of jurisdiction under Article 3 of the draft Convention or of the Brussels II Regulation had to be prior to, or at the time of, commencement of the proceedings.

57. The Commission proposal for what became the Brussels II Revised Regulation was presented on 17 May 2002: COM(2002) 222 final/2. The proposal in relation to what became Article 12(1) in the Regulation provided for jurisdiction in matters of parental responsibility where the child was habitually resident in one of the Member States, at least one of the spouses had parental responsibility in relation to the child and "if the jurisdiction of the courts has been accepted by the spouses and is in the best interests of the child" (Article 12(1)(c)). The proposal in relation to what became Article 12(3) provided that the courts of a Member State would have jurisdiction where "all holders of parental responsibility have accepted jurisdiction at the time the court is seised" (Article 12(2)(a)), where the child had a substantial connection with that State (in particular where one of the holders of parental responsibility was habitually resident there, or the child was a national) and jurisdiction was in the best interests of the child. Article 12(4) of the draft provided: "For the purposes of this Article the appearance of a holder of parental responsibility before a court shall not be deemed in itself to constitute acceptance of the court's jurisdiction." The draft contained in Article 16 the same provision as to date of seisin as the Regulation.

58. This suggests that the Commission's intention was to require acceptance of jurisdiction at or before the date of seisin, and the Commission's Practice Guide on the Brussels II Revised Regulation (pp 16-17), which is of course not authoritative, expresses the view (in relation to both Article 12(1) and Article 12(3)) that it is at the time the court is seised when the judge has to determine whether the relevant parties have accepted the jurisdiction either explicitly or otherwise unequivocally.

59. If this is the correct interpretation of Article 12(1) and Article 12(3) it leads to a result which does not commend itself to common sense. There is no reason in principle why there should not be provision for acceptance of jurisdiction after the commencement of proceedings, as Article 18 of the Brussels Convention and Article 24 of the Brussels I Regulation show.

60. In *Bush v Bush* [2008] EWCA Civ 865, [2008] 2 FLR 1437, para 53 I expressed the view that the paradigm case for acceptance of jurisdiction would be actual agreement by the parents at the time the matrimonial proceedings were instituted. The question in that case was not the time when acceptance of jurisdiction was to be tested but whether the steps taken by the father amounted to an acceptance of the jurisdiction of the English court.

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61. Lady Hale has referred (at 29) to Rauscher, Parental Responsibility Cases under the new Council Regulation "Brussels IIA", in European Legal Forum (E) I-2005, 35 at 40. He points out, in relation to Article 12(1) that if "at the time the court is seised" is to be understood literally, only an acceptance before the relevant steps under Article 16 are taken would be sufficient. In practice such an interpretation would render Article 12(1) almost useless. The parties to a divorce proceeding will not think about jurisdiction as regards parental responsibility before the court is seised. He suggests a more liberal interpretation, so that it would be understood in the sense of "at the time the court has been seised", thereby not requiring prorogation before the case has been brought to court. As soon as the case is pending, consensus can be achieved (and other holders of parental responsibility must also agree). He suggests the same solution for Article 12(3).

62. Another way of approaching Article 12 is to treat the words "at the time the court is seised" as qualifying the words "by the holders of parental responsibility" in Article 12(1) and the words "all the parties to the proceedings" in Article 12(3). In each case this would be a sensible construction, and would be consistent with the approach in the Brussels Convention, the Brussels I Regulation, the Hague Convention, and the Brussels II Regulation. It would also be consistent with the German version of the Brussels II Revised Regulation. It is well established that provisions of EU law must be interpreted and applied uniformly in the light of the versions in all the official languages: see, among many others, *Dirk Endendijk* (Case C-187/07) [2008] ECR I-2115, at paras 22-24. In the context of Article 18 of the Brussels Convention the European Court adopted the French version as being more in keeping with the objectives and spirit of the Convention: *Elefanten Schuh GmbH v Jacqmain* (Case 150/80) [1981] ECR 1671, at para 14.

63. This solution is an attractive one, but it is by no means an inevitable or a clear one, and, if the appeal depended on whether it was right, it would be necessary to make a reference to the European Court under Articles 68 and 234 of the EC Treaty.

64. But it is not necessary for this important question to be decided because on the facts it is clear that as at the date the court was seised with the mother's proceedings in 2007, the father had unequivocally accepted the court's jurisdiction in his own prior application and that everything he did after the mother's application confirmed his acceptance of the jurisdiction. The mother has plainly accepted the jurisdiction of the court by making her application in October 2007. Nor can there be any doubt that the father has "in an unequivocal manner" accepted the jurisdiction of the English court to deal with matters of parental responsibility. On his own application in 2004 he gave an undertaking to the court to return the child from Pakistan to England if ordered by the court so to do. When the mother issued her own application in 2007, the father attended a hearing when an agreed order for contact was made. He appeared at a hearing in 2008 before Hedley J when it was ordered that the mother could visit the child in Pakistan, and that he should bring the child to England in June/July 2009. Finally, counsel stated in March 2009 on the father's behalf that he accepted the court's jurisdiction, and that the court retained jurisdiction to make contact orders directed to him. All of those steps confirmed what was apparent and inevitable when the mother issued her application, namely that the father was already subject to the jurisdiction of the court and had accepted it in relation to matter of parental responsibility. There was, therefore, in the circumstances of the case an unequivocal acceptance of the court's jurisdiction at the date of seisin.

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LORD KERR

65. I also agree with Lady Hale that the appeal should be allowed and that the declaration proposed by her should be made.

66. I wish to say but a few words on the approach to the interpretation of article 12.1 and 12.3 of Council Regulation (EC) No 2201/2003. I consider that the interpretation discussed by Lord Collins in paragraph 62 of his judgment (which was that advanced by Mr Setright QC on behalf of the intervener) is the correct one.

67. The structure of both article 12.1 and article 12.3, if closely examined, support that conclusion, in my opinion. Article 12.1 (b) provides that the courts of a Member State exercising jurisdiction by virtue of article 3 on an application for divorce etc shall have jurisdiction in relation to any matter relating to parental responsibility connected with the application where at least one of the spouses has parental responsibility in relation to the child and: -

> "the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the best interests of the child."

68. If it had been intended that the words, "at the time the court is seised" should qualify the words, "accepted expressly or otherwise in an unequivocal manner", the composition of the sentence would surely have been different. To achieve that result the provision should have read thus: -

> "the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner at the time that the court is seised by the spouses and by the holders of parental responsibility and is in the best interests of the child."

69. The juxtaposition of the phrase, "at the time the court is seised" with the preceding, "the holders of parental responsibility" and the enclosing of the phrase referring to the timing by commas indicate that the time that the court is seised was intended to refer to the holders of parental responsibility, in my opinion.

70. That this should be so is entirely to be expected. The holders of parental responsibility may change from time to time. It is important that those who purport to consent to the jurisdiction of the court should be those who hold that responsibility at a time when the court is seised of the proceedings. Self evidently, spouses do not need to be identified in any temporal dimension and the words, "at the time the court is seised" have no reference to them.

71. The position is at least equally clear in relation to article 12.3 (b). Under this provision the courts of a Member State shall have jurisdiction in relation to parental responsibility where the child has a substantial connection with that Member State and: -

> "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."

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72. If it had been intended that the words, "at the time the court is seised" should refer to the timing of the acceptance of jurisdiction, it appears to me that the structure of the sentence best suited to achieve that result would be as follows: -"the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner at the time the court is seised by all the parties to the proceedings and is in the best interests of the child."

73. This interpretation would be, as Lord Collins suggests, sensible and would accord with the spirit of the Brussels Convention, the Brussels I Regulation, the Hague Convention, and the Brussels II Regulation. It also avoids the spectre, identified by Professor Rauscher, of rendering article 12. 1 virtually ineffectual. I am afraid that I could not be sanguine about the workability of article 12.1 or 12.3 if the interpretation advanced by the respondent is accepted.

74. Although I am reasonably firm in my opinion that the proper construction of these provisions is as Mr Setright submitted it should be, I agree with Lady Hale and Lord Collins that it is not necessary for a final view on the question to be reached in the present case. This is so because it is clear that the father had unequivocally accepted the jurisdiction of the court when, in 2007, it was indisputably seised of the proceedings. As has been pointed out, moreover, his subsequent attitude to the proceedings evinced unambiguous acceptance of the court's jurisdiction.

LORD CLARKE

75. I agree with Lady Hale that this appeal should be allowed and that we should make a declaration that the courts of England and Wales have jurisdiction in this case. I entirely agree with the reasoning and conclusions of Lady Hale and Lord Collins as to the meaning of "third State", as to the use that can properly be made of post-seisin evidence to demonstrate unequivocal acceptance at the time of seisin, as to the father's unequivocal acceptance at that time on the facts and as to the best interests of the child. Those conclusions are sufficient for this appeal to be decided by declaring that the English court has jurisdiction. The only point which has caused me some concern, and which I wish briefly to address in this judgment, is the true construction of article 12.3(b) of the Brussels II Revised Regulation.

76. Lord Collins has considered article 12.3(b) in some detail. I entirely agree with paragraphs 47 to 58 of his analysis. I also agree with him that the questions whether the relevant acceptance of jurisdiction must be before the court is seised or whether it can be later and, if so when, are important questions and, if the appeal depended upon the answers, (subject to what I say below) may have to be referred to the European Court of Justice. It is perhaps for this reason that Lord Collins does not express a concluded view on the point. As stated above, I agree with him and Lady Hale that the outcome of the appeal does not depend upon the answers to these questions.

77. I add a few words of my own because I am less concerned than Lady Hale and Lord Collins about what I regard as the natural construction of article 12.3(b). Indeed it seems to me that there is much to be said for the conclusion that that construction is acte clair. As I see it, the natural construction of article 12.3(b) construed in its context and having regard to its provenance as set out by Lord Collins at paragraphs 57 and 58 is that the relevant acceptance of jurisdiction must be before the court is seised.

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78. The question is what is meant by the expression "at the time the court is seised" in articles 12.1 and 12.3 of Brussels II Revised. For present purposes the relevant provision is article 12.3, which provides:

> "3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 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."

Article 12.1(b) is in very similar terms.

79. Until after Mr Setright QC had made his submissions, it had been contended by Mr Baker QC on behalf of the mother that the expression "the time the court is seised" in both article 12.1 and article 12.3 meant the specific point when the court is seised as defined by article 16 of the Regulation. Mr Baker submitted that that construction was to be preferred to that of the Court of Appeal, which held, as Thorpe LJ put it at para 28, that the court was seised throughout the continuance of the proceedings.

80. Article 16 has been set out by Lady Hale. It identifies the time when "a court shall be deemed to be seised". It is plain that it is describing a particular moment and not a period of time. Thus in both (a) and (b) it provides for a particular moment when the court is seised, namely either when the document instituting the proceedings is lodged with the court or, if the document has to be served before being lodged with the court, when it is received by the authority responsible for service. In each case there is a proviso (or condition defeasant), namely that the applicant has not subsequently failed to take steps he was required to take, in the first case to have service effected on the respondent and in the second case to have the document lodged with the court. As Lady Hale says, the importance of having a fixed time when the court is seised is explained by article 19 because, if the court first seised has jurisdiction, the court second seised must decline jurisdiction. It is thus important to know in each case when the court is seised and which is the court first seised.

81. Mr Baker's submission was based on the natural construction of the article construed in its context, which includes articles 16 and 19. While I entirely agree with Lady Hale that evidence of subsequent events may (and often will) assist the court to decide what the position was at the moment identified as the time the court is deemed to be seised under article 16, I see nothing in the language of article 12.3 (or the equivalent language of article 12.1) to suggest that, if the court was not seised in accordance with article 16 at the time the document instituting the proceedings is lodged, it can somehow become seised at a later date. The only provision affecting the position as at the date of seisin is the proviso in article 16, which might defeat the seisin. However, subject to that, as I see it, there is no scope for later seisin. Once jurisdiction is acquired, the court has jurisdiction throughout the proceedings.

82. It appears to me that in principle no-one should commence proceedings of any kind unless the court has jurisdiction or will have it at the moment it is seised of the proceedings. Otherwise the court is being asked to exercise jurisdiction which it does not have. This is of

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particular importance in this context because, where the court first seised has jurisdiction, under article 19 a court second seised must decline jurisdiction, once it is established that the court first seised has jurisdiction. Article 16 makes it clear that whether it has jurisdiction is to be tested as at the time of seisin as defined by article 16. Any other conclusion seems to me to be likely to lead to confusion.

83. Although Mr Setright submitted that in both article 12.1(b) and article 12.3(b) the words "at the time the court is seised" identify the parties, I do not think that that is a convincing reading of the language. It is much more natural to read the expression as requiring the acceptance of jurisdiction at the time the court is seised. All the articles of the Regulation relate to the moment of seisin. This seems to me to be implicit in articles 3, 6 and 7 and explicit in articles 8, 12, 13 and 14. Moreover, as Lord Collins demonstrates at paragraphs 57 and 58, the provenance of article 12 strongly supports this approach. Thus the Commission proposal in relation to what became article 12(3) provided that the courts of a Member State would have jurisdiction where "all holders of parental responsibility have accepted jurisdiction at the time the court is seised". The Commission's Practice Guide is to the same effect. Although I quite understand that the point was not argued, it is I think of some note that this conclusion is consistent with a dictum of Lawrence Collins LJ in *Bush v Bush* [2008] EWCA Civ 865, [2008] 2 FLR 1437 at para 53. As he puts it paragraph 60 above, the paradigm case for acceptance of jurisdiction would be actual agreement by the parents at the time proceedings were instituted.

84. In addition it seems to me that the words "has been accepted" support the same approach. Thus, as I read them, both article 12.1(b) and 12.3(b) require that "the jurisdiction of the courts has been accepted … at the time the court is seised" as defined in article 16. I respectfully disagree with Lady Hale at paragraph 27 that the expression 'has been accepted' is more consistent with the possibility of later acceptance of jurisdiction. On the contrary, it seems to me to support the proposition that the acceptance must be before the seisin.

85. Various other solutions have been suggested. The Court of Appeal suggested that the parties can reach agreement at any time after seisin. This might be months or years after the moment identified in article 16. I do not see how such an approach fits with articles 16 and 19. Mr Setright's construction does not seem to me to be a convincing reading of the language. Nor to my mind is that of Professor Rauscher quoted by Lady Hale at paragraph 29. The expression "at the time the court is seised" appears not only in article 12 but also in article 8, where it surely relates to the time the court is seised as defined in article 16, and does not mean "has been seised".

86. Further, if "is seised" means "has been seised", it is not easy to see why the Court of Appeal's approach, namely that it means during the whole period of seisin, is wrong. The problem with it is that stated above, namely that it does not readily fit in with the approach of the Regulation to the court first seised. Lady Hale suggests at paragraph 30 that article 16 fixes which proceedings are first in time for priority purposes but contains the possibility that apparent seisin may not mature into actual seisin unless the applicant effects service or lodges with the court. The suggestion is that a similar approach might be taken to prorogation so that the apparent seisin when the application is lodged does not mature into actual seisin until the respondent is served and has an opportunity to indicate whether or not he accepts jurisdiction. It is also suggested that that would be consistent with the English use of "has been" rather than "was".

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87. For my part, I find those suggestions difficult to accept. The Regulation could no doubt have so provided but it did not. As I see it, as stated above, the way article 16 works is that there is seisin on the date identified subject to a condition defeasant. That is not a case of apparent seisin maturing into actual seisin but there being actual seisin, which would take priority over any subsequent seisin, unless there was no service or lodgement. This would be known to the respondent immediately and the position would thus be clear immediately and, absent a failure of the kind expressly specified in article 16, the seisin would have priority over seisin in another jurisdiction before service or lodgement. I do not see how this can readily be applied to article 12.1(b) or article 12.3(b). On the face of it the court would have no jurisdiction at the moment of seisin; yet the suggestion must I think involve the proposition that the court would have jurisdiction retrospectively if at some future moment the jurisdiction was unequivocally accepted. By then another court might be seised and have jurisdiction as the court first seised. Is it really to be supposed that that other court would be required to decline jurisdiction under article 19 even though at the time it was seised no other court was seised? My answer to that question would be no.

88. I appreciate that it is contemplated that the respondent would take a stance immediately and that the position would be much as occurs (or occurred) under, for example, article 23 of the Brussels Convention and article 24 of the Brussels I Regulation which are referred to by Lord Collins at paragraph 53. I also appreciate the force of the point that it is very odd for an unconditional appearance, which of course takes place after seisin, to be a ground of jurisdiction in, say, the Brussels I Regulation and not in the Brussels II Revised Regulation. However, in article 24 of Brussels I appearance is a free standing ground of jurisdiction, whereas there is no equivalent provision in the Brussels II Revised Regulation.

89. I fully understand the concerns expressed by Lady Hale and Lord Collins (and indeed Professor Rauscher) that article 12 will or may be of limited value if it does not extend to post seisin acceptance or agreement. However, it seems to me that the concerns are somewhat overstated. As I see it, the time for parties to decide in what jurisdiction to proceed in matters relating to parental responsibility is before issuing the relevant proceedings. It is at that time that questions of jurisdiction should surely be considered, if only in order to decide where to issue the relevant process. It seems to me to be desirable that parents considering proceedings should be advised that that is the time to make an appropriate agreement. I agree with Lord Collins that that is the paradigm case and it seems to me that the problem should be tackled at the outset rather than that proceedings should be started without jurisdiction in the hope that the other party (or parties) will agree later or do something which could be construed as unequivocal acceptance of jurisdiction.

90. The concerns expressed can I think be resolved in this way. If an express agreement to jurisdiction is made or there is an unequivocal acceptance of jurisdiction after the court is seised and, by that time, proceedings have been commenced in a court in another Member State and that court has become seised, article 19 will operate to give exclusive jurisdiction to that second court. This is on the basis that at the time the first court was seised it did not have jurisdiction and there is nothing in the Regulation to provide for retrospective seisin; so that for the purposes of the Regulation the court first seised is the second court. The parties' legitimate interests are however protected by article 15, which gives the court "having jurisdiction as to the substance of the matter" a power to transfer all or part of the case to a court of another Member State if it concludes that such a court is in a Member State with which the child has a particular connection and that it would be better placed to hear the case or part of it.

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91. If, on the other hand, there is no court of another Member State that has jurisdiction under the Regulation, I can at present see no reason why the applicant should not issue fresh proceedings and rely upon the agreement or unequivocal acceptance in those proceedings to satisfy article 12.3(b). In this way the court will have jurisdiction at the time of seisin, which to my mind is what the Regulation intended. As I see it, in this way the concerns expressed by the Court of Appeal, Lady Hale, Lord Collins and others can be allayed. In particular in a case of this kind, where there is no other Member State which could have jurisdiction, the court in which the respondent has unequivocally accepted jurisdiction will have jurisdiction, albeit in proceedings commenced thereafter.

92. I appreciate that these are all questions for decision in another case. I express provisional views upon them in the hope that they may help to resolve potential issues in the future without the delay inevitably involved in a reference to the European Court of Justice. In the meantime, I agree that the appeal in this case should be allowed.

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