No. 18-661

In the Supreme Court of the United States

JASON MICHAEL ZANK,
Petitioner,

v.

LIZ LORENA LOPEZ MORENO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Motion by *Reunite* International Child Abduction Centre for Leave To File a Brief as *Amicus Curiae* and Brief of *Amicus Curiae Reunite* International Child Abduction Centre In Support of Neither Party

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MOTION BY *REUNITE* INTERNATIONAL CHILD ABDUCTION CENTRE FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

Pursuant to Rule 37.2 of the Rules of this Court, *Reunite* International Child Abduction Centre hereby moves for leave to file the accompanying brief as *amicus curiae* in support of neither party on the merits of their respective positions, but in support of certiorari being granted.

Reunite International Child Abduction Centre ("*Reunite*") is the leading charity in the United Kingdom (the "UK") specialising in advice, assistance, mediation, and research in relation to international parental child abduction and the movement of children across borders. According to the United States Department of State's 2018 Annual Report on International Child Abduction, in 2016 and 2017 (the most recent years for which data is available) there were 80 international child abduction cases pending between the Central Authorities of the United States and the UK, involving 109 children.[1] *Reunite* therefore has an interest in the correct interpretation of the 1980 Hague Convention on the Civil Aspects of International

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[1] *See* United States Department of State Annual Report on International Child Abduction (2018), *available at* https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/AnnualReports/2018 %20Annual%20Report%20on%20International%20Child%20Abduction%20FINAL1.pdf (last visited February 8, 2019).

Child Abduction ("the 1980 Hague Convention")[2], and in securing the prompt return of children wrongfully removed from or retained outside of their country of habitual residence.

Reunite submits that the issues engaged in this appeal are of fundamental importance to the operation and application of the 1980 Hague Convention in the USA and in the rest of the world, and in particular, between the United States and the UK. In submitting this brief, *Reunite* seeks to offer assistance and information to this Court with particular reference to the current position under English law and, where appropriate, international law.

This motion is necessary in that although Petitioner's counsel has consented to this filing, Respondent's counsel has advised *amicus curiae* that Respondent "does not object" but "cannot consent" to this filing.

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[2] T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10,493 (1986), text available at https://www.hcch.net/en/instruments/conventions/specialized-sections/childabduction (last visited February 8, 2019).

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QUESTION PRESENTED

Reunite will address the question presented in the Petitioner's Petition for Writ of Certiorari, with particular focus on the interpretation of the 1980 Hague Convention's "habitual residence" concept by English and other international courts.

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INTEREST OF AMICUS CURIAE[3]

Reunite International Child Abduction Centre ("*Reunite*") is the leading charity in the United Kingdom (the "UK") specialising in advice, assistance, mediation, and research in relation to international parental child abduction and the movement of children across borders. It is funded, principally, by the UK Ministry of Justice and the UK Foreign and Commonwealth Office.

Reunite has intervened – by providing written and sometimes also oral submissions – in many important international children's cases in the United Kingdom Supreme Court (hereafter the "UKSC") and in the European Court of Human Rights.[4] *Reunite* has also submitted *amicus curiae* briefs in this Court in *Abbott v. Abbott*, 560 U.S. 1 (2010) and *Lozano v. Alvarez*, 134 S. Ct. 1224 (2014). *Reunite* has been permitted to intervene in the five most recent cases to come before the UKSC that considered the concept of "habitual

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[3] Pursuant to Sup. Ct. R. 37.2, counsel for *amicus* certifies that counsel of record for all parties received timely notice of its intention to file an *amicus* brief at least 10 days prior to the due date for the *amicus curiae brief*. Petitioner consented to this filing. Respondent's counsel advised counsel for *amicus* that Respondent "does not object" but "cannot consent" to this filing. *Amicus* hereby certifies pursuant to Sup. Ct. R. 37.6 that this Brief was not authored in whole or in part by counsel for a party, nor did any person or entity other than *Amicus*, its members, or its counsel make a monetary contribution to fund the preparation or submission of this Brief.

[4] *Reunite* has intervened before the European Court of Human Rights in *X v. Latvia* (App. no. 27853/09) and *Ignaccolo-Zenide v. Romania*, (App. no. 31679/96).

residence." *See A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening)* [2013] UKSC 60, [2014] AC 1 (hereafter "*A v A*"); *Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 75, [2014] AC 1017 (hereafter "*Re L (A Child)*"); *Re LC (Children) (Reunite International Child Abduction Centre Intervening)* [2014] UKSC 1, [2014] AC 1038 (hereafter "*Re LC (Children)*"); *In re R (Children)* (Reunite International Child Abduction Centre and others intervening) [2015] UKSC 35, [2016] AC 76 (hereafter "*Re R (Children)*"); and *Re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] UKSC 4, [2016] AC 606 (hereafter "*Re B (A Child)*").

Reunite is not advancing, or seeking to advance, a particular outcome on the merits of these proceedings. In submitting this brief, *Reunite* seeks to offer assistance and information to this Court with particular reference to the current position in English law and, where appropriate, international law.

SUMMARY OF ARGUMENT

"Habitual residence" forms the cornerstone of the 1980 Hague Convention.[5] The 1980 Hague Convention is an international instrument *without* a co-ordinating supra-national court to provide a conformity of approach of interpretation among contracting States.

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[5] In *Mozes v. Mozes*, the Ninth Circuit described habitual residence as "the central – often outcome-determinative – concept on which the entire system is founded." 239 F.3d 1067, 1072 (9th Cir. 2001)

The question presented in the petition for a writ of certiorari is of considerable importance. That is because the majority of international instruments (whether within the European[6] context or otherwise) rely upon habitual residence as the primary indicator of connection and, therefore, the foundation of jurisdiction in relation to children. In the UK, those instruments (beyond the 1980 Hague Convention) currently include Council Regulation (EC) No. 2201/2003, (hereafter "Brussels IIa"),[7] and 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 (hereafter "the 1996 Hague Convention") which the United States has signed but not yet implemented.

The UKSC has held that courts should approach the question of a child's habitual residence consistently, notwithstanding the context in which the question arises. Thus, the same approach is taken to the determination of a child's habitual residence, whether it arises under the 1980 Hague Convention, the 1996 Hague Convention or Brussels IIa. *See A v A* at ¶ 54 (ii), (iv). As the three instruments referred to above are intended to operate in a harmonious and complementary manner, it is respectfully suggested that it is sensible for the lodestar that guides the

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[6] As of February 2019, the UK is currently a member of the EU, and is subject both to European regulations (such as *Brussels IIa)* and to the jurisdiction of the CJEU.

[7] Brussels IIa is an EU instrument that governs, *inter alia*, the existence and exercise of jurisdiction in relation to children.

operation of these instruments to be interpreted consistently.

Indeed, if habitual residence is defined consistently for the purposes of the essentially complementary instruments of the 1980 and 1996 Hague Conventions, and if those two Conventions are to operate effectively internationally, it is argued that it is necessary for countries to adopt an *autonomous* interpretation of the concept of "habitual residence." Such an interpretation must take into account the approach that is taken in other contracting States. As the Ninth Circuit held in its decision in *Mozes*:

> To achieve the uniformity of application across countries, upon which depends the realization of the Convention's goals, courts must be able to reconcile their decisions with those reached by other courts in similar situations. As the leading treatise on the Convention has observed, '[o]nly in exchanging and considering other views will a sophisticated and uniform interpretation evolve.'

Mozes, 239 F.3d at 1072.

There have, in recent years, been considerable developments in the approach taken to the determination of a child's habitual residence by the courts of England and Wales. Initially, and notwithstanding the principle as stated in *Akbarali v Brent London Borough Council; Abdullah v Shropshire County Council; Shabpar v Barnet London Borough Council; Jitendra Shah v Barnet London Borough Council; Barnet London Borough Council v Nilish Shah* [1983] 2 AC 309, (hereafter referred to as "*Ex p Shah*"),

and *C v S (minor: abduction: illegitimate child)* [1990] 2 All ER 961*, sub nom Re J (a minor) (abduction: custody rights)* [1990] 2 AC 562, (hereafter "*C v S sub nom In re J (A Minor)")* (quoted in the judgment in *Mozes*), it appeared that the English courts applied legal "rules" (or, at the very least, presumptions) to the determination of a child's habitual residence, with particular reference to the intention of the parents with regard to the child's habitual residence.

More recently, however, the UKSC has reverted to a more factual approach following two important judgments of the Court of Justice of the European Union, (hereafter the "CJEU"), *Proceedings brought by A (Case C-523/07),* [2010] Fam 42 (hereafter "*Proceedings brought by A*"), and *Mercredi v Chaffe (Case C-497/10),* [2012] Fam 22 (hereafter "*Mercredi v Chaffe*").[8]

Nonetheless, and while disparaging and formally rejecting the application of "rules" or presumptions to the otherwise factual enquiry, the UKSC has identified a number of different aspects of the habitual residence enquiry that are relevant, and which must be examined in any particular case. These are not "rules," "sub-rules," or presumptions, but are matters intended to guide the judicial fact-finder in reaching a conclusion.

In all the circumstances, therefore, it is argued that it would be beneficial for the approach to the

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[8] The factual, more child centred approach in these two decisions has been followed in further decisions of the CJEU: *see*, *e.g.,* Case C-111/17 *OL v. PQ*, June 8, 2017; Case C-512/17 Proceedings brought by HR (with the participation of KO and another) [2018] 3 WLR 1139*;* and Case C-393/18 *UD v. XB*, 17 October 2018.

determination of a child's habitual residence in a 1980 Hague Convention context that is taken by courts in the United States to be settled by this Court so that a single approach can be applied thereafter across all States (within the USA).

REASONS THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. Development of International Interpretation of "Habitual Residence"

A. The use of "habitual residence" by the Hague Conference

By the 1960s and in the years following, the concept of "habitual residence" was repeatedly used in a large number of international conventions conceived and drafted by the Hague Conference. However, it was and continues to be the consistent approach of the Hague Conference not to define "habitual residence" for the purposes of its conventions. This is generally thought to be because to do so would inhibit the latitude of domestic courts to apply the concept to the factual circumstances of the particular case. As long ago as 1951, the Committee Chairman of the VIIth Session of the Hague Conference commented that: "Habitual Residence is a factual notion and needs no connection with any given law system." *See*, *Nationality or Domicile? The Present State of Affairs, 3 Recueil des Cours de L'Academie de Droit International de la Haye,* 1969 at 428.

That disinclination to define the term "habitual residence" has continued to the present day. In the Explanatory Report to the 1980 Hague Convention, Prof. Pérez-Vera said "[t]he Convention, following a

long-established tradition of the Hague Conference does not define the legal concepts used by it."[9]

B. "Ordinary residence" and "habitual residence": *Ex p Shah*

The classic modern interpretation of "ordinary residence" under the law of England and Wales was until recently (when the European approach was adopted and adapted by the UKSC) that set out in *Ex p Shah*. In *Ex p Shah*, Lord Scarman set out what became the accepted starting point for the definition of the words "ordinarily resident" and, indeed, "habitually resident":

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

Ex p Shah at ¶ 343G-H.

Following the opinion of Lord Scarman in *Ex p Shah*, the interpretation by the courts of England and Wales of "habitual residence" continued to evolve. For example, in *C v S sub nom In re J (A Minor)*, (a case which concerned the interpretation of Article 3 of the

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[9] Elisa Pérez-Vera, *Explanatory Report: Hague Conference on Private International Law,* 3 Acts and Documents of the 14th Session at ¶ 83 (*see also* ¶ 66) (1980).

1980 Hague Convention), Lord Brandon in the House of Lords said:

> The first point is that the expression 'habitually resident'… is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question of whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. … An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that, where a child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.

C v S sub nom In re J (A Minor) at ¶¶ 578F – 579H.

C. "Habitual residence" and the 1980 Hague Convention: the present position in the law of England and Wales as interpreted by the UKSC

In recent years, the interpretation of the concept of "habitual residence" in the law relating to children in England and Wales has been radically influenced and reshaped by certain decisions of the CJEU. This has, in particular, been a result of the coming into force of the directly applicable European Regulation, *Brussels IIa*, which has been said to "complement" and "bolster" the provisions of the 1980 Hague Convention. The UKSC has, in a number of decisions discussed below, sought to harmonize the concept of "habitual residence" in the law of England and Wales with the reasoning of the decisions of the CJEU.

Accordingly, largely precipitated by two important decisions of the CJEU (*Proceedings brought by A* and *Mercredi v Chaffe*) the UKSC has, since 2013, considered the proper interpretation of "habitual residence" in cases concerning children on no less than five occasions: that is to say, (i) *A v A* (judgment having been given on 9 September 2013); (ii) *Re L (A Child)* (4 December 2013); (iii) *Re LC (Children)* (15 January 2014); (iv) *Re R (Children)* (22 May 2015); and (v) *Re B (A Child)* (3 February 2016).

Each of the five cases determined by the UKSC has contributed to the evolution of the concept of "habitual residence." The first, *A v A*, concerned children who had been retained by their father and his family in Pakistan against their mother's wishes (and so accordingly it did not directly engage the principles of the 1980 Hague Convention). This was the first

occasion that the UKSC had had the opportunity to consider in detail the proper interpretation of "habitual residence" in the light of the two decisions of the CJEU identified above. In giving the leading judgment, Baroness Hale expressly abandoned the previous approach espoused by the House of Lords in England and Wales in *Ex p Shah* and summarized the correct approach as follows (those passages omitted below not being relevant for the present discussion):

> (i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.
>
> (ii) …
>
> (iii) The test adopted by the European court is 'the place which reflects some degree of integration by the child in a social and family environment' in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.
>
> (iv) …
>
> (v) In my view, the test adopted by the European court is preferable to that earlier adopted by the English courts, being focused on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from Shah should be abandoned when deciding the habitual residence of a child.

> (vi) The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.
>
> (vii) The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.
>
> (viii) As the Advocate General pointed out in opinion, para 45 and the court confirmed in judgment, para [43] of Proceedings brought by A (Case C-523/07) [2010] Fam 42, it is possible that a child may have no country of habitual residence at a particular point in time."

A v A at ¶ 54.

In *Re L (A Child)*, the second of the five cases, the UKSC for the first time considered the interpretation of "habitual residence" in relation to the provisions of the 1980 Hague Convention. As the Court acknowledged, "*A v A* was not a Hague Convention case." However, the Court held that the test enunciated in *A v A* should apply to proceedings under the 1980 Hague Convention. *See Re L (A Child)* at ¶ 19. Baroness Hale went on to consider the role of parental intention in the habitual residence enquiry:

> … it is clear that parental intention does play a part in establishing or changing the habitual residence of a child: not parental intent in

> relation to habitual residence as a legal concept, but parental intent in relation to the reasons for a child's leaving one country and going to stay in another. This will have to be factored in, along with all the other relevant factors, in deciding whether a move from one country to another has a sufficient degree of stability to amount to a change of habitual residence.

Id. at ¶ 23.

The principal issue for the UKSC in the third case, *Re LC (Children),* was whether, in proceedings under the 1980 Hague Convention, "the court in making…[a] determination in relation to an adolescent child who has resided, particularly if only for a short time, in a place under the care of one of her parents, [could] have regard to her own state of mind during her period of residence there in relation to the nature and quality of that residence." *See Re LC (Children)* at ¶ 1. In addressing that principal issue, Lord Wilson (giving the judgment of the Court) said:

> Where a child of any age goes lawfully to reside with a parent in a state in which the parent is habitually resident, it will no doubt be highly unusual for that child not to acquire habitual residence there too. The same may be said of a situation in which, perhaps after living with a member of the wider family, a child goes to reside there with both parents. But in highly unusual cases there must be room for a different conclusion; and the requirement of some integration creates room for it perfectly… I see no justification for a refusal even to consider evidence of her own state of mind during the

> period of residence there. Her mind may – possibly – have been in a state of rebellious turmoil about the home chosen for her which would be inconsistent with any significant degree of integration on her part…What can occasionally be relevant to whether an older child shares her parent's habitual residence is her state of mind during the period of her residence with that parent.

Id. at ¶ 37.

In *Re R (Children)*, the fourth case, the UKSC had once again to consider the issue of habitual residence in proceedings under the 1980 Hague Convention. Lord Reed, giving the judgment of the Court, stated:

> It is therefore the stability of the residence that is important, not whether it is of a permanent character. There is no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely.

Re R (Children) at ¶ 16.

In *Re B (A Child),* the last of the five recent cases, the issue was whether the court had jurisdiction to make orders about a child at a particular time. Lord Wilson, giving the judgment of the majority of the Court (3:2), said:

> I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that

> a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it.

Re B (A Child) at ¶45.

D. The "habitual residence" of children as interpreted in New Zealand and Australia

Although in recent years the UKSC has sought in relation to cases concerned with the 1980 Hague Convention to adopt an approach to the issue of "habitual residence" that sits largely consistently with the jurisprudence of the CJEU, other countries (for example, common law countries outside the European Union) have, perhaps inevitably, developed different approaches to the concept. In circumstances where the provisions of the 1980 Hague Convention do not define the term, it is and would have been inevitable that different shades of meaning have evolved from one Contracting State to another. That said, the appellate courts of New Zealand and Australia have developed something of a consistent interpretation.

In *Punter v Secretary for Justice* [2007] 1 NZLR 40, the New Zealand Court of Appeal said, in relation to a court's enquiry into "habitual residence," (which was described as "a broad factual enquiry"), as follows:

> Such an enquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration…

Punter v Secretary for Justice [2007] 1 NZLR 40 at ¶ 88.

That analysis was commended by the High Court of Australia in *LK v Director-General, Department of Community Services* [2009] HCA 9 which stated that "the search is for the connection between the child and the particular state…the relevant criterion is a shared intention that the children live in a particular place with a sufficient degree of continuity to be properly described as settled." *LK v Director-General* at ¶ 44. The High Court of Australia earlier stated that the:

> application of the expression 'habitual residence' permits consideration of a wide variety of circumstances that bear upon where a person is said to reside and whether that residence is to be described as habitual. Secondly, the past and present intentions of the person under consideration will often bear upon the significance that is to be attached to particular

> circumstances like the duration of a person's connections with a particular place of residence.

Id. at ¶ 23.

In relation specifically to a child's "habitual residence," and the impact of a particular parent's intentions upon it, the Court said:

> when considering where a child is habitually resident, attention cannot be confined to the intentions of the parent who in fact has the day-to-day care of the child. It will usually be necessary to consider what each parents intends for the child. When parents are living together, young children will have the same habitual residence as their parents. No less importantly, it may be accepted that the general rule is that neither parent can unilaterally change that place of habitual residence. The assent of the other parent (or a court order) would be necessary. But again, if it becomes necessary to examine the intentions of the parents, the possibility of ambiguity or uncertainty on the part of one or both of them must be acknowledged.

Id. at ¶ 29.

E. The "habitual residence" of children as interpreted in Canada

More recently, the majority of the Supreme Court of Canada, after an extensive survey of the international approach (including the decisions of the CJEU) adopted, in the context of a 1980 Hague Convention case, what it described as the "hybrid approach" to

habitual residence (in contrast to the "parental intention approach" and the "child centred approach"). *See Office of the Children's Lawyer v Balev*, 2018 SCC 16 at ¶¶ 5, 39-47. The hybrid approach, it determined "holds that instead of focusing primarily or exclusively on either parental intention or the child's acclimatization, the judge determining habitual residence under Article 3 must look to all relevant considerations arising from the facts of the case at hand." *Id*. at ¶ 42.

The "hybrid approach" to habitual residence was, in the view of the Supreme Court of Canada, the approach which had been endorsed by recent decisions from, amongst others, the CJEU, the UK, Australia and New Zealand. *Id*. at ¶ 50. The Court determined that it should be followed in Canada because: (i) the principle of harmonisation supported that approach; and (ii) the approach best conformed to the text, structure and purpose of the 1980 Hague Convention. *Id*. at ¶ 48.

II. Development of United States Interpretation of "Habitual Residence"

A. An analysis of the approach that has developed in the USA in the context of the 1980 Hague Convention

It is suggested that the different approaches that have been adopted by the United States courts of appeal could be categorized in the following way:

(i) The "child centered focus" as established in *Friedrich v. Friedrich,* 983 F.2d 1396, 1401 (6th Cir. 1993) and applied in *Jenkins v. Jenkins,* 569 F.3d 549, 556 (6th Cir. 2009);

(ii) A "combined child's connection/parental intention focus" (or the "hybrid parental intent and child's perspective approach") derived from *Feder v. Evans-Feder*, 63 F.3d 217, 222-24 (3d Cir. 1995); and

(iii) The "parental intention focus," which is credited by INCADAT[10] to the decision in *Mozes* as applied in subsequent cases heard by the Seventh, Ninth and Eleventh Circuits. *See, e.g. Koch v. Koch,* 450 F.3d 703 (7th Cir. 2006)*; Holder v. Holder*, 392 F.3d 1009 (9th Cir 2004); *Ruiz v. Tenorio,* 392 F.3d 1247 (11th Cir 2004).

While the three lines of approach referred to above have developed separately, they have their origins in a combination of academic texts and English authority. In particular, those decisions that focus upon parental intention (whether independently or in combination with the child's connection to the country concerned) have developed from the decision of the Ninth Circuit in *Mozes* which (as analyzed further below) took as its influence the decision of the UK House of Lords in *Ex p Shah*.

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[10] "INCADAT" is the International Child Abduction Database of leading 1980 Hague Convention case law. It was developed and is maintained by the Permanent Bureau of the Hague Conference on Private International Law. The purpose of INCADAT is to facilitate the goal of uniform interpretation of the 1980 Hague Convention. *See* INCADAT Press Release, June 26, 2003, available at: https://www.hcch.net/en/news-archive/details/?varevent=48 (last visited February 8, 2019).

The diametrically opposite approach focussing on the child's perspective was established considerably earlier by the Sixth Circuit in *Friedrich*, in which the court considered and applied a decision of the Family Division of the English High Court: *In Re Bates,* No. CA 122.89, High Court of Justice, Family Div'n Ct. Royal Courts of Justice, UK (1989), together with commentary from Dicey and Morris, *The Conflict of Laws* 166 (11th ed.). The Ninth Circuit considered *Friedrich* when it decided *Mozes*, but rejected the Sixth Circuit's approach on the basis outlined by the Third Circuit's hybrid approach in *Feder* – that it is necessary to take account of "the parents' present, shared intentions regarding their child's presence." *Mozes,* 239 F.3d at 1076; *see also Feder*, 63 F.3d at 224.

B. *Mozes* and its application of English authority

In its decision in *Mozes*, the Ninth Circuit considered English authority at several stages of its enquiry, including *Ex parte Shah* and *C v S sub nom Re J*. The combined effect of the Ninth Circuit's evaluation of those authorities was its determination that: "…the agreement between the parents and the circumstances surrounding it must enable the court to infer a shared intent to abandon the previous habitual residence, such as when there is effective agreement on a stay of indefinite duration." *Mozes,* 239 F.3d at 1081.

Thus it was that an approach founded primarily (if not entirely) upon parental intention developed. It is, perhaps, unsurprising that this was so. A similar situation had developed in England following *Ex p Shah* whereby what has come to be described as a "rule" developed through various authorities (the

classic statement of the "rule" being within the dictum of Lord Donaldson, MR in the Court of Appeal in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 at 572) that where two parents had parental responsibility for a child, one could not change the child's habitual residence unilaterally.

The existence of such a "rule" was highlighted by Baroness Hale within her judgment in *A v A*. *See A v. A* at ¶ 19. Baroness Hale continued, however, to note that the "rule" had not been universally adopted, citing, *inter alia*, the decision of the Ninth Circuit in *Mozes*. Later, she questioned its utility. Following the decisions of the UKSC in *A v A* and *Re L (A Child)*, the Court of Appeal for England and Wales held in *In re H (Children) (Reunite International Child Abduction Centre Intervening)* [2014] EWCA Civ 1101, [2015] 1 WLR 863 at ¶ 34 (hereafter "*Re H (Children)*"), that the above "rule" should be consigned "to history."

C. The focus on the child's position in *Friedrich* and *Feder*

In contrast to the approach taken by the Ninth Circuit in *Mozes*, the Sixth Circuit in *Friedrich* adopted an approach that requires that "the court…focus on the child, not the parents, and examine past experience, not future intentions" *Friedrich,* 983 F.2d at 1401. Before reaching that formulation, the court had cautioned itself, based upon a similar warning given in *Re Bates*, in the following terms:

> It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as

> common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or presuppositions."

Id. at 1400.

It might therefore be thought that the eschewing of any evaluation of parental intention was a response to that warning. The approach taken in *Friedrich* has developed into authority for the proposition that the inquiry "should focus exclusively on the child's past experience. Any future plans that the parents may have are irrelevant to [the] inquiry." *See, e.g.*, *Robert v. Tesson,* 507 F.3d 981 (6th Cir. 2007). The child-centred approach taken by *Friedrich* (and the decisions that have followed it) was developed by the Third Circuit in *Feder*, founding the "hybrid" approach. While there are some distinctions, it is the "hybrid" approach that may hold the closest similarity to the English law as it now is (as described above). Again, it is founded upon the decision of Mr Justice Waite in *Re Bates*, which (as indicated above) drew from *Ex p Shah* in its formulation.

D. The significance of parental intention in the UK Supreme Court cases

It is clear from the extracts of the five UKSC cases that appear above that parental intention (and, in certain limited circumstances, the "state of mind" of the child itself) continue to be relevant when determining where a child is habitually resident. The focus of the enquiry into that intention has, however, shifted considerably from that which was typically undertaken

when cases were decided under the previous approach as established in *Ex p Shah* and *C v S sub nom Re J*.

In particular, when considering parental intention, the following applies:

(i) The focus on the enquiry is on the situation of the child "with the purposes and intentions of the parents being merely one of the relevant factors." *See A v A* at ¶ 54 (v);

(ii) Parental intention is relevant and "does play a part in establishing or changing the habitual residence of a child: not parental intent in relation to habitual residence as a legal concept, but parental intent in relation to the reasons for a child's leaving one country and going to stay in another." *See Re L (A Child)* at ¶ 23;

(iii) In appropriate cases, the "state of mind" of a competent, adolescent child can be relevant to the determination of their habitual residence. *See Re LC (Children)* at ¶ 37;

(iv) It is a misdirection to approach an enquiry into a child's habitual residence by seeking to determine whether or not there is an intention for that child to acquire a habitual residence. As Baroness Hale held in *Re LC (Children),* "It is not a matter of intention: one does not acquire a habitual residence merely by intending to do so; nor does one fail to acquire one merely by not intending to do so…" *See Re LC (Children)* at ¶ 59; and

(v) "There is no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely." *See Re R (Children)* at ¶ 16.

It can therefore be seen that, while still important, parental intention is not necessarily given greater weight than any other factor when determining a child's habitual residence. Further, the court evaluates parental intention in relation to the nature of the child's stay in the country in question (by way of example, whether it was for a vacation, or some other temporary purpose, or whether it was intended to be for a longer duration).

In that way, parental intention is treated as one factor within a broad factual enquiry, rather than as a separate and, perhaps, determinative enquiry that precedes or is separate from an evaluation of the child's circumstances. Within such an enquiry, the factors that are relevant to the habitual residence determination will vary in terms of the weight that they are given depending on the circumstances of the case. *See, e.g.*, *Re B (A Child)* at ¶¶ 49-51 (providing an example of how those facts might be weighed against each other).

CONCLUSION

In *Re H (Children)*, Lady Justice Black (sitting in the Court of Appeal for England and Wales) explained the importance of the decision of the UKSC in *A v A* in the following way: "Overall, what to my mind emerges from Lord Hughes' judgment, as from Baroness Hale's,

is a general disinclination to encumber the factual concept of habitual residence with supplementary rules…" *Re H (Children)* at ¶ 30. In relation to *Re L (A Child)*, she added that: "*Re L* also shows a continuing reluctance on the part of the court to permit legal glosses to be placed on the factual concept of habitual residence…" *Re L (A Child)* at ¶ 32.

Finally, Lady Justice Black observed that any remaining "rules" (and, particularly in that context, the "rule" that one parent could not change a child's habitual residence without the consent of the other) should be consigned "to history in favour of a factual enquiry tailored to the circumstances of the individual case." *Id*. at ¶ 34.

Accordingly, the focus of the court will be on the basic, factual reality of the child's life, taking into account all of the circumstances that are relevant to deciding "the place which reflects some degree of integration by the child in a social and family environment," and so where the child is habitually resident. That is not to say that parental intention is irrelevant. Parental intention remains a factor, and in certain cases it might be a factor that commands significant weight. However, the factual approach that is now required pursuant to the decisions of the CJEU as applied by the UKSC requires that no single factor is automatically given precedence or greater weight over another, unless the particular facts of the case requires such an approach.

Reunite submits that the issues engaged in this appeal are of fundamental importance to the operation and application of the 1980 Hague Convention in the

USA and in the rest of the world and should therefore be considered and decided by this Court.

Respectfully Submitted,

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