LORD REED:

1. The issue in this case is whether the court should order the return to France of two little girls who have been living with their mother in Scotland since July 2013. The issue arises under article 3 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, as incorporated into the law of the United Kingdom by the Child Abduction and Custody Act 1985.

The facts

2. The children were born in France in August 2010 and June 2013. Their father is a French citizen who has lived in France all his life. He has a small business in France. Their mother is a British and Canadian citizen, who was born in Canada of Scottish parents. She works from home for a Canadian employer.

3. Until July 2013 the family lived together in France, visiting the mother's parents in Scotland from time to time. During July 2013 the mother and the two children came to live in Scotland. They did so with the agreement of the children's father. According to the father's affidavit, it had been agreed that the mother and the children should live in Scotland during her 12 months' maternity leave, returning afterwards to France. According to the mother's affidavit, it had been agreed that the family would move permanently away from France, although not necessarily remaining in Scotland beyond the

duration of her maternity leave. The father was to join the rest of the family after the family home in France had been sold, and arrangements had been made in relation to the management of his business, and they would then decide where to settle in the longer term. What is uncontroversial is that the mother and children were to live in Scotland for the period of about a year during which she was on maternity leave.

4. Following their arrival in Scotland, the mother and children lived initially with the maternal grandparents. In August 2013 the family home in France was sold, the sale being completed two months later. The elder child also started to attend the local nursery in Scotland in August 2013, and has continued to do so since then. The father visited the rest of the family in Scotland for several days every month. The mother and children joined the father for a holiday in France in September 2013, and also spent twelve days with him in October 2013 at their former home in France, shortly before it changed hands. On their return to Scotland they moved into a rented house, adjacent to the maternal grandparents, which the mother and father had inspected together. The mother and children have lived there ever since.

5. On 9 November 2013 the mother discovered infidelity on the part of the father and told him that their relationship was over. On 20 November 2013 he was served with notice of proceedings in Scotland in which the mother sought

a residence order in respect of the children, and interdict against the father removing them from Scotland.

6. In the present proceedings, the father maintains that the initiation of those proceedings was a wrongful retention within the meaning of the Hague Convention. That proposition is predicated upon the children's being habitually resident in France immediately before 20 November 2013. That is the question on which issue was joined in the courts below.

The proceedings below

7. In the Outer House of the Court of Session, the Lord Ordinary, Lord Uist, identified the first question which he had to determine as being whether the children were habitually resident in France immediately before 20 November 2013. It was common ground that that question was to be determined in accordance with the guidance given by this court in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60; [2014] AC 1 and *In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 75; [2014] AC 1017.

8. After summarising the evidence and the parties' contentions, the Lord Ordinary stated (para 7):

> "After considering all the relevant evidence I am satisfied that the children had not immediately before 20 November 2013 lost their habitual residence in France. They had both been born there and lived there in family with their parents until 26 July. This was a French family living in France. There is nothing which happened thereafter which persuades me that they had ceased to be habitually resident in France. I conclude from the evidence and productions presented that the stay of the respondent and the two children in Scotland was to be of limited duration, consisting of the period of her maternity leave. I do not regard the sale of the family home in Narbonne as evidencing a joint intention to leave France for good. I am not persuaded that there was a joint decision to uproot themselves from France and relocate permanently to Scotland. The petitioner has his own expanding business in Narbonne, for which he relies on his livelihood (sic) and in order to maintain the respondent and children. He speaks little or no English. I reject as fanciful any suggestion that he intended to set up a business in Scotland. That would have involved abandoning his established business in France and attempting to set up a business in a country where he did not speak the language and had no obvious prospect of succeeding. He continued to live and work in France after the respondent and children came to live in Scotland, although he visited them regularly. The respondent and children returned to France on two occasions after their move to Scotland. Certain of the children's belongings were in storage in France. The lease of the property in which the respondent and children were living in Scotland was in her name alone. Nothing in the communications between the parties indicates a joint intention to uproot themselves from France and relocate permanently to Scotland."

The Lord Ordinary therefore granted the father's application.

9. That decision was reversed by an Extra Division of the Inner House of the Court of Session: [2014] CSIH 95; 2014 SLT 1080; [2014] Fam LR 131. The court considered that the Lord Ordinary had erred in law, in the passage which I have just quoted, in treating a shared parental intention to move permanently to Scotland as an essential element in any alteration of the children's habitual residence from France to Scotland. This error had deflected him from a proper consideration of the factors relied upon by the mother. Considering the matter afresh, in the light of the guidance provided by this court, the Extra Division concluded that the children were habitually resident in Scotland at the material time:

> "If the salient facts of the present case are approached in accordance with the guidance summarised earlier, the key finding of the Lord Ordinary is that the children came to live in Scotland. The real issue is whether there was a need for a longer period in Scotland before it could be held that there had been a change in their habitual residence. For our part, in the whole circumstances we would view four months as sufficient." (para 14)

The law

10. Article 1 of the Hague Convention provides that its objects include "to secure the prompt return of children wrongfully removed to or retained in any contracting state". In terms of article 3, the removal or the retention of a child is to be considered wrongful where, in the first place, it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or

alone, under the law of the state in which the child was habitually resident immediately before the removal or retention. Article 12 provides that, where a child has been wrongfully removed or retained in terms of article 3, and proceedings are commenced within one year before the judicial or administrative authority of the contracting state where the child is, the authority shall order the return of the child forthwith. Under article 13, the return of the child need not be ordered if it is established, inter alia, that the person having the care of the child consented to the removal or retention.

11. In relations between the member states of the EU other than Denmark, the Hague Convention is supplemented by the Brussels II Revised Regulation (EC) No 2201/2003 ("the Regulation"), which is in similar but not identical terms. The Regulation takes precedence over the Convention: see article 60.

12. It is common ground that "habitual residence", for the purposes of applying the Hague Convention and the Regulation, is to be determined in accordance with the guidance given by this court in the cases of *A v A, In re L* and *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1; [2014] AC 1038. It is also common ground that that guidance is consistent with the guidance given by the Court of Justice of the European Union as to the application of the Regulation in *Proceedings brought by A* (Case C-523/07) [2010] Fam 42, *Mercredi v Chaffe* (Case C-497/10PPU) [2012] Fam 22, and *C v M* (Case C-376/14PPU) [2015] Fam 116.

13. In *A v A,* Lady Hale drew attention at para 48 to the operative part of the judgment of the Court of Justice in *Proceedings brought by A*:

> "2. The concept of 'habitual residence' under article 8(1) of Council Regulation (EC) No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case." (p 69)

14. Lady Hale also noted at para 50 the need to focus upon the primary carer, rather than the child, in cases where the child is an infant. As the Court of Justice explained in *Mercredi v Chaffe*:

> "An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where … the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the court's case law, such as the reasons for the move by the child's mother to another member state, the languages known to the mother or again her geographic and family origins may become relevant." (para 55)

15. In the circumstances of the present case, it is also important to note what was said by Lady Hale in relation to passages in *Mercredi v Chaffe* which

appeared to import a requirement of permanence for residence to be habitual. In particular, in para 51 of *Mercredi v Chaffe* the Court of Justice stated:

> "In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host state, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case."

16. In *A v A,* Lady Hale commented at para 51:

> "At first instance in *DL v EL* [2013] FLR 163, Sir Peter Singer compared the French and English texts of the judgment, which showed that the French text had almost throughout used 'stabilité' rather than permanence and in the one place where it did use 'permanence' it was as an alternative to "habituelle": paras 71 et seq."

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.

17. As Lady Hale observed at para 54, habitual residence is therefore a question of fact. It requires an evaluation of all relevant circumstances. It focuses upon the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. It is necessary to assess the degree of integration of the child into a social and family environment in the country in question. The social and family environment of an infant or young child is shared with those (whether parents or others) on whom she is dependent. Hence it is necessary, in such a case, to assess the integration of that person or persons in the social and family environment of the country concerned. 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. In particular, it follows from the principles adopted in *A v A* and the other cases that the Court of Appeal of England and Wales was right to conclude in *In re H (Children) (Reunite International Child Abduction Centre intervening)* [2014] EWCA Civ 1101; [2015] 1 WLR 863 that there is no "rule" that one parent cannot unilaterally change the habitual residence of a child.

18. Finally, it is relevant to note the limited function of an appellate court in relation to a lower court's finding as to habitual residence. Where the lower court has applied the correct legal principles to the relevant facts, its evaluation is not generally open to challenge unless the conclusion which it reached was not one which was reasonably open to it.

The present case

19. Counsel for the father sought to persuade this court that there had been no error of approach by the Lord Ordinary, and that the Inner House had therefore not been entitled to interfere with his assessment.

20. I am unable to accept that submission. In the salient passage in his judgment, quoted earlier, the Lord Ordinary's focus was entirely upon whether there had been a joint decision to move permanently to Scotland. He began by expressing his conclusion, at para 7:

> "I conclude from the evidence and productions presented that the stay of the respondent and the two children in Scotland was to be of limited duration, consisting of the period of her maternity leave."

He then referred to aspects of the evidence which bore upon that issue, stating that he did not regard the sale of the family home in France as evidencing "a joint intention to leave France for good", and that he was not persuaded that there was "a joint decision to uproot themselves from France and relocate permanently to Scotland". In that regard, he referred to the father's business interests in France, his limited command of English, the fact that he continued to live and work in France, the fact that the mother and children had visited him there, the fact that certain of the children's belongings were in storage in France "after the [mother] and children came to live in Scotland", and the fact that the

lease of the house in Scotland was in the mother's name alone. He then concluded his discussion of the issue of habitual residence:

> "Nothing in the communications between the parties indicates a joint intention to uproot themselves from France and relocate permanently to Scotland."

21. In determining the case on this basis, the Lord Ordinary failed to apply the guidance given in the authorities. As I have explained, parental intentions in relation to residence in the country in question are a relevant factor, but they are not the only relevant factor. The absence of a joint parental intention to live permanently in the country in question is by no means decisive. Nor, contrary to counsel's submission, is an intention to live in a country for a limited period inconsistent with becoming habitually resident there. As was explained in *A v A,* the important question is whether the residence has the necessary quality of stability, not whether it is necessarily intended to be permanent. The Lord Ordinary's exclusive focus on the latter question led to his failing to consider in his judgment the abundant evidence relating to the stability of the mother's and the children's lives in Scotland, and their integration into their social and family environment there.

22. Counsel for the father further argued that the Extra Division had themselves fallen into error, in treating the critical issue as being whether it was necessary for the mother and children to have spent a longer period in Scotland before the children could be said to have become habitually resident there. The

Extra Division had, it was argued, answered that question without themselves addressing the truly critical issue, namely whether the children retained habitual residence in France immediately before 20 November 2013. They had erroneously focused only on the children's circumstances in Scotland, and had left out of account the agreement between their parents as to the limited duration of the stay in Scotland, and their parents' intentions.

23. I do not find that submission persuasive. The Extra Division proceeded on the basis that the stay in Scotland was originally intended to be for the 12 months' maternity leave, that much being uncontroversial. They therefore assumed, in the father's favour, that the stay in Scotland was originally intended to be of limited duration. Their remark that the real issue was whether there was a need for a longer period in Scotland, before it could be held that the children's habitual residence had changed, followed immediately upon their statement:

> "If the salient facts of the present case are approached in accordance with the guidance summarised earlier, the key finding of the Lord Ordinary is that the children came to live in Scotland."

In other words, following the children's move with their mother to Scotland, that was where they lived, albeit for what was intended to be a period of 12 months. Their life there had the necessary quality of stability. For the time being, their home was in Scotland. Their social life was there. Their family life

was predominantly there. The longer time went on, the more deeply integrated they would become into their environment in Scotland. In that context, the question the Extra Division asked themselves did not indicate any error of approach. Nor did their answer:

> "For our part, in the whole circumstances we would view four months as sufficient."

24. The Extra Division therefore considered the evidence on a proper understanding of the nature of habitual residence. In the light of the evidence before them, their conclusion that the children were habitually resident in Scotland at the material time is one which they were entitled to reach.

Other issues

25. Counsel for the mother took the opportunity of this appeal to raise the question whether there had been any wrongful retention of the children in Scotland. It was argued that the bringing of the residence proceedings did not amount, implicitly or otherwise, to a wrongful retention within the meaning of the Hague Convention. That issue was not raised in the courts below, and it does not arise for decision by this court: given the conclusion that the children were habitually resident in Scotland at the material time, they cannot have been wrongfully retained there.

26. There was also discussion in the courts below of the question, under article 13 of the Hague Convention, whether the father had consented to the children's retention in Scotland. Given my conclusion on the issue of habitual residence, that question also does not arise, and need not be considered.

Conclusion

27. For these reasons, I would dismiss the appeal.