Neutral Citation Number: [2020] EWHC 3321 (Fam)

Case No: FD20P00356

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

In the matter of R (A Child)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2020

Before :

MR DAVID LOCK QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Georgina Rushworth (instructed by **Axiom Stone Solicitors**) for the **Applicant Father**
Paul Hepher (instructed by **Blackfords**) for the **Respondent Mother**

Hearing dates: 30 November and 1 December 2020

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Approved Judgment

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

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MR DAVID LOCK QC

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr David Lock QC :

1. This is an application under the inherent jurisdiction relating to **R** who is aged 6. The application is bought by R's father, "the Father" and the Respondent is R's mother, "the Mother". In substance, the orders sought by the Father are that the Mother returns R to live in UK.

2. This application was issued on 16 June 2020. On 19 June 2020 the matter came before Mr Justice Williams who, after hearing counsel for both parties, declined to make any declarations as to jurisdiction but ordered that a hearing was required to determine whether the Court has jurisdiction to consider the Father's application. I heard that application over 30 November 2020 and 1 December 2020. The Father was represented by Ms Rushworth and the Mother was represented by Mr Hepher. I am grateful to both counsel for their assistance.

3. During the hearing I heard evidence from the Father and the Mother. There were a number of other supplementary witness statements and relevant documents which I have read and have taken into account.

The Background

4. The Father has dual citizenship with the UK. He lived in the London area for many years prior to meeting the Mother. The Father and the Mother met in 2011 and commenced a relationship. The Father owns property in London and the couple initially spent some time living at that property. However, the Father developed business interests in the United States and owns property in the United States. From early 2012 the couple started to spend considerable periods of time in the United States. They were unable to acquire visas to live in the United States on a full time basis and so tended to spend periods of up to 90 days in the USA at a time, and then left before their visas expired. The Father also acquired property in the West Indies and for several years the couple moved between houses in the West Indies and the Father's USA property, thus avoiding the need to obtain permanent USA visas.

5. In 2013 the Mother became pregnant. The Mother and Father lived together in the USA during the early stages of her pregnancy. However, they returned to London for a period of about 10 months leading up to and after R's birth in April 2014. They then moved back to the USA property in September 2014 and substantially lived abroad for the next 2 years, only making occasional trips back to London.

6. The evidence on both sides confirms that the Mother and Father had a somewhat volatile relationship. There were clearly periods when they were happy and devoted to each other and to their son, but there were other times when the relationship between them was very difficult. In part those difficulties were caused by the stresses faced by the Father as a result of his business dealings and in part, I find on the evidence before me because of his erratic behaviour, later linked to being diagnosed with anxiety and depression. By early 2017 the relationship between the Father and Mother was showing signs of considerable strain. At about the same time, the Father was facing increasing challenges in maintaining his businesses and dealing with legal and commercial disputes which had arisen as a result of his business activities.

7. In May 2017 the couple had a series of arguments, some of which were in front of R. The Mother informed the Father that she wished to take some time to see her family and flew out with R to London. She explained that, at this time, she misled the Father about her intentions because she told him she was only going on holiday. In fact, she was intending to leave the Father for an extended period, and possibly on a permanent basis. She explained in evidence that the Father had become angry, upset and aggressive towards her and that she misled him because she feared for her safety. She says she made the decision that she did not want to stay in a relationship with the Father and flew to London, with the aim of spending an extended period of time with her parents in Spain.

8. The Mother returned to London in May 2017 with R but unfortunately found that the property owned by the Father had been burgled and boarded up by the police. She explained in evidence that she had a good relationship with the Father's father and step-mother and so went to stay with them for about a week before spending a single night at the London property. She then left England to move to stay with her parents who live in the Andalusia region of southern Spain.

9. The Mother's parents had moved to Spain about 10 years previously. They ran a hotel and bar business in a coastal village in Southern Spain ("the village"). They also owned a house in the village. The evidence is that it is a small village of about 500 permanent residents but that it is a popular resort for Spanish holidaymakers, and the population expands to about 3000 during the summer months. It has a village primary school but depends for other services on the nearby larger town.

10. The evidence appears to suggest that the Mother and Father continued to communicate between May and October 2017, and the Mother facilitated Facetime contact between R and his father. In October 2017 the Mother returned to the USA in order to allow the Father to spend time with R and also to see whether it would be possible for her to resume a meaningful relationship with the Father.

11. Any attempt at reconciliation during this visit for her was not a success and relations between them quickly broke down. There was at least one serious altercation between the parties which resulted in the Mother incurring injuries, and with possible minor injuries being suffered by the Father as well. The Father accepts that he inflicted the Mother's injuries but says that he was trying to restrain her hitting him and he did not inflict any injuries deliberately. Whatever the truth of the position, the result of this dispute was that the police were called and they escorted the Mother out of the house with R. No charges were pressed but, having heard both the Mother and Father give evidence, I accept her evidence that, at least at that point, this incident convinced her that her personal relationship with the Father was at an end.

12. The Mother flew back to Spain with R. I accept that she recognised that, even if her personal relationship with the Father was ended, he remained R's father and that she continued to facilitate contact between R and his father.

13. Between October and December 2017, the Father visited the Mother and R in Spain on about 3 or 4 occasions. At this point the Mother and R were living with her parents. However, the Mother states that it was agreed between them that the Mother and R

needed a place of their own. In November 2017, the Father rented a property for the Mother and R in the village. The rental period was from 10 December 2017 until 10 June 2018. The Father's case was that this property was intended to be a home for them as a family. I do not accept his evidence as it is clear that the relationship between them had broken down by this stage. I accept that the Father continued to hope that he could be reconciled with the Mother but I do not accept that the Mother agreed to a reconciliation.

14. During the periods when the Father was in Spain over this autumn, he had periods of contact with R and also spent periods of time with the Mother. However, at about this time the Mother's evidence is that the Father's conduct caused the Mother further serious concerns. She described him as being "*unhinged*" and said that "*his drinking was out of control*". It is not necessary for me to come to any final view on exactly what happened but I accept that, whatever occurred, these events were sufficiently frightening to her that she sought Spanish legal advice and she temporarily left the village. She then obtained a restraining order against the Father which was served on him by the police. The restraining order resulted in the Father leaving Spain. He did not return again until November 2018.

15. During this period the Mother was working at the bar owned by her parents. She also took increasing responsibilities for the operation of the hotel. During one of his visits a particular issue appears to have caused anguish to the Father, namely that he alleged the Mother had developed a relationship with a member of staff at the bar. Whilst it is not necessary to work out the underlying truth of this allegation, it seems to me that the Father's reaction to this alleged relationship is indicative of his attitude to the Mother. The Father and the Mother were not married and, by late 2017, they had been living in different countries for about 6 months. The Father ought to have realised that she had decided that her personal relationship with him was over, and thus she should be free to embark on a new relationship if she chose to do so. However, it is clear from the evidence that the Father considered that he had the right to control the Mother's relationships with others and to get angry when he discovered she was having a relationship with someone of whom he did not approve. That indicates that he was seeking to exert a wholly inappropriate element of control over the Mother in circumstances where he had no proper basis for doing so. I accept the Mother's counsel's submission that the Father's desire to reassert control over the Mother is a feature of this case and is one of the factors that has led him to commencing legal proceedings in the United Kingdom. For the reasons set out below, both these proceedings and the previous proceedings are factually and legally misconceived. Whilst I accept that the Father wishes to have better access to his son, the way he has conducted these proceedings appears to be part of an overall attempt to reject the ability of the Mother to make any decisions for herself and to undermine the few decisions that they have together, probably because he has later regretted making those decisions.

16. In 2017 and into 2018 the Mother continued working in and living at the property rented for her by the Father in the village in Spain. She enrolled R at a local school and provided the details of the school to the Father. Meanwhile the Father continued his peripatetic lifestyle between the USA and London.

17. On 23rd of January 2018 the Father issued wardship proceedings in the High Court in London under the inherent jurisdiction in action number FD18P00089. In those

proceedings the Father complained that the Mother had abducted the child. The application said:

> "The Respondent mother has taken the child to Spain and has refused to return the child back to the UK where he is habitually resident"

18. It follows that the Father was advancing his case on the basis that R had been habitually resident in the UK and had been wrongfully removed by the Mother. He identified the date when she was said to have refused to return the child to the UK as being November/December 2017. It is thus necessary to say something about the law of habitual residence in order to examine where R was habitually resident at this time.

19. The law concerning the place of habitual residence of a child has recently been summarised by Mr Justice MacDonald in *AB v EM (Jurisdiction Foreign Custody Order)* [2020] EWHC 549 (Fam) who said at §29 to §31 as follows:

> "29. For habitual residence to be established the residence of the child must reflect some degree of integration in a social and family environment (Area of Freedom, Security and Justice) (C-532/01) [2009] 2 FLR 1 and Re A (Jurisdiction: Return of Child) [2014] 1 AC 1). Whether there is some degree of integration by the child in a social and family environment is a question of fact to be determined by the national court, taking into account all the circumstances specific to the individual case. Habitual residence must be established on the basis of all the circumstances specific to the individual case (Case C-523/07 [2010] Fam 42). With respect to those circumstances, in Re A (Area of Freedom, Security and Justice) and Mercredi v Chaffe [2011] 2 FLR 515, the Court of Justice of the European Union identified the following, non-exhaustive, list of circumstances that might be relevant in a given case:
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> i) Duration, regularity and conditions for the stay in the country in question.
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> ii) Reasons for the parents move to and the stay in the jurisdiction in question.
>
> iii) The child's nationality.
>
> iv) The place and conditions of attendance at school.
>
> v) The child's linguistic knowledge.
>
> vi) The family and social relationships the child has.
>
> vii) Whether possessions were brought, whether there is a right of abode and whether there are durable ties with the country of residence or intended residence.

30. In a series of decisions, namely Re KL (A Child) [2014] 1 FLR 772, Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2014] 1 FLR 772, Re LC (Children) (Reunite International Child Abduction Centre intervening) [2014] 1 FLR 1486, Re R (Children) (Reunite International Child Abduction Centre and others intervening) [2015] 2 FLR 503 and Re B (A child) (Habitual Residence: Inherent Jurisdiction) [2016] 1 FLR 561 the Supreme Court has articulated the following principles of general application with respect to the question of habitual residence:

i) It is the child's habitual residence which is in question and hence the child's level of integration in a social and family environment which is under consideration by the court determining the question of habitual residence.

ii) In common with the other rules of jurisdiction, the meaning of habitual residence is shaped in the light of the best interests of the child, in particular on the criterion of proximity. Proximity in this context means the practical connection between the child and the country concerned.

iii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must also weigh up the degree of connection which the child had with the state in which he resided before the move.

iv) The relevant question is whether a child has achieved some degree of integration in social and family environment. It is not necessary for a child to be fully integrated before becoming habitually resident.

v) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there.

vi) In circumstances where the social and family environment of an infant or young child is shared with those on whom she is dependent, it is necessary to assess the integration of that person or persons (usually the parent or parents) in the social and family environment of the country concerned.

vii) In respect of a pre-school child, the circumstances to be considered will include the geographic and family origins of the parents who effected the move.

viii) The requisite degree of integration can, in certain circumstances, develop quite quickly. It is possible to acquire a

> new habitual residence in a single day. There is no requirement that the child should have been resident in the country in question for a particular period of time. The deeper the child's integration in the old state, probably the less fast his or her achievement of the requisite degree of integration in the new state. Likewise, the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his or her achievement of that requisite degree. In circumstances where all of the central members of the child's life in the old state to have moved with him or her, probably the faster his or her achievement of habitual residence. Conversely, were any of the central family members have remained behind and thus represent for the child a continuing link with the old state, probably the less fast his or her achievement of habitual residence.
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> ix) A child will usually, but not necessarily, have the same habitual residence as the parent(s) who care for her. The younger the child the more likely that proposition but this is not to eclipse the fact that the investigation is child focused.
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> x) Parental intention is relevant to the assessment, but not determinative. There is no requirement that there be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely. Parental intent is only one factor, along with all other relevant factors, that must be taken into account when determining the issue of habitual residence.
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> 31. In considering the question of habitual residence, it is not necessary for the court to make a searching and microscopic enquiry (Re B (Minors)(Abduction) (No 1) [1993] 1 FLR 988). In Re B (A Child)(Habitual Residence: Inherent Jurisdiction) Lord Wilson noted as follows at [45]:
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> > "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 will 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."

20. I have set out that quotation at length because it describes the proper approach which needs to be taken to determining a child’s residence. It is the approach that I will follow in this case.

21. The Father's case that, despite the fact that R has been very largely living in Spain since May 2017, the child has never acquired habitual residence in Spain. The Father suggests that he was entitled to assert in January 2018 that R was habitually resident in the UK because, properly examined, that was where R was habitually resident. The factors relied upon by the Father, through his counsel, to support this case are the following:

    a. The Mother was only ever in Spain "on the run" and never had a settled existence there;
    b. The Mother did not register R with a Spanish GP in Spain;
    c. The Mother's car remained in London (albeit off the road in the driveway of the London property);
    d. R's toys remained at the London property;
    e. The Mother never applied for permanent legal residence in Spain;
    f. The Mother continued to receive Child Support payments from the UK in respect of R and maintains banking arrangements in the UK; and
    g. The Mother's place of residence changed on a number of occasions after her arrival in Spain.

22. The Mother's response to this was as follows:

    a. The Mother disputes that she was only ever in Spain "on the run" or that she did not have a settled existence there. She says that she and R never had a settled existence anywhere before she arrived in Spain in May 2017 and that once she arrived in Spain, she became settled there and planned to make Spain her long term home;
    b. The Mother did not register R with a GP in Spain because she preferred for him to be seen by a private, English speaking GP and that was what happened;
    c. The Mother accepted that she did not apply for permanent legal residence in Spain but says that, until Brexit became a reality, she was not required to do so. However, she registered to work in Spain and paid taxes in Spain;
    d. The Mother says that the only toys and clothes left behind in London were those from when R was a baby. She effectively started again to buy him clothes, toys and everything else he needed once they arrived in Spain, and that he now has toys and clothes in his home in Spain;
    e. The Mother accepts that she continued to receive Child Support payments from the UK in respect of R but contends that she was entitled to that money because R is British and was born in the UK. She says she has a UK credit card account and the child benefit payments are made into that account;
    f. She accepts that her place of residence changed after her arrival in Spain but, by January 2018, says that she had only moved within the small village , starting in her parents' house and then moving to further accommodation in the village, but she says that a move within the village cannot affect the country of habitual residence.

23. In substance I accept the Mother's case on this issue. It seems to me that none of the factors relied upon by the Father come close to showing that either R was not habitually resident in Spain in January 2018 or that R was habitually resident in the UK. By January 2018, R had been living with his mother and grandparents in Spain

for over 6 months and was living a more stable life there than he had known before that time. Apart possibly for the period April to September 2014 when he was a baby, this was the longest period R had lived anywhere continuously in his short life. It was a more stable home than he had ever had before and the evidence clearly shows that R and his Mother were becoming integrated into the village community and were putting down roots there. At this point it seems to me that R had a far greater level of integration into the social and family environment in Spain than he had anywhere else, and that his Mother, as his primary care giver, intended that situation to continue. I thus conclude that, by January 2018 at the latest, R was habitually resident in Spain.

24. Further, I do not accept that R can have been habitually resident in England in January 2018 because he had not spent any significant period of time in England since he was a baby. The Mother has produced a helpful schedule which shows the periods spent in various countries during their relationship. It shows that R spent far more time away from the UK than in the UK, and never really had any stable place to live until he moved to Spain in May 2017. The few remaining links that R had to the London property and his Mother's other ties to the UK were wholly insufficient to add up to R ever being habitually resident in the UK after September 2014.

25. I thus conclude that the January 2018 application made by the Father presented a false picture to the court. It was a wholly misleading application because R could not properly be said to be habitually resident in the UK at this time. The application was originally made without notice and so the full position should have been presented to the Court.

26. Once issued, the proceedings appear to have been served on the Mother without any difficulty at the Bar in Spain. That shows that the Father was perfectly able to locate the Mother and serve her with legal proceedings if he wished to do so. That is relevant to his case about "whereabouts" which I shall consider below.

27. An unfortunate aspect of this case is that the Mother did not seek legal advice in respect of this application. She states that she was naive in not seeking legal assistance but says that the family were struggling financially and neither she nor her parents could afford legal support.

28. The first (and it turns out only) substantive hearing of the application was before Mr Justice Holman on 16 March 2018. The Father was represented by counsel and the Mother attended in person. The Father forwarded the Mother an email from his solicitors dated 14 March 2018, 2 days before the hearing. This said:

> "Dear,
>
> I understand that you and the mother may be able to reach an agreement regarding your schedule of time to spend with R in the UK and Spain. If this is the case, and subject to the mother attending court on Friday 16 March, I am happy to instruct your barrister to request the court to withdraw your application for Wardship and instead agree a child arrangements order for R. This order will include the agreement you have with the mother regarding your time to spend with him"

29. That email also referred to the Father having "contact" with R. It thus appears that any discussions prior to this hearing assumed that R would continue to live with his mother in Spain, but that the Father would have contact with R in the UK.

30. However, that was not the position as set out in the order made by Mr Justice Holman. The only evidence before the Court comprised the Father's application, a sworn statement in support and a Position Statement. I do not have a copy of that Position Statement. The Father's statement contained a series of statements that were untrue. It said that the Mother had abducted the child to Spain in October 2018, but that was not correct. She had gone to Spain with the Father's agreement. It said that the Father had "immediately" reported the child missing to the police. That was not correct because the Mother and R had left in October 2018 and the Father only made a report to the police on 4 March 2019. The statement said that he had no electronic contact with R "throughout" this period, but Facetime contact had continued until about May 2019. The Father referred to his visit to Spain in November 2018 when he said he went "*to try and ascertain R's whereabouts*" and says he was threatened by the Mother's parents. In ~~fact~~fact, he had had spent several days with the child and this incident only occurred when he was returning the child to the Mother. The Father's statement also said that he had "*no knowledge of her whereabouts in Spain or elsewhere*". That was misleading because he knew the village in which she was living and had been informed of her address, even if he chose to question whether that information was correct or not.

31. The Court Order recites that the parties had agreed that the Mother would return with R to live in the UK from 30 June 2018 and that R would spend 50% of the time with his Mother and his Father thereafter. The Order included the following Declarations:

> "7. The child is and will remain habitually resident in England and Wales, pursuant to article 8 of the Council Regulation (EC) No 2201/2003 (Brussels II Revised Regulation 2003)
>
> 8. The courts of England and Wales shall have the substantive welfare jurisdiction over and in respect of the child as a consequence of declaration 7 above"

32. Having made interim orders for the Mother to return R to the UK, paragraph 14 of the Order provided that the proceedings should be listed for a further hearing on 6 July 2018 where the court would consider the future progression of the proceedings and future child arrangements. That paragraph also provided that the hearing may be vacated on written notice to the Clerk of the Rules if both parties agree.

33. It seems clear to me that the Declarations made by Mr Justice Holman can only have been Interim Declarations to preserve the position until the Court was able either to endorse an agreement between the parties concerning the arrangements between them for R or, if there was no such agreement, to hear evidence in order to determine future arrangements for the child, having regard to his best interests. I do not accept the submission made by Ms Rushworth that these were final Declarations. Any Declarations made on the basis of one party's Position Statement and statement, but without having sight of either a statement or Position Statement from the other party or without hearing evidence can only have been intended to govern an interim period prior to the Court making a final order.

34. In the event, it appears that neither party attended before the Court on 6 July 2018 for the next hearing. There is no evidence that the Court made any order at that hearing but equally there is no evidence that the proceedings were formally withdrawn. Counsel for the Mother invites me to discharge the order made by Mr Justice Holman in proceedings FD18P00089 on the grounds that it was made on a fundamentally flawed factual basis because, at this point, R was not habitually resident in the UK. Whilst it is unclear to me whether that interim order continues to have any legal effect, I am confident that it does not properly reflect the position in March 2018. Ms Rushworth on behalf of the Father accepted that, in any event, any Declarations made in March 2018 could not be determinative of R's place of habitual residence at a later date and in particular could not govern the position in June 2020 when these proceedings were commenced.

35. I have had the advantage of hearing evidence concerning R's place of habitual residence which confirms that the court was misled about the factual basis of this application and that, contrary to the factual case advanced by the Father, R was habitually resident in Spain at that time. I accept that this Order was made by consent but it was made without hearing any evidence and recorded matters that I find were not factually correct and which, given the true events, may well have led to the court refusing to make any order at all. In those circumstances I agree with the Mother's counsel that, having determined that R was habitually resident in Spain in January and March 2018, it is inappropriate for a Court Order to remain in existence which declares something that is factually incorrect. I therefore accept that it would be appropriate to discharge that interim Order and I agree to do so despite the fact that those proceedings are not technically before me as part of this hearing.

36. It is clear that there were further discussions between the Father and the Mother following the hearing before Holman J in March 2018. It is common ground that it was agreed between them that R would spend time over the summer with his father in London. The Mother returned to the UK with R in early July and, after settling him with his father for about a week at the London property, she returned to Spain.

37. R stayed with his father at the London property for the summer of 2018 and father and son appear to have had an enjoyable time together. On 10 August 2018, the Mother emailed the Father with details of a school that she said she would like R to attend in Spain. She also informed the Father that she was proposing to rent a small house in the coastal village in Spain for €550 per month. It thus appears that, whatever may have been agreed in March 2018, by August 2018 the Mother envisaged a future life for herself and R in Spain. Unfortunately, this period of reasonable relations between the Father and Mother was short lived. In summary, the Mother says that she agreed with the Father that she would continue to live in Spain with R but that she would ensure that he had contact with his father and that he would be able to spend periods of time with his Father including alternative Christmases. In contrast, the Father asserts that the agreement was that the Mother would only return to Spain for the autumn but would then return back to live full-time in the UK with R, and that R would attend school in the UK.

38. One of the significant difficulties in this case is that the Father fully accepts that he has been suffering from reasonably serious mental health problems and contends that his mental health difficulties have affected his memory. He therefore asserts that he made factual statements which he believed to be true at the time that he made the

statements albeit he now accepts that many of the things he claimed were untrue. He has disclosed a letter from his GP, dated 6 September 2019 which refers to him suffering from anxiety and depression, and that this had caused him poor sleep and poor motivation. Dr W states that his anxiety and depression is being exacerbated by the separation from a young son. The letter also reports that the father told Dr W that "his son was taken from England by his ex-partner and without his consent". That was factually wrong because R left the United States to move to Spain, not England. The Father has also disclosed a report from Dr B, dated 9 January 2019 which supposedly related to a court appearance that the father was facing in January 2019. That cannot relate to these proceedings. This letter refers to the father's memory being affected by his mental health condition and suffering high levels of anxiety.

39. When giving evidence, the Father referred to being diagnosed with Post-Traumatic Stress Disorder. There is no medical evidence to support that claim but, even if the Father was not suffering from full PTSD, it is clear that the Father has suffered reasonably serious mental health difficulties and that his day to day functioning was substantially affected by his mental health condition.

40. Having heard both the Mother and the Father giving evidence I am confident that the Mother never agreed that she would move back to England on a full-time basis. I accept that the Father continually pushed her to do so and was extremely reluctant to allow her to take R back to Spain when the summer was over. The Mother explained in her evidence how the Father was pressurising her to move back to England and how she was refusing to do so. I find as a fact that there were fraught discussions between the Mother and the Father in September 2018 which eventually resulted in the Father agreeing that the Mother and R should return to Spain on 9 October 2018 and that R should go back to school in Spain. I reject the Father's evidence that he reached a clear agreement with the Mother but she would return with R to live in England on a full-time basis in December 2018. Equally, I do not accept the Mother's evidence that it had become clear that the opposite agreement was reached, namely that the Father accepted that R would be living in Spain on a full-time basis. It seems to me far more likely that no final agreement was reached between them other than that the Mother would return to live in Spain with R for the autumn term and that R would be coming back for a visit to see his father for Christmas.

41. The Mother had exhibited a handwritten note which both parties now accept was signed at the time. It is undated but it says:

> "I AB father of R authorise CD mother of R to be removed from the UK to Spain until December 20th 2018"

42. That note is not inconsistent with the case now advanced by either the Mother or the Father but it does not take matters a great deal further apart from confirming that R was travelling back to Spain with the agreement of both parents, as text messages between them confirmed. That note was exhibited by the mother to her witness statement of 6 November 2020. The Father then prepared a witness statement in response dated 25 November 2020. He suggested at paragraph 79 of that witness statement that this handwritten note referred to an earlier occasion when Mother was travelling with R to the West Indies and did not refer to October 2018. At that time, he was still advancing a case that the Mother had left England in October 2018 with R without his agreement. He said at paragraph 35 that become mother had "*once again*

abducted R and return to Spain". Even giving due consideration for the fact that the Father has had mental health problems, it seems to me this was a clear lie. In my judgment, the Father knew perfectly well that he had agreed to the mother returning to Spain with R in October 2018. It is nonsense to suggest that the handwritten note referred to an earlier time when they were in the West Indies because it had the date "20 December 2018" as a projected return date. I thus accept that the Father was prepared to lie to advance his case and continued to lie even when presented with clear evidence showing he was lying.

43. By early January 2018 I have decided that R was habitually resident in Spain. However, that creates a potential difficulty because an order was made by consent by Mr Justice Holman which purported to declare that R was habitually resident in the UK. The Judge was thus prepared to make an order setting out matters which were incorrect. Primary responsibility for misleading the Judge must lie with the Father since he brought these proceedings on an incorrect factual basis and maintained that incorrect factual basis before the court.

44. However, even if that order had the effect of changing R's place of habitual residence (which I doubt given that habitual residence is a matter of fact not law), it seems to me that R very quickly resumed being habitually resident in Spain in October 2018 after resuming living in Spain because that was where his primary carer was living, that was where he was attending school and that was the location where he had the greatest personal stability. Seen through the child's eyes, Spain was his home.

45. As part of the flurry of evidence exchanged immediately before this hearing the father produced a further witness statement dated 29 November 2020. This included a photocopy of a document that purported to be a typed agreement dated 8 October 2018. The photocopy appeared to have been signed by both the Mother and the Father. It appeared to commit the Mother to returning to live in the UK full-time with R from January 2019. The origin of this document is mysterious. The Father has been living in the United States since at least February 2020. He states that this document was discovered by friend who then provided him with a copy. There is no witness statement from the friend. The Mother says she has no recollection of this document, has never seen it before and would never have agreed to sign it. She disputes that this is her signature.

46. The original piece of paper is not available to the Court or the parties, and its whereabouts are entirely unclear. At one stage the Father suggested it had been posted to him in the USA and then he suggested it would be delivered up to his solicitors. This supposed document has only emerged at a very late stage and in circumstances which are both very unclear and highly unsatisfactory. Its provenance is disputed and I do not consider I can place any weight at all on this document. It seems to me totally incredible for a detailed agreement in this form to have been drawn up by the Father and then for him to have entirely forgotten about the existence of the document. I accept that he has suffered from mental health problems and may have some difficulty in recalling precise details, but it is incredible to suggest that he would have forgotten that the Mother had signed up to a detailed, typed agreement before taking R to Spain in October 2018. Further, if he had access to this document, I find it inconceivable that he did not provide a copy of it to his solicitors or refer to the document when these proceedings were launched. He also made repeated complaints to the police about the Mother's alleged abduction a few months after this document

was supposed to have been signed. If this is genuine, it is inexplicable as to why a copy of this document was not provided to the police. I therefore accept the Mother's evidence that she did not knowingly sign any form of document in this form.

47. The Father then visited Spain in November 2018 in order to spend time with R. However, there was an altercation between the Father and the Mother when the time came to hand R back to his mother. Various witnesses have described these events in witness statements but the exact sequence of events is unclear. However, whatever precisely happened between the Father and the Mother on this occasion, it appears to have been treated by the Mother as the final straw. She decided that she was not prepared to allow R to return to England to spend time with his father in December as had been agreed because she did not feel she could trust the Father to act appropriately with R. I do not need to decide if that was a justified or unjustified decision but I note that that was the last occasion on which the Father saw R in person, albeit there have been Facetime sessions since that time.

48. At first the Father did nothing but, in March 2019, some 4 months after the Mother had told him she would not bring R to England in December 2018, the Father made allegations to the Metropolitan Police that the Mother had unlawfully abducted R. The Father then had a series of discussions with the police between February 2019 and September 2019. During these exchanges, the Father was repeatedly told by the police that this was a civil matter but he did not appear to accept this. Eventually a decision was made by the Crown Prosecution Service on 5 November 2019 that there should be No Further Action. The Father challenged that decision and it was reviewed but the decision was upheld

49. Meanwhile the Mother continued to live with R in Spain throughout 2019. These proceedings were commenced on 16 June 2020 by way of an application in the Inherent Jurisdiction. The trigger for the application was said to be the fact that the Mother's brother had tragically died and was due to be buried on Tuesday 17 June at a cemetery in a town outside London. The application stated the Father's belief that the Mother would be likely to attend the funeral along with her parents. The application stated as follows:

> "The Applicant suspects that the child is in Spain or possibly could be in the UK currently for the reasons set out in the statement in support (paragraph 3 below). The child was abducted by the Respondent from the UK in October 2018. The Applicant has not had contact with the child since then and the Respondent refuses to disclose the child's whereabouts to the Applicant"

50. The relief sought included an order to return R to the UK and an order enforcing the terms of the order of 16 March 2018. I cannot see that this application can possibly have been justified. The Father knew where the Mother lived and worked and could have served her with normal proceedings. Issuing proceedings to be served during her brother's funeral appears to me to be close to being vindictive.

51. The application also stated:

> "In the event that the Respondent does not attend her late brother's funeral the Applicant believes that the child's maternal grandparents will attend, they are ordinarily habitually resident in Spain. They can be ordered to disclose the whereabouts of the child.
>
> The Applicant believes that there is only a small window of opportunity to issue this application and serve the Respondent with orders where previous other attempts have failed including port alerts having failed to previously detain the Respondent. There is a strong likelihood that the Respondent or members of her family are in the UK currently and would know the whereabouts of the child in order to seek his summary return"

52. That application was, in my judgment, substantially misleading because the Father had consented to the Mother taking R to live in Spain in October 2018 and had seen the child in November 2018. He had also been informed of her address and knew where her parents' hotel and bar were located. He had had no difficulty in serving the previous proceedings on her in Spain and could have done so at any time. However, none of this was known to the Court at the time that the Father made without notice applications on incorrect factual basis. The order made by Williams J was duly served on the mother's parents at an address in the town where the uncle's funeral had been arranged on the morning of 17 June 2020. This was the day following their son's funeral. As a result of the orders obtained by the Father and maternal grandfather's refusal to engage with them, he was arrested. As it happened, the Mother did not have a valid passport at this time and therefore was unable to travel to her brother's funeral. As a result, R did not travel to England in June 2020. However, that does not excuse the unnecessary disruption of the family at what must have been a most difficult time.

53. This matter came back before the Court on 17 June 2020 and an order was made that the maternal grandfather be released and the Mother was prohibited from removing R from Spain, all on the basis of an alleged abduction case which was, of course, totally incorrect. Two days later on 19 June 2020 this case returned before Mr Justice Williams and, on this occasion, both the Father and the Mother were represented by counsel. That hearing led to the present application as a result of paragraph 3 of the order which provided:

> "The court declined to make any declarations as to jurisdiction at this hearing in light of the mother's assertion that she and R have been living in Spain since 2017 and that consequently she says R is habitually resident in Spain. The father asserts that R was wrongfully removed from the UK in October 2018 and has been wrongfully retained by the mother since that time. A hearing is required to determine jurisdiction"

54. In order to determine whether this court has jurisdiction, the first question I have to decide is where R was habitually resident at the time the court was seized of this application: see article 8 of Council Regulation (EC) No 2201/2003 (Brussels II Revised Regulation 2003 ("**BIIa**"). The court is seized of the application at the date the application is issued, namely in June 2020. For the reasons stated above, as a matter of fact R was habitually resident in Spain at that date. Accordingly, the courts

in Spain have exclusive jurisdiction in matters of parental responsibility over R and the UK court should not entertain this matter.

55. However, in order to meet the problem that the Court may decide that the child is habitually resident in Spain, the Father attempts to rely on Article 10 BIIa which provides:

> "**Article 10**
>
> **Jurisdiction in cases of child abduction**
>
> In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:
>
> (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;
>
> or
>
> (b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:
>
> (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;
>
> (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);
>
> (iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);
>
> (iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention"

56. I do not consider that article 10 BIIa assists the father because:

a. As a matter of fact, R has not been habitually resident in the United Kingdom at any point since at least May 2017. I do not accept that the situation was changed by the erroneous Declaration that the High Court was persuaded to make in March 2018 because, properly analysed, R was habitually resident in Spain at that time and accordingly the High Court in London had no jurisdiction to make interim Declarations concerning R's place of residence. If, as a matter of fact, R was not resident in the United Kingdom in March 2018 I do not accept that this situation was changed by the fact that the Court was persuaded to make an interim Declaration to that effect;

b. However, even if R is required to be treated as if he was habitually resident in the UK in March 2018, both the Father and the Mother agreed that he should move back to Spain in October 2018 and he was thus able to resume his habitual residence in Spain. There was, as I have found, no clear agreement between the parties as to whether R would live anywhere other than Spain and no settled agreement for his return. Accordingly, as I have found above, he once more became habitually resident in Spain from at least October 2018;

c. I do not accept that R was wrongfully removed from the United Kingdom in October 2018. He was moved with the consent of both parents, there being no settled agreement for his return and therefore it cannot have been wrongful;

d. I accept that the Mother did not facilitate a visit for R in December 2018 when it had been agreed that he would have contact with his Father. However, any dispute about contact could only have been decided within the Courts in Spain because that was where he was habitually resident. I do not consider that R was wrongfully retained in Spain within the meaning of the opening words of article 10 BIIa because there was no settled agreement that he would return to England and thereby change his place of habitual residence;

e. Even if he had been wrongfully retained, R thereafter lived in Spain for over one year and has plainly been settled in his new environment applying the observations of Thorpe LJ in *Cannon v. Cannon* [2004] EWCA Civ. 330, [2005] 1 FLR 169 that "*the word 'settled' has two constituents. First, it involves a physical element of relating to being established in a community and an environment. Secondly, I find that it has an emotional constituent relating to security and stability."* Applying these tests, it is plain that R was settled in Spain and remained settled in Spain after May 2017. That was where his primary carer was, his extended family, where he went to school and where his friends were. It is where he undertook after-school activities and where, seen through his eyes, he would consider his home to be.

57. The Father advances his case that article 10 did not apply because he did not know the "whereabouts" of his child. In *R v P* [2017] EWHC 1804 (Fam) Mrs Justice Theis said at §69 and §70 as follows:

> "69. There is no authority that has determined what should be given to the term "whereabouts" in Art.10. The Oxford English Dictionary has a number of suggestions depending on whether

> it is used as an adverb or a noun. Used as an adverb, it is "where or approximately where"; but when used as an noun, it is "the place where someone or something is" and it goes on to give further detail about that in terms of location, position, site, place, situation, etc. So more focused than perhaps it is when being used as an adverb.
>
> 70. In considering the context in which the term is used in Art.10, namely "to preserve jurisdiction following a wrongful removal or retention until such time as a parent has been able to exercise their right to seek the child's return", in that context it could be said that "whereabouts" denotes sufficient knowledge to launch an application for the child's return. In England, it would be sufficient to know the child is in this country in order for that claim to be advanced"

58. I agree with this approach. It seems to me that the purpose of this provision is to ensure that time does not run against a parent in circumstances where the parent is aware that a child is in a particular country but cannot launch proceedings to seek the return of the child in that country because the child's whereabouts are sufficiently unclear that proceedings cannot be served on the absconding parent. I therefore reject the submission that the Father in this case did not know his son's whereabouts. He knew the village in which his son was living, the place at which the Mother was working and had been provided with various addresses. It is irrelevant whether he subjectively believed that this information was correct.

59. In particular, the Father was fully aware of the parents address because he had included it in a Christmas message to his son. The date of that message is not entirely clear but it must have predated the issue of these proceedings. Accordingly, even if R had been subject of a wrongful retention in Spain by his Mother after October 2018 (which I have found was not the case) the Mother would have been able to take advantage of article 10 in order to insist that any dispute about R's care arrangements should be litigated within the courts in Spain and not in London.

60. I have therefore concluded that the Court has no jurisdiction to hear this application and therefore it will be dismissed. I will hear counsel on any consequential orders.