Neutral Citation Number: [2021] EWHC 14 (Fam)

Case No: FD18P00811

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2021

Before :

MR JUSTICE MOSTYN

- -

Between:

GC — **Applicant**

- and –

AS — **Respondent**

- -
- -

Will Tyler QC (instructed by **Expatriate Law Ltd**) for the **Applicant**
Cliona Papazian (instructed by **Freemans Solicitors**) for the **Respondent**

Hearing dates: 14-15 December 2020

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Approved Judgment

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MR JUSTICE MOSTYN

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 Justice Mostyn:

1. In this judgment I shall refer to the applicant as "the mother", and to the respondent as "the father".

2. The mother is English. The father is Libyan although he has a British passport. They have three children: S aged 6, Y aged nearly 5 and A aged 3. They all have British passports. In December 2017 the family consensually relocated to Libya. The three children have been in Libya ever since. In 2018 the mother travelled from and to Libya. She last had direct contact with the children in September 2018. Following that contact the mother returned finally to this country and has not returned to Libya since.

3. On 17 August 2020 the mother applied under the inherent jurisdiction for orders that the court should "protect" the children. She invoked the ancient *parens patriae* jurisdiction, which is based on the British nationality of the children, as the basis for the making of the order. She accepted that she could not satisfy the usual jurisdictional criterion of habitual residence of the children or the retained jurisdiction under Article 10 of Council Regulation (EC) No 2201/2003 ("Brussels 2").

4. Plainly, a motive of the mother, in all likelihood her primary motive, in making her application was to lead the court to conclude that the best, if not sole, way of protecting these children would be to order the father to repatriate them from Libya. However, even though this was likely the mother's primary motive, it is important that I recognise, for reasons which will become apparent later, that the subject matter of the application before me is the protection of the children under the inherent jurisdiction and that the specific issue that I have to decide is whether the children should be protected, and if so how.

5. This was not the first attempt by the mother to retrieve the children from Libya. On 30 November 2018 the mother had started wardship proceedings, seeking an inward return order. She claimed that the children were habitually resident in this country, alternatively that there had been a wrongful removal giving rise to the retained jurisdiction under Article 10. Cobb J on that day made an order, ex parte, making the children wards of court. They have remained wards of court ever since, although that continued status was likely the result of an oversight, as I will explain.

6. The application for an inward return order was heard over two days by HHJ Hillier, sitting as a High Court judge, on 3 and 4 September 2019. She had a substantial amount of written evidence and heard the oral evidence of the parents, the father giving his via video link from Libya. On 25 October 2019 she handed down a detailed comprehensive written judgment in which she found that the children were not habitually resident here on 30 November 2018 nor had there been a wrongful removal or retention engaging Article 10. Therefore, the application for an inward return order was dismissed. Curiously, the judge did not dismiss the wardship proceedings and de-ward the children. This seems to have been an oversight, but it has had the consequence that the children have remained wards of court to this day.

7. In the proceedings before HHJ Hillier the mother put all her eggs in the basket of habitual residence and/or Article 10. She did not advance the *parens patriae* doctrine as a backup. That said, the mother did describe in her witness statements how extremely dangerous life was in Libya, an anarchic place notoriously riven by factional strife,

violence and lawlessness. Thus, in her witness statement dated 15 May 2019 she spoke of being petrified because the civil war in Libya had "again escalated since April 2019". She described how, as a result of the ongoing fighting, rockets had landed in the area where the children were located. She exhibited the latest advice from the FCO regarding travel to Libya and the situation in Tripoli. This stated that the political situation in Libya remained fragile; that the security situation remained dangerous and unpredictable; that fighting can break out anywhere without warning; and that many civilians had been killed in outbreaks of conflict in residential areas. It strongly advised against travel to Libya.

8. Similarly, in her witness statement dated 9 August 2019 she stated that she was extremely concerned about the children's safety. In the last few weeks, she stated, fighting had again erupted in Tripoli, with shells landing in the street where the children lived as recently as 11 July 2019. She exhibited news reports of people being killed from that barrage, as well as the FCO travel advice.

9. In such circumstances it is hard to understand why the mother did not advance the *parens patriae* doctrine as a backup. After all, she was by no means assured that she would win on the question of habitual residence or Article 10.

10. However, counsel for the father did raise the *parens patriae* doctrine in a pre-emptive manoeuvre. He sought a finding that it could not apply on the facts of this case. HHJ Hillier was not to be drawn. She recorded in her judgment that the mother had made neither an application nor advanced any submissions asserting that the court should exercise its *parens patriae* jurisdiction; therefore, there was no need for her to analyse the modern scope of the jurisdiction or whether in the absence of habitual residence or wrongful retention she should consider making any orders by this route. HHJ Hillier must be taken to have concluded that the evidence of the mother about the dire situation in Libya was not sufficiently compelling to guide her, on her own initiative, to instigate an investigation whether it was feasible for the court, exercising the sovereign's protective role in relation to children, to take steps to rescue these wards of court from peril.

11. Although HHJ Hillier was not primarily concerned with the quality of the father's accommodation I note that in para 97 of her judgment she found that the father's apartment within the apartment block occupied by members of his family was separate and of a good standard.

12. The mother appealed. In an appeal notice dated 6 November 2019 she advanced six grounds of appeal. Essentially, she challenged HHJ Hillier's factual findings in relation to habitual residence and alleged wrongful retention. She did not then say that HHJ Hillier was wrong not to invoke the *parens patriae* doctrine. The skeleton argument in support, also dated 6 November 2019, makes no mention of the collapse of civil society resulting from the civil war in Libya.

13. On 6 February 2020 Moylan LJ granted permission to appeal but observed that as the appeal was largely, if not solely, against findings of fact the mother would have to surmount a high threshold for the Court of Appeal to intervene. The appeal was fixed for 24 March 2020.

14. At some point after 6 February 2020 those advising the mother came to the view that the failure of HHJ Hillier to invoke, on her own initiative, the *parens patriae* jurisdiction should also be put before the Court of Appeal. Therefore, on 10 March 2020 the mother issued an application notice seeking permission to rely on an additional ground of appeal. That additional ground was as follows: "Further or in the alternative, the court should have investigated whether it was appropriate to exercise its *parens patriae* jurisdiction." On 16 March 2020 Baker LJ directed that the permission application should be heard rolled up with the substantive appeal on 24 March 2020.

15. For the purposes of the appeal the mother placed before the Court of Appeal a report dated 26 August 2019 from the UN Secretary General concerning the United Nations Support Mission in Libya. It recorded that a peace conference had been set up to take place from 14 to 16 April 2019. Unfortunately, one of the factions on 4 April 2019 launched an offensive to seize control of Tripoli. The fighting led to hundreds of deaths and the damage of critical civilian infrastructures aggravating humanitarian needs and forcing displacement.

16. The appeal was duly heard on 24 March 2020. Brief submissions were made in relation to the proposed additional ground of appeal. On 9 April 2020 the appeal was dismissed in relation to those grounds where permission had been granted. Permission to appeal was refused in respect of the proposed additional ground. The only judgment was given by Cobb J: *Re S (Children)* [2020] EWCA Civ 515.

17. Cobb J refused permission in respect of the proposed additional ground for three reasons. First, it had been no part of the mother's case before HHJ Hillier that she should exercise the *parens patriae* jurisdiction: see [55] and [56]. Second, the *parens patriae* jurisdiction is a "relative rarity" the exercise of which should be approached with great caution: see [57]. Third, the deployment of the *parens patriae* jurisdiction is highly discretionary. It would be very difficult for the mother successfully to argue that the discretion had miscarried particularly where this point had not been argued before the judge: see [58].

18. At [59] Cobb J held:

> "Even if we had decided that the mother should be allowed to rely on this further ground of appeal, then for the reasons outlined above, I would have had no hesitation in concluding that this ground would not have added materially to the merits of the appeal, or affect the ultimate outcome."

Although the meaning of this sentence is not entirely free from ambiguity, I am satisfied that all that it means is that the discretionary power had not miscarried. I do not think that Cobb J was saying, on the facts of the case before him, that the *parens patriae* jurisdiction could not be used to protect the children. Put another way, I do not think that I am impeded by the Court of Appeal decision from considering whether the jurisdiction should be exercised.

19. After the conclusion of the appeal the mother changed her legal team and on 17 August 2020, as I have mentioned above, she issued the application which is before me. In fact, she sought to issue two applications. First, she attempted to issue a Form C66 which sought the following relief:

> "For the court to continue to hear the case on the basis of an application to exercise its inherent jurisdiction, but to do so in pursuance of *parens patriae*, on the basis of the children's nationality and because the children's situation requires their immediate protection by the High Court."

20. Second, she sought to issue an application in Form C2 claiming the following relief:

> "For the court to set-aside the order of HHJ Hillier sitting as a judge of the High Court on 28 October 2019. The mother relies upon FPR 2010, rule 12.52A (*sic, semble* 12.42B) … The mother asserts there has been a fundamental change of circumstances which undermines the basis on which the original order was made, as now incorporated in FPR 2010, PD12F, para 4.1A, and in addition facts not properly considered by the court at first instance that were presumably not considered by mistake."

21. When the mother's solicitor attempted to issue the applications, he was told that the former was unnecessary as there was already on the court file the original Form C66 seeking wardship which had not been disposed of. I have referred to this oversight above. Therefore, the only application that needed to be issued was the second one.

22. The applications came before me for directions on 22 September 2020. I expressed myself to be entirely in agreement with the way the mother had formulated her claims. Although it would have been possible, at any rate in theory, for the mother to have pursued her first application alone, it seemed to me illogical and conceptually challenging for the court to consider making a return order while there remained on the file a valid, undischarged order refusing that very relief. Therefore, I agreed entirely that the mother had to seek to set aside the order of HHJ Hillier, and I expressed the opinion that at the trial that application should be the lead application. I further expressed the view that the mother was likely to face at trial an argument that she had been guilty of *Henderson* abuse. That argument, if successful, would preliminarily deprive her of the relief that she sought on the basis that it would be procedurally abusive for her to seek it in circumstances where she could and should have advanced that very claim before HHJ Hillier.

23. In the civil sphere, and in the financial remedy field of family law, arguments about *Henderson* abuse are not uncommon. However, there has never, so far as I am aware, been a case where such an argument has been deployed in a case about children.

24. Among other directions I ordered the mother to file and serve factual evidence, including a statement from herself setting out, inter alia:

    i) what she asserts to be the relevant change in circumstances since the family's consensual relocation to Libya and to set out those changed circumstances in schedule form identifying the factual evidence in support of same;

    ii) the current state of the justice and geo-political systems currently pertaining in Libya;

iii) an explanation as to why she did not seek to argue that there should be a full welfare enquiry and/or consideration of orders pursuant to the inherent (*parens patriae*) jurisdiction when the case was heard by HHJ Hillier in September and October 2019;

iv) why she asserts that the changed circumstances, as alleged by her, should lead to the court exercising its inherent (*parens patriae*) jurisdiction.

The father was ordered to file a statement in reply.

25. The mother did not apply to me at the directions appointment for permission to adduce expert evidence pursuant to FPR Part 25, although the need for this had been touched on in her solicitor's witness statement. I did not consider that expert evidence would be necessary. Rather, I intended that the mother would file factual evidence from herself and possibly other witnesses as to the state of the justice and geopolitical systems in Libya. That would not need expert evidence; the evidence would simply be statements of primary fact.

26. The mother's statement is dated 13 October 2020. To it she exhibited, as I expected, certain open-source documents about the dire state of affairs in Libya. These included the latest country guidance given by the Upper Tribunal on Libya on 3 May 2017 in the case of *ZMM (Article 15(c)) Libya CG* [2017] UKUT 263 (IAC).

27. However, the sixth exhibit was a 33-page, highly detailed expert report from Dr Igor Cherstich, an anthropologist by profession although with experience and knowledge of Libya far beyond matters anthropological. I agree with Mr Tyler QC that the qualifications of Dr Cherstich could scarcely be more impressive. His qualifications alone cover three pages of text.

28. In his report Dr Cherstich makes many statements of primary fact. That is unobjectionable and was specifically anticipated by my directions order. However, when he expresses opinions, specifically in this case predictions about the risks that the children face in the future, then he is giving expert evidence. It will be expert evidence, rather than mere subjective opinion, where the prediction can be said to be the product of professional expertise gained from training and experience (see *The RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch) at [14]). Clearly, the opinions expressed by Dr Cherstich met this standard.

29. Dr Cherstich's summary of his evidence was set out at the end of his report in the following terms:

> "a) Libya is in state of war.
>
> b) There is widespread and unpredictable violence throughout the country, and if the children remain in Libya they would, solely on account on their presence there, face a real risk of being subject to violence.
>
> c) If they children remain in Libya, they will not be able to live a functional life, access healthcare or pursue an education.

> d) In the context of a potential litigation between the mother and the father, it is likely that the mother will not be able to access the Libyan justice system.
>
> e) In the context of a potential litigation between the mother and the father, it is likely that any application brought by the mother or on her behalf in relation to the children will not be considered fairly.
>
> f) The three governments operating in Libya are unable to ensure that the children's human rights are respected."

30. Mr Tyler QC faced a problem. Section 13(1) and (2) of the Children and Families Act 2014 provide:

> "(1) A person may not without the permission of the court instruct a person to provide expert evidence for use in children proceedings.
>
> (2) Where in contravention of subsection (1) a person is instructed to provide expert evidence, evidence resulting from the instructions is inadmissible in children proceedings unless the court rules that it is admissible."

31. Mr Tyler QC therefore had to persuade me to rule that the report of Dr Cherstich was admissible. Although Ms Papazian had complained in her skeleton argument about the irregularity of the provision of the expert evidence she did not oppose me so ruling. She did argue, however, that the irregularity in the provision of the report did justify me in not attributing much weight to it.

32. I concluded that the report was "necessary" to assist me to resolve the proceedings justly (see sec 13(6)). In a way, I had solicited the opinions by the terms of my directions order. Therefore, I ruled on the first day of the hearing before me that the report was admissible.

33. Although the report is very eloquently written and was very interesting to read it has to be said that in terms of the primary facts which it conveyed it did not tell me anything more about the state of anarchy, violence, lawlessness, and chaos in Libya that was not already before the court from the material previously deployed by the mother as described above. The opinions were certainly more extensive than those which had previously been expressed but it would not have taken much imagination to have reached similar conclusions based on the existing material.

34. The mother's evidence also explained how the Covid-19 pandemic had hit Libya particularly hard in view of its political instability, its insecurity and its weak health system. Parts of the country had no preparedness and response activities.

35. The father's evidence in response dated 13 November 2020 was to downplay the very obvious problems suffered by Libya. However, he was able to make some good points in response. He made the fair point that the evidence adduced by the mother is of a general nature and does not focus on the lifestyle and day-to-day activities of

professional middle-class families in Tripoli. He points out that things have not deteriorated since December 2017 when the family consensually relocated to Libya. He points to the Upper Tribunal country guidance of July 2017 which stated that Libya was then in such a state of civil unrest that it would be in breach of human rights for asylum seekers to be forcibly returned there. Yet that was where the mother was happy for the children to live, and a place where she herself lived or visited up until September 2018. Moreover, WhatsApp messages as recent as August 2020 show the mother negotiating with the father for him to pay travel costs and accommodation for her to visit Libya in order to see the children.

36. The father maintains that the wider geopolitical state of affairs is certainly no worse than when the matter was before HHJ Hillier in September 2019 and is probably appreciably better. The father points to the peace conference held in Berlin in January 2020; to the follow-up talks in Geneva in February 2020; and to the ceasefire negotiated by the UNSMIL (United Nations Special Mission in Libya) Special Representative Stephanie Williams as recently as 23 October 2020. This was described in a communiqué by the European Union thus:

> "Taking immediate effect, this complete, permanent and countrywide Ceasefire Agreement is a crucial step and the result of months of intense regional and international efforts, initiated within the framework of the UN led Berlin process."

37. The father disputes that were the mother to litigate in Libya she would be treated unfairly. He points to a recent case where a mother from Western Europe was able to obtain custody of her children from a court in Libya. He disputes that the children would not be able to access reasonable healthcare. As for Covid-19 he says, with some justification, that the infection and mortality rates in Libya are far less than in the USA, France and the United Kingdom. He exhibited photographs of the children in banal surroundings, at home, at the playground or on the beach, seeking to show an entirely unremarkable and normal life.

38. In his written response Mr Tyler QC suggested that it was almost as if the husband was describing a country other than Libya. He was particularly critical of the photographs produced by the husband suggesting that they were well out of date or staged. In his oral argument he asked: where are photographs of the inside of the father's apartment? Where are photographs taken from the roof of the apartment looking north, south, east and west? Predictably, this led to photographs being taken and emailed instantly which showed a perfectly well-appointed apartment situated in a middle-class area of the city with unremarkable and normal facilities.

39. As for the outbreak of peace in Libya Mr Tyler QC quoted the remarks of Stephanie Williams to the Libyan political dialogue forum as recently as 2 December 2020 where she stated that time was not on Libya's side; that the country was infested by foreign forces and mercenaries; that there were about 1.3 million Libyans in need of humanitarian assistance; that the purchasing power of the currency has collapsed; that there was a terrible electricity crisis; and that there were domestic actors engaging in widespread corruption, self-dealing and mismanagement. Yet, she did say that the best way to move forward was through the political dialogue which ought to lead to unification of government institutions to lead to a lasting peace. She did not suggest that the shooting had restarted.

Legal principles: Set Aside

40. I now turn to the relevant legal principles. The power to set aside an order made under the inherent jurisdiction is contained in FPR 12.42B. It is explicated in FPR PD 12D para 8.1 – 8.6 and PD 12F para 4.1A – 4.1B. The former states at para 8.4:

> "The grounds on which an inherent jurisdiction order may be set aside are and will remain a matter for decisions by judges. The grounds may include: (i) fraud; (ii) material non-disclosure; (iii) certain limited types of mistake; (iv) a fundamental change in circumstances which undermines the basis on which the order was made; and (v) the welfare of the child requires it."

And at para 8.6:

> "In applications under rule 12.42B, the starting point is that the order which one party is seeking to have set aside was properly made. A mere allegation e.g. that it was obtained by fraud, is not sufficient for the court to set aside the order; evidence must be provided. Only once the ground for setting aside the order has been established (or admitted) can the court set aside the order and rehear the original application. The court has a full range of case management powers and considerable discretion as to how to determine an application to set aside an inherent jurisdiction order, including where appropriate the power to strike out or summarily dispose of an application to set aside. If and when a ground for setting aside has been established, the court may decide to set aside the whole or part of the order there and then, or may delay doing so. Ordinarily, once the court has decided to set aside an inherent jurisdiction order, the court would give directions for a full rehearing to re-determine the original application. However, if the court is satisfied that it has sufficient information to do so, it may proceed to re-determine the original application at the same time as setting aside the inherent jurisdiction order."

PD 12F para 4.1A states "The threshold for the court to set aside its decision is high".

41. Thus, the procedure prescribed by these Practice Directions is that the court may first consider whether the application is either unarguable or otherwise abusive and if so dispose of it then and there. If it survives this preliminary sift the court will give the necessary directions for evidence and set the case down for trial. At trial the court will determine the application and, if it is successful, will go on to determine anew the original application. Such a two-part process is routine for all kinds of applications. It happened in this case although it was not pressed on me at the directions hearing that the application to set aside HHJ Hillier's order should be summarily dismissed or struck out. This bifurcated process is also suggested in some obiter observations by Moylan LJ in *Re B (A Child) (Abduction: Article 13(b))* [2020] EWCA Civ 1057 at [89] – [90].

42. As for the grounds for a set-aside it is my opinion, consistently with my decision in the financial remedy case of *CB v EB* [2020] EWFC 72, that there is no scope for expanding

the list of potential grounds mentioned in PD 12D para 8.4. Moreover, the final ground namely "the welfare of the child requires it" cannot be interpreted literally to allow repeated further bites at the cherry on the mere assertion that a new welfare analysis militates in favour of a different order. In my opinion the welfare ground should be aligned with the change-of-circumstances ground. There must have been such a fundamental change in circumstances that the welfare analysis is completely undermined, and a fresh analysis of the child's welfare demands a different disposition. Any other approach is to encourage duplicative litigation and to defeat finality, which is contrary to the public interest.

***Henderson* abuse**

43. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 at [25] Lord Sumption explains that if a losing party to a piece of litigation later starts another piece of litigation against the winning party then, provided that the parties are exactly the same, the substantive law doctrine of *res judicata* will potentially apply. If the parties and the subject matter of the proceedings are exactly the same then a cause of action estoppel will arise and there will be, subject to proof of fraud or collusion, an absolute bar on the second case proceeding. In *Tinkler v Ferguson and others* [2020] EWHC 1467 (QB), [2020] 4 WLR 89 at [36(i)] Nicklin J put it thus:

> "Cause of action estoppel is absolute in relation to all points which had to be, and were, decided in order to establish the existence or non-existence of a cause of action. It also bars the raising, in subsequent proceedings, of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised."

44. If the subject matter of the proceedings in the second case differs to that in the first case but a particular issue relevant to the cause of action in each case has been decided in the first case, an issue estoppel will arise barring that issue from being litigated in the second case, unless fraud, collusion or special circumstances can be shown. Nicklin J put it this way at [36(ii)]:

> "Issue estoppel arises where, although the cause of action is not the same in the subsequent action, an issue which is necessarily common to both actions has been decided in the earlier case and is binding on the parties. Except in special circumstances, where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (a) were not raised in the earlier proceedings; or (b) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could, with reasonable diligence, and should in all the circumstances have been raised."

45. Neither cause of action estoppel nor issue estoppel can apply in this case. Although the parties are the same, the subject matter in each case is different. In the case before HHJ Hillier the subject matter was whether the children should be ordered to be returned to this country under the statutory jurisdiction established by the Brussels 2 regulation. In

the case before me the subject matter is whether the children should be protected pursuant to the inherent *parens patriae* jurisdiction. The key issue in the first case was whether the children should be returned; before me the key issue is whether they should be protected. I accept that the issues, as framed, could be said to be amounting to the same thing in the real world but there is, however, a difference between them.

46. The second reason why the substantive law doctrine of *res judicata* does not apply is that it has been held that it is not applicable to children proceedings: see *Re B (Children Act Proceedings: Issue Estoppel)* [1997] Fam 117, where Hale J said at 128:

> "It seems to me that the weight of Court of Appeal authority is against the existence of any strict rule of issue estoppel which is binding upon any of the parties in children's cases. At the same time, the court undoubtedly has a discretion as to how the enquiry before it is to be conducted. This means that it may on occasions decline to allow a full hearing of the evidence on certain matters even if the strict rules of issue estoppel would not cover them. Although some might consider this approach to be a typical example of the lack of rigour which some critics discern in the family jurisdiction, it seems to me to encompass both the flexibility which is essential in children's cases and the increased control exercised by the court rather than the parties which is already a feature of the court's more inquisitorial role in children's cases…
>
> …
>
> The court will wish to balance the underlying considerations of public policy, (a) that there is a public interest in an end to litigation – the resources of the court and everyone involved in these proceedings are already severely stretched and should not be employed in deciding the same matter twice unless there is good reason to do so; (b) that any delay in determining the outcome of the case is likely to be prejudicial to the welfare of the individual child; but (c) that the welfare of any child is unlikely to be served by relying upon determinations of fact which turn out to have been erroneous; and (d) the court's discretion, like the rules of issue estoppel, as pointed out by Lord Upjohn in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (No.2) [1967] 1 AC 853, 947, 'must be applied so as to work justice and not injustice.'"

47. Closely related to the doctrine of res judicata is the procedural power of the court to prevent duplicative litigation that would be manifestly unfair to a party to proceedings before it. This is sometimes called *Henderson* abuse, named after the famous decision of Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100. This power does not derive from the rule of substantive law; it is a procedural power, either prescribed by rules or within the inherent jurisdiction of the court. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 Lord Diplock put it this way at 536:

> "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

48. The first kind of case where these powers will be exercised is where a party seeks to mount a collateral attack upon a final decision of a court of competent jurisdiction. In *Hunter v Chief Constable of the West Midlands Police* Lord Diplock explained at 541 that such attacks may take a variety of forms. He cited Lord Halsbury LC in *Reichel v. Magrath* (1889) 14 App.Cas. 665 at 668 where he said:

> "My Lords, I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."

49. Where a case is shown to be a collateral attack on a previous judgment then it will be relatively straightforward to find that such a case is abusive and should be stopped. In *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 Lord Bingham of Cornhill stated at [30]:

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party"

50. However, this passage demonstrates that it is not necessary, in order to find that the second case is abusive, to be satisfied that it involves a collateral attack on a previous decision. Lord Bingham continued:

> "It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.

> That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

51. Therefore, even if the second case does not involve a collateral attack on the decision in the first it may nonetheless still be characterised as abusive and stopped if it can be shown, on a broad merits-based judgment, that the claim now being made should have been raised first time round. In *Henderson* itself Wigram V-C put it this way:

> "…where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

52. Therefore, there is imposed on a litigant a requirement to show that she could not with reasonable diligence have brought forward the subject matter, or key ingredients, of the second case first time round.

53. This principle is mirrored by the first rule in *Ladd v Marshall* [1954] 1 WLR 1489 where Denning LJ famously stated:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial …."

In *GM v KZ (No 2)* [2018] EWFC 6 at [10] – [12] I held that the due diligence requirement applied to an application to set aside an inward return order in respect of two children aged 5 and 4. Although an appeal was allowed from my decision (*Re M (BIIa Article 19: Court First Seised)* [2018] EWCA Civ 1637), this aspect of my judgment was not disturbed.

54. That said, it is established that the due diligence principle is applied in children cases with a degree of flexibility. In *Re S (Discharge of Care Order)* [1995] 2 FLR 639 at 646 Waite LJ stated:

> "The willingness of the family jurisdiction to relax (at the appellate stage) the constraints of *Ladd v Marshall* upon the admission of new evidence, does not originate from laxity or benevolence but from recognition that where children are concerned there is liable to be an infinite variety of circumstances whose proper consideration in the best interests of the child is not to be trammelled by the arbitrary imposition of procedural rules. That is a policy whose sole purpose, however, is to preserve flexibility to deal with unusual circumstances. In the general run of cases the family courts (including the Court of Appeal when it is dealing with applications in the family jurisdiction) will be every bit as alert as courts in other jurisdictions to see to it that no one is allowed to litigate afresh issues that have already been determined "

In this case the mother did not raise *parens patriae* first time round, or at least not soon enough. The first case lasted for 17 months from November 2018 to April 2020. This case has lasted for 4 months since its initiation in August 2020. It is hard not to draw the conclusion that the father is being unjustly harassed. The mother's explanation for the failure to advance her present argument is simply that she was not advised to raise it by her lawyers.

55. If this were a case about money I would readily conclude that the failure to advance the case first time round was not justified and that therefore the current case is an abuse which should be stopped. However this is not a case about money and my conclusion on the facts of this case is that the unjustified failure to advance this claim first time round should be brought into the equation as part of the overall discretionary exercise as to whether the jurisdiction should be exercised, rather than as a preliminary reason to stop the case without further consideration of the wider question. I am not saying that this should be the rule in all children's cases; there may well be cases where *Henderson* abuse, if proved, should stop the case preliminarily. However, on the facts of this case it would not be just, in my judgment, to stop the case now without consideration of the scope and purpose of the *parens patriae* jurisdiction and whether it should be exercised in this case. To this I now turn.

Parens Patriae

56. An eloquent account of the history of the inherent *parens patriae* jurisdiction is given in the judgment of the Court of Appeal in *Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)* [2015] EWCA Civ 886, [2016] AC 606, [2016] 2 WLR 487 at [31] – [45]. A fuller account is given in a recent lecture given by Sir James Munby to the Court of

Protection Bar Association on 10 December 2020: *Whither the inherent jurisdiction? How did we get here? Where are we now? Where are we going?*

57. The jurisdiction is explained by Sir James as follows. The Crown has an obligation as *parens patriae* to protect those who are unable to protect themselves, whether by reason of non-age or mental incapacity. It is a corollary of the duty of allegiance owed by British subjects to the Crown. That duty extends to British subjects travelling abroad on a British passport, as William Joyce discovered to his cost. Thus, the corollary is that the Crown's protective obligation applies, in theory at any rate, to British children and incapacitated adults who are overseas. This protective power of the Crown is a part of the Royal prerogative, the deployment of which has devolved to the High Court exercising its inherent jurisdiction.

58. The exercise by the High Court of this power to make decisions to promote a child's welfare has been described as a process of benevolent opportunism on the part of the judiciary (see Seymour: "Parens Patriae and wardship powers: their nature and origins" (1984) 14 OJLS 159). It was not always thus. The main function of the wardship jurisdiction at the beginning of the 20th century was restricted to protecting wealthy orphans and their property (see Cretney: Family Law in the 20th Century OUP 2003 at 584). However, as the *Latey Report* noted in 1967 wardship had by then enabled the court to act "to protect the young and inexperienced from folly and exploitation up to the age of 21".

59. Sir James explains how in relatively modern times the jurisdiction has been rejuvenated and has, by judicial creativity, acquired particular force and utility. This was traceable to the seminal decision of Singer J in *Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542. In that case KR, a teenage girl, was feared to have been lured to India to be forcibly married. The court deployed the *parens patriae* power to find her, rescue her and repatriate her. Since then there has been a resurgence of the jurisdiction in relation to abduction, forced marriage, female genital mutilation, stranded spouses, radicalisation and terrorism. In these cases, an order commonly made provides for the repatriation of affected children.

60. In current times the exercise of the power to order repatriation is however anomalous. In *Re B (A child)* [2016] UKSC 4, [2016] AC 606 Lord Sumption expressed the opinion at [87] that it is "on any view an exceptional and exorbitant jurisdiction". Parliament has legislated to restrict its use. In sections 1(1)(d), 2(3) and 3(1) of the Family Law Act 1986 it provided that the High Court cannot make an order under its inherent jurisdiction which gives care of a child to any person or provides for contact with, or the education of, a child, unless jurisdiction over that child is established under the Brussels 2 regulation, or the 1996 Hague Convention, or by virtue of the child's presence in England and Wales. Lord Wilson posed the question at [53] whether an order for the return of the child (which would, on implementation, inevitably have led to the appellant in that case issuing an application for residence with or contact to the child) would improperly subvert Parliament's intention when enacting this legislation. He then posed the alternative question whether Parliament in fact intended that the interests of the child should prevail. And he answered neither question.

61. At [85] Lord Sumption stated that the inherent jurisdiction should not be exercised in a manner which cuts across the statutory scheme. He stated:

> "I do not accept that the inherent jurisdiction can be used to circumvent principled limitations which Parliament has placed upon the jurisdiction of the court. For these reasons, in addition to those given by the judge and the Court of Appeal, I do not think that an order for the child's return could be a proper exercise of the court's powers."

62. Baroness Hale and Lord Toulson gave a joint judgment. At [59] they stated that the use of the jurisdiction should always be with great caution or circumspection. However, it would be an overstatement to say that the circumstances justifying its use must be "dire and exceptional" or "at the very extreme end of the spectrum". They gave three reasons why great caution should be exercised before wielding the power. First, to do so may conflict with a jurisdictional scheme between the countries in question. Second, it may result in conflicting decisions in those two countries. Third, unenforceable orders may result.

63. At [60] they set out their criterion for the use of the power in a simple formulation:

> "The real question is whether the circumstances are such that this British child requires that protection."

64. All of the comments of the Justices were obiter dicta, as the majority decision of the Supreme Court was that the courts of England and Wales had jurisdiction by virtue of habitual residence. However, in the decision of *Re M (A Child)* [2020] EWCA Civ 922, [2020] 3 WLR 1175 the Court of Appeal considered a case where the *parens patriae* jurisdiction had been exercised, and an order for repatriation made, there being no other jurisdictional ground for the court making the order. It set aside that order.

65. Moylan LJ sought to clarify the decision of the Supreme Court in *Re B*. From his judgment I extract the following principles:

i) the use of the jurisdiction must be approached with great caution and circumspection [104];

ii) there must be circumstances which are sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction [105];

iii) when considering the exercise of the power there is a need for a 'substantive' threshold [106]; and

iv) the statutory limitations in sections 1(1)(d), 2(3) and 3(1) of the Family Law Act 1986 support the conclusion that the inherent jurisdiction, while not being wholly excluded, has been confined to a supporting, residual role [107].

The last point echoes the observation of the Court of Appeal in *Re B* at [38]: "the focus nowadays must be on the protective rather than the custodial aspect of the inherent jurisdiction".

66. These pronouncements are not obiter dicta and are binding on me. I shall apply them.

67. Lying behind these principles are two big questions. First, can this court's order actually protect these British children? This gives rise to the question of the enforceability in the

other country of any order that this court might make. This was touched on by Baroness Hale and Lord Toulson, as I have mentioned above.

68. This question was discussed in the Court of Appeal in *Re B* at [56] where it said:

> "We acknowledge the principle, articulated by Romer LJ in *In re Liddell's Settlement Trusts* [1936] Ch 365, page 374, that "It is not the habit of this Court in considering whether or not it will make an order to contemplate the possibility that it will not be obeyed." On the other hand, as Kerr LJ put it in *Hamlin v Hamlin* [1986] Fam 11, page 18, "our courts will not make orders which they cannot enforce." These are matters which the President considered in *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [2014] 1 FLR 523, §§ 60-64. As in that case, so here, we do not think there is any need for us to come to a concluded view on a point which does not in fact arise for decision and which, if it had to be decided, would call for fuller argument than was appropriate here. We merely note, as the President did, that in *Wookey v Wookey, In re S (A Minor)* [1991] Fam 121, page 130, Butler-Sloss LJ said that "there must be a real possibility that the order, if made, will be enforceable," while in *Dadourian Group International Inc v Simms and others (Practice Note)* [2006] EWCA Civ 399, [2006] 1 WLR 2499, § 35, Arden LJ said that "the court must be astute to see that there is a real prospect that something will be gained." And we are inclined to agree with the President's view (§ 63) that in such cases the court will need evidence as to the applicable law and practice in the foreign court, in particular, evidence as to whether the foreign court would be likely to enforce the order."

69. This passage suggests that a factor, maybe a critical factor, at large when deciding to make a protective order is the likelihood of successful enforcement of the order by the other country's legal system in the event that the actor with the care of the children refused to comply with it. Does the court need to assess the likelihood of non-compliance? Consider an application for a freezing injunction in respect of an asset overseas where the court does not have personal jurisdiction over the respondent. When considering whether to grant such an injunction the court will have in mind, perhaps at the forefront of its mind, whether the overseas court would reciprocally enforce the order if the respondent refused to comply with it. The court does not generally make an assessment, when making its decision, of the subjective intentions of the respondent as regards compliance with the order. Rather, the court is principally concerned with the question whether its order would be futile if the respondent breached it.

70. This is precisely the approach adopted by Sir James Munby P in *Re Jones (No 2)* [2013] EWHC 2730 (Fam), where he said:

> "15. The normal approach of the court when asked to grant an injunction is not to bandy words with the respondent if the respondent says it cannot be performed or will not be performed. The normal response of the court is to say: "The order which

> should be made will be made, and we will test on some future occasion, if the order which has been made is not complied with, whether it really is the case that it was impossible for the respondent to comply with it." There is a sound practical reason why the court should adopt that approach, for otherwise one is simply giving the potentially obdurate the opportunity to escape the penalties for contempt by persuading the court not to make the order in the first place. That said, I have to recognise that the court – and this is a very old and very well-established principle – is not in the business of making futile orders. How does one balance those two somewhat contrasting propositions?"
>
> 16. The answer, it seems to me, is that one has to evaluate the degree of likelihood that the order, if made, will be futile, which, in the present case means that one has to evaluate the degree of likelihood that the order, if made, will be frustrated, not by the actions of the mother, but despite her best endeavours to ensure compliance, by the obdurate opposition of the children."

When making that evaluation Sir James placed in the scales the likelihood of frustration of the order not by the conduct of the mother but rather by the obdurate opposition of the children. This I take to be confirmation that, generally speaking, the court will not undertake an analysis of the subjective intentions of the respondent regarding compliance. I am not suggesting, of course, that such an analysis is impermissible, or that conclusions reached are inadmissible. Rather, I am suggesting that if this course is taken it is a distinctly secondary exercise.

71. This leads to the next big question, which follows from the first. What can this court do when the children are living in a place where normal civil society has broken down? When Singer J made his famous order in *Re KR* he was satisfied that a combination of assistance from the Indian authorities, the British High Commission, and KR's own brother who had travelled out to India to help her, would result in his order for return being implemented. His order provided:

> "IT IS ORDERED that every person in a position to do so shall co-operate in assisting and securing the immediate return to England of KR, a ward of this honourable court"
>
> AND NOW THEREFORE this court invites all judicial and administrative bodies in the State of India to render assistance in establishing the whereabouts of the ward of this honourable court and in arranging for her to be placed in contact with the British High Commission in New Delhi and to facilitate her travel to the British High Commission with a view to her immediate return to the UK."

72. It is doubtful that he would have made his order if the evidence was that India had collapsed into anarchic disorder: it would have been a futile order. His confidence that the order would be implemented was justified. KR was delivered to the High Commission and made her way back to England safely.

73. In his lecture Sir James Munby addressed this point. He said:

> "The purpose of such an order is to protect the child, not least by facilitating the child's hopefully speedy return to the jurisdiction. In the days of Lord Palmerston, the Briton imperilled abroad had merely, in echo of the Roman of old, to assert *civis britannicus sum* to find rescue at hand, if need be in the form of the Royal Navy. The days of gunboat diplomacy are, at least in this context, long gone. …
>
> The English court, of course, has no authority at all in a foreign state, and must always be astute to ensure that no order it makes could possibly be construed as an interference with the sovereign rights of another State. These are matters to be dealt with in accordance with the well-established principles of international comity between friendly States. Unless, conceivably, in the case of failed states where there is no effective functioning Government at all, we cannot, as it were, send in the Royal Marines, the SAS or the SBS to rescue a child. We have to engage the willing assistance of the foreign state. That is why judicial comity properly bridles at the use of a word such as 'require' in an English order directed to a foreign court. A wardship order relating to a British child abroad which seeks the assistance of the foreign authorities, whether judicial or other, is couched in language designed to minimise all risk of offence. Typically, it contains explanatory recitals designed to engage the concern of the foreign authorities and to elicit their willing assistance; and it then 'respectfully requests' that assistance."

74. It is my clear judgment that where the court is exercising this exorbitant extraterritorial jurisdiction, it has to make first and foremost an assessment of the likelihood of reciprocal enforcement of its order in an overseas court. The court will need to be satisfied, therefore, before it makes an order for protection – and realistically the order will be almost invariably be an order which facilitates repatriation – that in the event of non-compliance by the actor with the care of the children there is a reasonable prospect of the authorities of that country enforcing the order.

This case: conclusions

75. I approach my task with great caution and circumspection. My conclusion is that the mother does not surmount the substantive (which I take to mean "high") threshold for the making of a protective order in respect of these children. I cannot conclude that the circumstances are sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction. I now give my reasons.

76. I consider first whether a protective order for repatriation, if made, would be likely to be capable of enforcement in the Libyan courts at the suit of the mother.

77. The expert evidence of Dr Cherstich states:

> "Having established that the rule of law is practically absent in Libya, I will now present some further considerations with regards to the case of the three children.
>
> For what concerns the possibility of a litigation between the mother and the father of the children over custody, one has to consider that it is likely that such litigation would not be conducted fairly, as women are currently highly discriminated in Libya.
>
> Consequently, the mother will have limited access to Libyan family courts and it is likely that any application brought by her or on her behalf in relation to the children will not be considered fairly."

78. This evidence is clear. The mother would be unlikely to be able to enforce an order for repatriation in the courts of Libya, even assuming that they were functioning. Therefore, an order for repatriation which seeks the assistance of the Libyan authorities in its facilitation would be a *brutum fulmen*, or an exercise in futility.

79. Would there nonetheless, having regard to the approach of Romer LJ in *In re Liddell's Settlement Trusts*, be purpose in making an order directed only at the father? Would he comply with it? Mr Tyler QC has pointed out that the father has fully and compliantly participated in both sets of proceedings and has never defaulted in respect of any procedural orders of the court. Why not just make the order and see if he complies? I have explained above that an assessment of the likelihood of compliance by the father with an order for repatriation is not the ultimately determinative consideration in assessing whether the order, if extending to the Libyan authorities, would be futile.

80. In this case, looking at the matter realistically, I would be surprised if the father voluntarily complied with an order for repatriation were I to make it. In any event, there is no need for me to come to a decided view about the respondent's probable state of mind, or what weight it should be given, if any, because of the weight of the other reasons for refusing the application, to which I now turn.

81. I turn to the question of change of circumstances. I am not satisfied on the evidence that since December 2017, when the family consensually relocated to Libya, there has been a major deterioration in the security situation in Libya. The evidence suggests that things are really no worse than they were when the Upper Tribunal issued its country guidance in July 2017. Indeed, it could well be argued that things have improved.

82. Further, I am not satisfied that since the order of HHJ Hillier on 25 October 2019 there has been a fundamental change of circumstances undermining the basis on which her order was made, justifying its setting aside or that the welfare of the children demands it. On the contrary, it seems to me, while the situation in Libya is concerning, that things have not got worse and that it could be said that things have slightly improved since that date.

83. So, these are the two primary reasons why the mother's application is refused: (i) the order, if made, would likely be futile; and (ii) there has been no fundamental change of

circumstances in Libya either since the arrival of the family there in December 2017 or since the order of HHJ Hillier in October 2019.

84. There are two further reasons why the applications must be dismissed:

i) Although the mother has carefully framed her application in terms of protection, the stark reality is, just as it was in *Re B*, that as soon as the children arrived here (if they ever did) she would apply for residence with, or contact to, them. This means that the inherent jurisdiction is sought to be used to circumvent principled limitations which Parliament has placed upon the jurisdiction of the court. This would not be a proper exercise of the court's powers.

ii) The fourth point at paragraph 65 above is that the inherent jurisdiction, while not being wholly excluded, has been confined to a supporting, residual role. Recently, in a public law case, I made orders under the jurisdiction authorising a local authority to collect a British infant born in Spain from the British Embassy in Madrid where she had been delivered by Spanish social services. That is a good example of the jurisdiction being used in a supporting, residual role. However, in this case, the mother seeks the jurisdiction to be used as the primary, indeed sole, form of relief. Again, this would not be a proper exercise of the court's powers.

85. Those are the reasons for my conclusion. An additional reason (on which my primary conclusion does not depend) is that the mother has been guilty of *Henderson* abuse. She could and should have raised her *parens patriae* arguments before HHJ Hillier. The failure of her previous lawyers to advise her to place this argument before HHJ Hillier does not justify the default. For the father to have been forced to endure, if not an identical claim, then one that is strikingly similar, only four months after the conclusion of the first claim does amount, in my judgment, to unjust harassment.

86. The mother's application dated 17 August 2020 will be dismissed, as will her originating wardship application dated 30 November 2018. For the avoidance of any doubt the children will be de-warded.

87. I cannot part from this case without urging the father to allow the mother to have meaningful contact with her children. This, I suggest, must lead him to enable the mother to visit the children in Libya when flights resume, and it is safe to do so. If the mother needs financial assistance to do so then the father, as a matter of basic humanity, should furnish that. In the meantime, I urge the father to allow the mother's WhatsApp video contact with the children to take place for reasonable periods rather than for the very short times that have recently been allowed by him.

88. That is my judgment.
