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Case No: FD20P00354/FD20P00355

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10/03/2021

**Before:**

**MRS JUSTICE ARBUTHNOT**

**A (A Child) (Abduction: Jurisdiction: 1996 Hague Convention)**

**MS MEHVISH CHAUDHRY** (instructed by **DAWSON CORNWALL**) for the **applicant**  
**MR MICHAEL GRATION** (instructed by **BANNER JONES**) for the **respondent**  
**MS JENNIFER PERRINS** (instructed by **CAFCASS LEGAL**) for the **child**

Hearing dates: 1 and 2 March 2021

**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.

.....  
MRS JUSTICE ARBUTHNOT

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.

## **Introduction**

1. I shall refer to the applicant as “the father”, and to the respondent as “the mother”.
2. This my judgment on the father’s application dated 18<sup>th</sup> August 2020 under the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement in Respect of Parental Responsibility and Measures for the Protection of Children (“the 1996 Hague Convention”) that jurisdiction be transferred to Switzerland pursuant to Article 8 of that Convention where the parties’ child is currently living with her father. The application is opposed by the mother and the guardian.

## **Background**

3. A (“the child”) was born in 2018 and is therefore aged a little over 2 years old.
4. The parents met in 2016 when on holiday. They married in 2018. The mother is British, and the father is Swiss. The parties lived together at the mother’s home with the child, who is a British national.
5. A is one of a number of the mother’s children. The older children, all boys, are aged between 19 and six. Three older children remain with the mother, the fourth child has taken himself into care whilst the fifth and sixth children, aged four and six are subject to private law proceedings and live with their father. A significant issue in the proceedings concerning the boys is that the mother had the two boys “circumcised during a contact visit without their father’s knowledge or consent.
6. In late 2019 or in early 2020, the father and mother’s relationship came to an end, but the father remained in the mother’s home. Both parties make serious allegations against each other including of domestic abuse.
7. On 2<sup>nd</sup> June 2020, it is agreed that A was abducted by the father from England when his parents paid for a private jet to take the father and his daughter to Switzerland.
8. The mother saw A twice in Switzerland, but she has not seen her in person since August 2020. Contact via video link has been unsatisfactory for one reason or another.

## **Proceedings in Switzerland**

9. On 8<sup>th</sup> June 2020, the father issued an application in Switzerland for protective measures in respect of A pursuant to Article 11 of the 1996 Convention. On 9<sup>th</sup> June 2020, the court issued a provisional order that the father be granted custody and that the mother be allowed contact three times a week by video link.
10. On 12<sup>th</sup> June 2020, the mother launched summary proceedings in Switzerland under the 1980 Hague Convention on the Civil Aspects of International Child Abduction to have A returned. On 16<sup>th</sup> June 2020, the father’s applications were stayed until the conclusion of the 1980 Convention proceedings.

11. On 3<sup>rd</sup> July 2020, the Juvenile Protection Service Evaluation Unit in Switzerland served an assessment concluding that protective measures were not necessary. The conditions in which A was living were deemed to be adequate.
12. On 10<sup>th</sup> July 2020, the mother's application was dismissed by the Swiss courts on the grounds of the father's defence under Article 13b, that A would be in psychological danger or in an intolerable situation if she were to be returned. Part of the evidence relied on by the Swiss court was a section 7 Children Act 1989 report produced for the private law proceedings. This set out serious welfare concerns relating to two older half-siblings. Both the mother and the father gave evidence and were represented. A was presented by a Guardian whose position was that A should not be returned to England.
13. On 11<sup>th</sup> September 2020, the mother's appeal was dismissed by the Swiss Federal Court. The Swiss court then set down the father's application for a hearing on 1<sup>st</sup> December 2020 which was adjourned on the mother's application. A letter dated 12<sup>th</sup> February 2021 has been sent by the Swiss Court which explains that a decision about competence will be made soon.

### **Proceedings in this jurisdiction**

14. In terms of applications in this jurisdiction, the mother issued a C100 on 12<sup>th</sup> June 2020 and proceedings have been ongoing since then. Amongst other applications, the mother applied for a return order pursuant to Article 11(7) of the Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 ("BIIa"). The mother withdrew her application as it was accepted that Switzerland is not a "member state" for the purposes of the regulation.
15. Finally, the father made his application to transfer jurisdictions. During the course of these proceedings, on 3<sup>rd</sup> July 2020, Mr Justice Holman declared by consent, pursuant to Article 15 of the 1980 Convention, that A's removal from England to Switzerland on 2<sup>nd</sup> June 2020, was wrongful within the meaning of Article 3 of the 1980 Convention.
16. On 11<sup>th</sup> June 2020, A was joined as a party to the proceedings and a rule 16.4 guardian, Mrs Odze of the High Court team was appointed. On 28<sup>th</sup> October 2020, the father agreed that the courts of England and Wales had a substantive welfare jurisdiction in relation to the child by virtue of Article 10 of the Brussels II Revised regulations and/or Article 7 of the 1996 Convention.

### **Questions raised:**

17. I am asked to decide four questions:
  - i) Can this court transfer proceedings to Switzerland either pursuant to BIIa or to Article 8 of the 1996 Convention?

- ii) If the answer is yes, should the court transfer these proceedings to Switzerland pursuant to the same Article?
  - iii) If the answer is no, is there an alternative route to transfer? If the answer is yes, should the court consider transfer via this alternative route?
  - iv) Depending on the decision made, the country for any interim contact and the amount of it between the child and her mother should be considered by the court.
18. What is not in dispute is that the child was wrongfully removed from this jurisdiction on 2<sup>nd</sup> June 2020. The father accepts that A was habitually resident in England and Wales at the time of her removal and that the mother was exercising her rights of custody in relation to their daughter.

### **BIIa v the 1996 Convention**

#### **Question (i)**

19. Can this court transfer proceedings to Switzerland either pursuant to BIIa or to Article 8 of the 1996 convention?
20. Various arguments were raised as to whether BIIa or the 1996 Convention applied in this case. Initially Mr Gration for the mother argued that this was a BIIA case although in argument the parties including the guardian agreed that the 1996 Convention applied.
21. England remains a BIIa state (for proceedings started before 31<sup>st</sup> December 2020) and is a 1996 Convention state whilst Switzerland is a non-BIIA state but has signed the 1996 Convention.
22. The relevant provisions of BIIA are as follows:
23. Article 8 of BIIA provides:

*“Article 8*

#### **General jurisdiction**

- 1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seized.
  - 2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.”
24. The habitual residence of the child is key. At all material times the child’s habitual residence in this case was in England.
25. Article 10 of the BIIa 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) ...
- (ii) ...
- (iii) ...
- (iv) ..."

26. In this case of A's agreed wrongful removal, according to Article 10 of BIIa, the courts in England retained their jurisdiction because she was habitually resident here and had not acquired a habitual residence in another Member State. She had been removed to Switzerland, which is not another BIIa member state and the mother had not acquiesced to the removal or retention.

27. In this case it is not relevant to consider the wide territorial reach of Article 10 which was interpreted by the advocate general recently after a CJEU reference by Mr Justice Mostyn.

28. Article 15 of BIIa is relevant:

*"Article 15*

## **Transfer to a court better placed to hear the case**

1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

- (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or
- (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2.-6. ...”

- 29. This Article permits transfer in appropriate cases from the courts in a member state with jurisdiction to a court in another member state. Switzerland is not a member state therefore Article 15 does not apply.
- 30. Finally, Articles 61 and 62 read as follows:

*“Article 61*

**Relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children**

As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:

- (a) where the child concerned has his or her habitual residence on the territory of a Member State;
- (b) ...

*Article 62*

**Scope of effects**

- 1. The agreements and conventions referred to in Articles 59(1), 60 and 61 shall continue to have effect in relation to matters not governed by this Regulation.
- 2. ...”
- 31. Articles 61 and 62 are not particularly straightforward. What is clear however is that Article 61 deals with the relationship between the 1996 Convention and BIIa. BIIa applies where the child has her habitual residence in a member state as “this Regulation shall apply” as against the 1996 Convention.
- 32. Article 62 however, considers the scope of Article 61 (and Articles 59(1) and 60). The 1996 Convention in Article 61 “shall continue to have effect in relation to matters not governed by this Regulation”.

33. The expression “not governed by” has been considered in various authorities. The parties rely on Lord Justice Lewison’s explanation in relation to Article 19 of BIIa, *lis pendens*, at paragraph 48 of *Mittal v Mittal* [2013] EWCA Civ 1255 that in “my judgment in the context of a legislative provision dealing with a stay of proceedings, the proceedings are only “governed” by BIIR if BIIR tells the court how to deal with the application”.
34. The Practice Guide for the Application of the Brussels BIIa Regulations at page 88, paragraphs 8.3.1 and 8.3.2 considers the approach to be taken when considering Article 61(a). The court should ask the following questions:
- “8.3.1. Does the case concern a matter covered by the regulation?
- 8.3.2. Does the child concerned have his or her habitual residence on the territory of the member state?”
35. The Practice Guide makes it clear that the paragraphs concern the relationship between Member States. Ms Chaudhry suggests that the answer to the first question is no. I agree with her. The matter in this case concerns an application for a transfer to a non-member state. The Article concerning transfers to other states, Article 15, is confined to member states therefore this case does not concern a matter covered by BIIa, it does not apply and does not prevail over the 1996 Convention.
36. The meaning of Article 61 and the interrelation between BIIa and the 1996 Convention has been considered in two authorities. Unfortunately, they seem to be inconsistent with each other.
37. The first in time is *H (A Child) (Care Proceedings Jurisdiction)* [2014] EWHC 2550. It is a decision of Theis J. She decided that a request under Article 8 of the 1996 Convention for a transfer of jurisdiction to Albania from England was not possible as Article 15 of BIIa only allowed transfer of jurisdiction to other member states. Albania was not a member state of BIIa but was a party to the 1996 Convention. She held that the effect of Article 61 was to prevent the operation of Article 8 of the 1996 Convention as “the Regulation acts to provide for jurisdiction only to be exercised under the Regulation...” I noted that Theis J was not referred to Article 62 of BIIa which sets out the scope of Article 61 nor did she hear full argument. I noted further two important authorities which might have had a bearing on the decision were not cited.
38. The second case is that of Baker J (as he then was), *JA v TH (1996) Hague Convention: Request to Exercise Jurisdiction* [2017] 2 FLR. In that case which concerned proceedings in Norway and the power to submit a request under Article 9 of the 1996 Convention to transfer jurisdiction to England, it was accepted that Article 15 BIIa did not apply as it was directed at Member States (although at first everyone in the case had overlooked the fact that Norway was not a member of the EU). The court granted the application to transfer proceedings to England under Article 9.
39. *JA v TH* contradicts the earlier authority of *H*. I prefer the former although I noted that the matter was not fully argued as the parties and the court assumed that as Norway was not a Member State but was a party to the Convention, the 1996 Convention applied.

40. The argument before me is that BIIa does not tell the court how to deal with a transfer between a member state (England) and a non-member state (Switzerland). Article 15 of BIIa deals with transfers between member states only. Although Article 61(a) suggests that as between BIIa and the 1996 Convention where the child has her habitual residence in a Member State then BIIa shall apply. Article 62 limits the scope of Article 61. The 1996 Convention will have effect “in relation to matters not governed by this Regulation”. Transfers between a Member State and a non-Member State are not governed by Article 15 of BIIa, therefore, the 1996 Convention continues to apply.
41. In my judgment BIIa does not apply and I turn to the 1996 Convention.
42. Before I do so, I should mention that Ms Chaudhry argued that this court should not give primacy to BIIa as the UK had now left the EU and Parliament had ensured that the 1996 Convention continued to operate after Exit Day. She said that the withdrawal agreement had not intended that Articles 61 and 62 BIIa should apply after the end of the transition period although she accepted that Article 8(1)(a) of the Jurisdiction and Judgments (Family) Amendment etc (EU Exit) Regulations 2019 meant that BIIa continues to apply in these proceedings. Her argument in relation to this was dealt with very briefly by Mr Gratton for the mother and Ms Perrins for the guardian. Ms Chaudhry’s argument was not a reason why this court decided to give primacy to the 1996 Convention.

### **The 1996 Convention**

43. The aim of the 1996 Convention is to avoid conflicts in respect of jurisdiction between the signatories. The relevant provisions of the 1996 Convention are as follows:

#### “Article 1

(1) The objects of the present Convention are –

- a) to determine the State whose authorities, have jurisdiction to take measures directed to the protection of the person or property of the child;
  - b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
  - c) to determine the law applicable to parental responsibility;
  - d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
  - e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.”
44. Article 3 defines the measures which the Contracting State has jurisdiction to take. These include *inter alia* the exercise of parental responsibility, the right to access and the right to determine the child’s place of residence. The mother’s application in this case for a



child arrangements order amongst other applications falls within the definition of Article 3.

45. Article 5 of the 1996 Convention provides:

“Article 5

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.”

46. Article 7 provides:

Article 7

(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another 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 State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

(2) The removal or the retention of a child is to be considered wrongful where –

a) ...

b) ...

(3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.

47. Article 8 provides:

“Article 8

(1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or
- suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.

(2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are

- a)* a State of which the child is a national,
- b)* a State in which property of the child is located,
- c)* a State whose authorities are seized of an application for divorce or legal separation of the child's parents, or for annulment of their marriage,
- d)* a State with which the child has a substantial connection.

(3) The authorities concerned may proceed to an exchange of views.

(4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.”

48. Ms Chaudhry for the father argues that the power to transfer jurisdiction (or to find that another Contracting State “would be better placed in the particular to assess the interests of the child”) is set out in Article 8. She contends that in in the Convention there is power to transfer under Article 8 whether a case comes within Article 5 (and 6) or within Article 7. The court could have jurisdiction on more than one basis. The court could have jurisdiction under Article 5 as the child was habitually resident as at the date of issue which was 15<sup>th</sup> June 2020.
49. If Article 7 is excluded by Article 8 then it would limit the court’s options and be against the best interests of the child. The court should adopt a purposive approach to a request to transfer in these circumstances and transfer the proceedings to Switzerland where the courts would be better placed to determine A’s living arrangements.
50. Mr Gratton for the mother and Ms Perrins for the guardian accept there is a discretion to transfer jurisdiction under Article 5 but not where there has been a wrongful removal of a child as has occurred in this case.
51. No mention of Article 7 is found in the power to transfer jurisdiction set out in Article 8. The guardian and mother contend that Article 7 of the Hague Convention means that the courts here retain their jurisdiction over A as she was habitually resident here before her

wrongful removal. Switzerland quite properly exercised its jurisdiction under Article 11 of the 1996 Convention to take urgent measures. For the substantive application they say that jurisdiction is retained until the child has acquired a habitual residence in Switzerland and the mother has acquiesced in the removal to Switzerland, which has not occurred in this case.

52. I consider that a plain reading of Articles 5, 7 and 8 makes it clear that a change of the child's habitual residence to another Contracting State can occur under Article 5(2) of the 1996 Convention. Article 7 is confined to cases where there has been a wrongful removal or retention, the authorities of the Contracting State, here England, in which the child was habitually resident immediately before the removal or retention, in this case on 2<sup>nd</sup> June 2020, keep their jurisdiction until the child has acquired a habitual residence in another State and the other conditions are met as set out in article 7 and one of the other conditions required by Article 7 are established. The retained jurisdiction has not been lost as the mother has not acquiesced to the child's removal to Switzerland. Article 8 applies to a Contracting State "having jurisdiction" under Article 5 (and 6), Article 7 is not included. Articles 5 and 6 are mentioned in two places in Article 8, at (1) and (4).
53. The 1996 Convention has an Explanatory Report by Paul Lagarde who was the "Rapporteur" for the Special Commission set up in 1994 to draw up the draft text of the Convention. This can be relied on to clarify the Articles. Page 557, paragraph 46 says in relation to Article 7 that:

"The underlying idea is that the person who makes a wrongful removal should not be able to take advantage of this act in order to modify for his or her benefit the jurisdiction of the authorities called upon to take measures of protection for the person, or even the property of the child. But, on the other hand, the wrongful removal, if it persists, is a fact that cannot be ignored to such a point as to deprive the authorities of the new State, which has become that of the new habitual residence of the child, of this jurisdiction over protection. The difficulty consists therefore in determining the temporal threshold from which jurisdiction would pass from the authorities of the State from which the child has been wrongfully removed, to those of the country to which he or she has been taken or in which he or she has been retained".
54. The guidance on Article 8 in the Explanatory Report does not assist the father in this case. It is clear that jurisdiction has not crossed the acquiescence or the temporal threshold in which jurisdiction would pass to Switzerland.
55. Ms Chaudhry relied on two examples in the Practical Handbook on the operation of the 1996 Convention which appear to support the father's argument. The handbook was published by the Hague Conference on Private International Law Permanent Bureau in 2014.

56. Guidance is given in relation to Article 7 and jurisdiction in cases of international child abduction at page 42, paragraph 4.20. This makes it clear that the authorities in the state where the child was habitually resident immediately before wrongful removal retain jurisdiction until a number of conditions have been met. It explains this rule is to deter international child abduction “by denying any jurisdictional benefit to the abducting party”. The handbook gives at paragraph 4.22 two sets of circumstances where jurisdiction can change. In the first situation, habitual residence has been acquired in the other state and the person with rights of custody has acquiesced to the removal or retention. In the second, habitual residence has been acquired, the child has resided in the other state for at least one year after the person having rights of custody should have known the whereabouts of the child and no request for return has been lodged within that period has been made and the child is settled in the other state.
57. This is followed by a flowchart at page 45, paragraph 4.24 confirming graphically what is said in the preceding paragraphs from 4.20 onwards.
58. Examples follow and at page 47 example 4 (D) set out a similar situation to the one in this case. A child is wrongfully removed to state B. On the basis of the grave risk of harm to the child, the mother fails in her attempt to have the child returned to state A under the 1980 Convention. She then wishes to initiate custody proceedings in state A. As a year has not passed and the mother does not acquiesce, the authorities of state A retain jurisdiction.
59. Ms Chaudhry relies on the final paragraph of example 4 (D) where the handbook says:
- “However, if the authorities in State A consider that the authorities in State B are better placed to assess the best interests of the child and that State A is a State falling within Article 8(2) of the 1996 Convention in the particular case, they can request (directly or with the assistance of the Central Authority of State A) that the authorities in State B assume jurisdiction, or they can suspend consideration of the case and invite the father (or mother) to introduce such a request before the authorities of State B. The authorities in State B can assume jurisdiction in the case if they consider that it is in the child’s best interests.”
60. She points out that the example 4 (D) imports a discretion to transfer jurisdiction where a child has been wrongfully removed and it is a situation falling within Article 7.
61. Article 8 (and 9) and the question of when jurisdiction can be transferred to take measures of protection is considered at Chapter 5 of the Practical Handbook. The relevance of Articles 5 and 6 is considered but Article 7 is not mentioned.
62. Chapter 13 of the Handbook considers a number of special topics including at A. International Child Abduction at page 139. Paragraph 13.3 confirms the narrow reading of Article 7 where the authorities of the state of the habitual residence of the child retain jurisdiction until a number of conditions are met (acquiescence, the one-year rule etc).

63. The example 13 (A) of a wrongful removal does not import an assessment of the best interests of the child with a discretion to return in certain circumstances using Article 8.
64. Ms Chaudhry relies on page 160, paragraph 13.55 of Example 13(I) where despite a child having been wrongfully removed from state A, there is an agreement between the parties that the child may relocate to state B. Although the Article 7 requirements for a change in jurisdiction are not met and jurisdiction does not move to state B, the agreement can be submitted to the authorities in state A “who have general jurisdiction to take measures of protection in relation to the child (Art. 5(1))”. This example, Ms Chaudhry says, shows that this court can transfer jurisdiction under Article 8 despite the fact that A has been wrongfully removed from England. In my judgment this example is of a situation where there has been an agreement mediated between the parties and not of a wrongful abduction without more.
65. The two examples relied on by Ms Chaudhry contradict a plain reading of Article 7 and Article 8 and the Explanatory Report of M Lagarde. Mr Gratton argues that the paragraph in 4 (D) of the Practical Handbook relied on by Ms Chaudhry must be a mistake as it contradicts the wording of Articles 7 and 8. He points out the Handbook was created 20 years after the Explanatory Report and page 14, paragraph 1.11 notes that the guidance in the Handbook is not legally binding on the Contracting States to the 1996 Convention. He relies on the example at 13(A) at page 142 which I have dealt with above. He says that I should not be bound to follow the examples Ms Chaudhry relies on.
66. Can this court transfer proceedings to Switzerland either pursuant to BIIa or to Article 8 of the 1996 Convention?
67. In my judgment the court cannot transfer these proceedings under BIIa. There is a general power to transfer under Article 8 in the 1996 Convention if the situation comes within Article 5 or 6. Article 7 requires that jurisdiction is retained by the country of habitual residence immediately before the child was wrongfully removed. The lack of ability to transfer jurisdiction in wrongful removal cases is supported by a reading of the Article as well as the Explanatory Notes written by the Rapporteur M. Lagarde. The Practical Handbook is not binding on this court. It was written 20 years afterwards and although in one example it contradicts the narrow construction of Article 7 it generally supports the principle that jurisdiction is not transferred for reasons of policy.
68. In my judgment jurisdiction cannot be transferred in the case of wrongful removal under Article 7 until the conditions in Article 7(1)(a) or (b) are met.

**Question (ii)**

69. If the answer is yes, should the court transfer these proceedings to Switzerland pursuant to the same Article?
70. I have made it clear that in my judgment Article 8 does not apply in a case of wrongful removal when the conditions in Article 7(1)(a) or (b) are not met. If I am wrong about that, the Article 8 test is whether this court considers that the authorities in Switzerland

“would be better placed in the particular case to assess the best interests of the child” because the child has a substantial connection with Switzerland (Article 8 (2)(d)). In those circumstances this court has a discretion to ask Switzerland to assume jurisdiction to take measures as it sees fit or to stay the case and invite the parties to place the request before the courts there. This court and the Swiss court could “proceed to an exchange of views”.

71. In terms of whether the court should exercise its discretion and transfer the proceedings to Switzerland pursuant to Article 8 of the Convention, Ms Chaudhry relied on a number of features to show the courts in Switzerland would be better placed to assess A’s best interests.
72. Ms Chaudhry relied on the fact that A, a Swiss national, had resided in Switzerland for the past nine months. Her closest connections are there. There will need to be assessments of the family and child before any final determination of welfare is made, that would be more appropriately done in Switzerland. A Swiss social worker is allocated to her. A child psychologist sees her once a week. Her doctors, dentists and teachers are in Switzerland. The Swiss court is about to decide on competence and therefore is seized of proceedings in relation to A. Orders in relation to contact have been made in the Swiss court. Child protection services have been involved in her life in Switzerland and A has a court appointed guardian. The parents both had lawyers in Switzerland and the mother will have a court appointed interpreter. Jurisdiction in Switzerland would avoid conflicting orders and determinations in respect of the child. Earlier stays were correctly granted by the High Court whilst the 1980 proceedings were determined in Switzerland.
73. The guardian and father disagree that the Swiss court is better placed to hear the welfare proceedings. Ms Perrins and Mr Gratton suggest that I should exercise my discretion and not transfer the case. The question of ‘better placed’ is about forum. The guardian relies on the following: the background facts prior to removal all occurred in England. The mother is British, and the family have lived with A in England. The English court would be best place to weigh up the significance of the private law proceedings in relation to the half-siblings. The guardian relies on the language barriers for the mother if the case were to be heard in Switzerland. The father speaks fluent English and would not face such barriers in this jurisdiction. There would be more delay in Switzerland, with the expert suggesting a delay of 9 to 12 months before the proceedings are finalized.
74. The best interests of A fall to be considered by this court. The factual background to the abduction is relevant to a consideration of A’s best interests, it would be concerning if the mother’s unilateral actions in abducting A were to be endorsed which they would be if jurisdiction were to be transferred to Switzerland. The mother does not show insight into the harm the abduction will have caused A who was being breast fed by her primary carer at the time of the abduction.
75. I agree with the mother’s and the guardian’s analysis and disagree with the father’s. In my judgment, the courts here are better placed to determine A’s best interests. One of the most important aspects of the proceedings may well be the mother’s care of her older

children particularly the youngest three. The proceedings concerning the boys have been on-going for some time, there is a section 7 Children Act 1989 report prepared which would need to be considered in any proceedings in relation to A. In Switzerland the report was considered out of context without the surrounding statements of the mother and the father of the half-siblings. These may prove to be significant when disputed allegations are being made by the mother and the father of A against each other.

76. Delay is another factor I consider of significance. The expert on Swiss law says there could be delay of up to one year before the proceedings are concluded in Switzerland. This is a very young child, who was abducted by her father nine months ago, her living arrangements should be determined much sooner than that. These and the other factors relied on by Ms Perrins and Mr Gratton would lead me not to exercise any discretion I might have under Article 8 to transfer these proceedings to Switzerland.
77. The answer to question 2, is no.

### **Question (iii)**

78. If the answer to question 2 is no, is there an alternative route to transfer? If the answer is yes, should the court consider transfer via this alternative route?
79. Ms Chaudhry contends that the proceedings here could be stayed under section 5(2) (a) or (b) of the Family Law Act 1986.
80. Section 5 provides:

#### **5 Power of court to refuse application or stay proceedings.**

- (1) A court in England and Wales which has jurisdiction to make a Part I order may refuse an application for the order in any case where the matter in question has already been determined in proceedings outside England and Wales.
- (2) Where, at any stage of the proceedings on an application made to a court in England and Wales for a Part I order, or for the variation of a Part I order], ... it appears to the court—
  - (a) that proceedings with respect to the matters to which the application relates are continuing outside England and Wales ...
  - (b) that it would be more appropriate for those matters to be determined in proceedings to be taken outside England and Wales, ...
  - (c) that it should exercise its powers under Article 15 of the Council Regulation (transfer to a court better placed to hear the case) or

- (d) that it should exercise its powers under Article 8 of the Hague Convention (request to authority in another Contracting State to assume jurisdiction),]

the court may stay the proceedings on the application (as the case may be) or exercise its powers under Article 15 of the Council Regulation or Article 8 of the Hague Convention].

(2A)...

(3)...

(3A) ...

(3AA) The court may remove a stay granted in order for it to exercise its powers under Article 8 of the Hague Convention, and withdraw any request made by it to an authority in another Contracting State to assume jurisdiction, if—

- (a) the authority in the other Contracting State does not assume jurisdiction within the period for which the court granted the stay, or
- (b) the parties do not, within the period specified by the court, request the authority in the other Contracting State to assume jurisdiction.]

(3B) If the stay removed under subsection (3) or (3A) is a stay in relation to which the court suspended an activity direction made under section 11A of the Children Act 1989 (or an enforcement order made under section 11J of that Act), the court may when removing the stay under subsection (3) (3A) or (3AA)] also bring the suspension to an end.]

(4) Nothing in this section so far as it relates to proceedings not governed by the Council Regulation] shall affect any power exercisable apart from this section to refuse an application or to grant or remove a stay.

81. Ms Chaudhry relies on section 5(2)(a) above and contends that the English and Swiss proceedings are applications which relate to the same matters. The father's application is dated 8<sup>th</sup> June 2020 and he is applying for substantive welfare orders in Switzerland. She argues under section 5(2)(b) that it is more appropriate for the matters to be dealt with in Switzerland for the reasons I have set out above in paragraph 72. She invites this court therefore to stay these proceedings to allow the Swiss Court to continue to determine the father's applications before it. The court should then make directions to effect transfer in the way set out in the expert report.
82. Mr Gratton for the mother, rejects this argument. He says that proceedings are not continuing in Switzerland so as to give this court a discretion to stay these proceedings. The only proceedings that took place in Switzerland were the urgent protective measures under Article 11 of the 1996 Convention. Section 5(2)(d) refers to a situation where there is a discretion to stay the proceedings where this court decides to request for the



proceedings to be transferred under Article 8 of the 1996 Convention (request to authority in another Contracting State to assume jurisdiction). There is no power to transfer under Article 7 of the 1996 Convention set out in the Family Law Act 1986.

83. In my judgement Mr Gration is right. There is no power to stay in this Article 7 case. The only power under the 1996 Convention is that set out in section 5(2)(d) which refers to Article 8. Section 5(2)(d) excludes the operation of other parts of section 5(2). Any other interpretation would mean that although the 1996 Convention restricts transfer after a wrongful removal under Article 7, the domestic legislation was drafted to get around this. I accept that section 5(2)(d) emphasis the separate nature of the proceedings when the 1996 Convention is involved. This is reinforced by section 5(3AA). The Family Law Act distinguishes between two separate jurisdictional schemes. I find I have no power to transfer under the Family Law Act and if I did, I would exercise my discretion and not transfer these proceedings.
84. The answer to question 3 is no. There is no alternative route to transfer. Question 4 falls away.

**Question (iv)**

85. The question of contact will be decided separately.
86. That is my judgment.