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.

Neutral Citation Number: [2022] EWHC 1073 (Fam)

Case No: FD21P00356

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2022

Before :

MR JUSTICE PEEL

- -

Between :

H

Applicant

- and -

R
THE EMBASSY OF THE STATE OF LIBYA

Respondents

- -
- -

Michael Hosford-Tanner (instructed by **Duncan Lewis Solicitors**) for the Applicant
Jacqueline Renton and Charlotte Baker (instructed by **Freemans Solicitors**) for the 1st Respondent

Hearing dates: 28-29 April 2022

- -

Approved Judgment

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MR JUSTICE PEEL

Mr Justice Peel :

1. The children are a girl ("A") (13 ½) and a boy ("B") (12). They have been living with members of F's family in Libya since August 2020. I shall refer to the mother as "M" and the father as "F". At its heart, this is an application by M for the children to be returned from Libya and placed in her care. Behind the complex legal arguments on jurisdiction advanced before me is the depressing fact that at present these two children who are growing up without the society of either parent.

2. The issues before me were as follows:

   i) Whether the court has jurisdiction to make return and welfare orders on the basis of the habitual residence of the children;

   ii) Whether, if it does, the proceedings in this jurisdiction should be stayed in favour of proceedings taking place in Libya;

   iii) If the answer to (i) is yes and (ii) is no, whether a return order and/or other welfare orders should be made.

3. In the 2 day time estimate, with a very large bundle, numerous statements, lengthy skeleton arguments and hundreds of pages of authorities, it was clearly not possible to deal with all the issues, nor to receive oral evidence, in the allotted time. With the agreement of the parties, I decided to determine issues (i) and (ii) on submissions only and put over to another day issue (iii), should M succeed on issues (i) and (ii).

The background

4. Both parents are Libyan, having been born and brought up there. Both come from well off Libyan families. In 2007 they married in Libya. In 2008 they moved to England for postgraduate studies. They both have professional degrees. The children were born in England. They are Libyan citizens. Their residence permits for the UK expired in June 2021. The parties agreed to apply for an extension of the permits, and later for UK citizenship, for the children but so far without success. Until August 2020, the children had lived in England for all their lives, although they travelled from time to time to see family in Libya and on one occasion in 2009, A was taken to Libya by M for 10 months by agreement. F spent time working in Libya, but he and M were both undoubtedly living permanently in England. The impression I have from the papers is that M had primary responsibility for the children's day to day care. In 2019 F applied for indefinite leave to remain in the UK, which was granted in November 2020, and M likewise obtained indefinite leave to remain in March 2021.

5. In circumstances which are in dispute, F took the children to Libya in August 2020. M says this was without her knowledge or consent. F says it was for a pre-planned and agreed summer holiday, intending to return with them to the UK. He says that upon return they would all continue living in England until the end of 2021, whereupon the whole family would move to Libya where he planned to take up a university post. Either way, the children were placed by F with his family, principally his father and sister (the children's paternal grandfather and aunt) in Tripoli.

6. Shortly after arrival in Libya, on or about 12 August 2020 it is said that the children reported to the paternal family that they had been physically abused and neglected by M, an allegation which M has at all times completely denied. This was reported to the local mayor by the grandfather. In October 2020, the children were taken to the Libyan police by the grandfather, where they repeated the allegations.

7. On 14 August 2020, M reported an allegation of abduction to the UK police, which in turn appears to have led to a family falling out. Thereafter, approximately 10 months elapsed before M applied for wardship and return orders on 2 June 2021. It is clear from the papers that M did not simply sit back and accept the situation during that time. Having reported the alleged abduction to the police, and followed it up several times, she also reported the circumstances of the children's removal to social services, sought the advice of a solicitor in August 2020 (but was told she would not qualify for legal aid), and participated in negotiations with F's family about a possible return of the children to this country.

8. On 30 October 2020, the paternal grandfather wrote to the children's school to the effect that he was looking after the children until the parental issues were resolved, and they would then return to school in England. F had also emailed the school asking for the places to be kept open for their return.

9. On 30 April 2021 F was detained by the UK police for questioning. The criminal child abduction allegation case has now been closed and no further action has been taken.

10. On 4 June 2021 (pursuant to the application made on 2 June 2021 by M) the children were made wards of court at a without notice hearing. Various tipstaff orders were made and remain in place, including preventing F from leaving the country. As it happens, I made those orders. I did not make a return order.

11. On 6 June 2021, pursuant to an application made on 24 May 2021, the grandfather was granted a legal guardianship order by the Libyan court. There is a travel ban on the children leaving Libya without the grandfather's permission. Subsequently, M, through the maternal grandparents, applied in Libya to discharge the guardianship order. F also applied in Libya for discharge of the guardianship order. The proceedings are ongoing but have been delayed, partly as a result of the pandemic and partly as a result of applications by the grandfather for an adjournment.

12. During the course of the proceedings, F stated in written witness evidence, on 16 June 2021 and again on 27 July 2021, that it was his wish for the children to be returned to this country. In the earlier statement he said: "*I wish to make it clear that it is my wish for our children to return to our care in this jurisdiction. My wife and I have chosen to make the UK our home and we obviously want our children with us*". He went on to say that it was not within his power to procure their return because of (i) the reports of abuse made by the children in Libya, (ii) ongoing enquiries by the Libyan authorities, (iii) Libyan court orders preventing their removal from Libya and (iv) his father strenuously opposed a return.

13. On 17 June 2021, the first substantive on notice hearing, Poole J recorded at para 4 of his order by way of recital that he considered the children to have been habitually resident in England and Wales at the date of removal in August 2020 and that they remained habitually resident in this country as at 17 June 2021. Paragraph 9 provides

by way of recital that M and F agreed a mechanism for the children to be handed over to M by the paternal grandparents at an airport in Tunisia to be flown to England accompanied by M. Paragraph 12 provides by way of recital that M and F agreed that upon the return of the children to England, they are to live with M for 7 days and until a hearing listed on 8 July 2021. He went on to continue the wardship order first made by me, and additionally made a return order. Both parties were legally represented at this hearing. The judge gave a short judgment although there appears to have been limited argument on habitual residence. Counsel for M did not argue before me that the recital at para 4 as to habitual residence is binding on me, or that jurisdiction was determined on that date, although I shall return to the order and its provisions in due course.

14. The wardship and return orders made by Poole J on that occasion were reiterated at subsequent hearings by different judges.

15. On 9 November 2021, F issued an application for the question of habitual residence to be resolved, raising (as I understand it for the first time) a jurisdictional challenge.

16. On 17 November 2021, Moor J stayed enforcement of the return order on the basis of F's challenge to jurisdiction and made directions for statements, a Cafcass wishes and feelings report, and a report on Libyan law by Dr Ian Edge. The Embassy of the State of Libya was joined as intervener.

17. At the same hearing, F indicated through counsel that he no longer sought the children's return to this country, stating that they were settled in Libya and had expressed a wish to remain there.

18. Dr Edge's report dated 30 January 2022 states that there are no reciprocal enforcement steps which can be taken in Libya to implement or recognise orders of this court, and the Libyan courts would be unlikely to accede to any request for a return, particularly given that the children are presently under the guardianship of their grandfather.

19. Ms Demery of the High Court Cafcass team has conducted a comprehensive report on the wishes and feelings of the children dated 17 March 2022. As usual, it is thorough, insightful and helpful. She records:

    i) A misses her parents. She would like her parents to be in Libya.

    ii) B said that "Being with my parents is more important than country". If both parents were in England, he would like to return there. His order of preference is (i) to be with both parents in Libya, (ii) to be in England if both parents are there or (iii) to be in Libya if he can only be with one parent.

    iii) M does not want to live in Libya. F intends to move to Libya for work purposes.

    iv) The children believed in August 2020 that they were going to Libya for a holiday.

    v) The children did not repeat any of the allegations about M's behaviour, and had little negative to say about their mother.

vi) The children have experienced seismic changes, in terms of country, home, schooling and carers.

vii) They are enjoying their school in Libya.

viii) Overall, the children's wishes and feelings are to remain in Libya. These appear to be authentic views, with cogent reasons. They have no complaints about the care they receive from their paternal relatives. They miss their parents and would like them to come to Libya.

20. There are no real concerns about the care of the children given by the paternal family in Libya in physical and practical terms. It seems reasonably clear that they live in a safe neighbourhood of Tripoli, in a large and well appointed house with their grandfather, step-grandmother and aunt. Libyan authorities have reported on the quality of the accommodation. They have attended an international school since September 2020, where they are happy and progressing well. They enjoy extra curricular activities and have family in Libya on both sides. They are registered with doctors and dentists.

21. Of much greater concern is the impact on the children of the "seismic changes" described by Ms Demery, the lack of contact with M and the effect on them of being separated from their parents. They have not seen M since July 2020, and have had only irregular telephone contact since. Nor have they seen F since April 2021. The emotional impact upon these children is likely to be profound.

Parens patriae

22. It is common ground that M cannot invoke the parens patriae jurisdiction as the children are not British nationals, nor do they travel on British passports: para 34 of **Re B [2015] EWCA Civ 886**.

The nature of M's application

23. M's application is framed in Form C66 as one under the inherent jurisdiction for wardship and an inward return order. She did not make, instead or additionally, an application by way of specific issue order (or otherwise) under s8 of the Children Act 1989 as she might well have been. As Lord Wilson explained at para 44 of **Re NY (A Child) 2019 UKSC 49:**

"i) The application for the return order may be framed either as a claim for a specific issue order under section 8 of the Children Act 1989 or for an order pursuant to the inherent power of the High Court. However, the latter course should only be invoked exceptionally. Exceptionality may be demonstrated by reasons of urgency, complexity or the need for particular judicial expertise.

24. However, in her supporting statement dated 2 June 2021, M said at para 41 that her application included that "*my children be returned to my care and control immediately".*

25. Further, by para 16 of the order of Poole J dated 17 June 2021, F was ordered to return the children to England and Wales. As I have indicated, the order included recitals about

returning the children to England, and placing them in her care for a limited period of time pending further hearing. It follows, in my judgment, that the order of Poole J constituted an order made pursuant to an application by M under the inherent jurisdiction which, in substance, sought care of the children. It is that order which is currently stayed in terms of enforcement, but remains in force.

26. In **A v A and another (Children: Habitual Residence) (Reunite International Centre Child Abduction Centre and others intervening [2013] UKSC 60** at paras 25-28, Baroness Hale described the bare inward return order made under the inherent jurisdiction in that case as not encompassing care or contact and therefore not falling within s1(1)(d) of the Family Law Act 1986. On the facts of **A v A**, habitual residence was established under Article 8 of BIIa so that the order made was upheld by a different route.

27. For the reasons given, I take the view that in this case M did not seek solely an inward return order; she sought substantive child arrangements orders and secured such orders from the court on 17 June 2021. That potentially brings the application within s1(1)(d), plotting, as I will explain, a route from the Family Law Act 1986, via the 1996 Hague Convention, and then back to the Family Law Act 1986.

Jurisdiction: habitual residence

28. The starting point is the Family Law Act 1986 which at s1 includes within the definition of a "Part I order":

> *a) a section 8 order made by a court in England and Wales under the Children Act 1989;*
>
> *d) an order made by a court in England and Wales under the exercise of the inherent jurisdiction of the High Court with respect to children –*
>
> *(i) so far as it gives care of a child to any person or provides for contact with, or the education of, a child;*

29. As I have indicated, in my view the nature of M's application, being for the children to be committed to her care, brings it within s1(1)(d).

30. That being so, one travels to s2(3) of the Act which provides that a s1(1)(d) order shall not be made by the court unless:

> *a) it has jurisdiction under the Hague Convention, or*
>
> *b) the Hague Convention does not apply but –*
>
> *(i) the condition in section 3 of this Act is satisfied.*

31. The condition in s3 is, so far as relevant for these purposes, that "*on the relevant date*" the child concerned was habitually resident in England and Wales. And by the interpretation at s7(c), "*relevant date*" is "*the date of the application"*.

32. As the statute says, M's application is governed first by the 1996 Hague Convention. This is described by Baroness Hale at para 20 of **A v A** as the "first port of call". True,

that was a BIIa case, but it is clearly analogous to a 1996 Hague Convention case (and was part of the wording of s2(3) of the Family Law Act 1986 before the exit of the UK from the European Union).

33. I turn to the 1996 Hague Convention. By 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"*.

34. The first question for me to decide is the date at which habitual residence falls to be considered. Is it, as M submits, the date of her application (2 June 2021) or, as F submits, the date of hearing (April 2022)? If the latter, there is an obvious concern in cases like these that it is in the interests of an alleged abductor to prolong proceedings in order to establish a greater degree of settlement or integration of the children in the country to which they have been removed; in other words, to improve a habitual residence defence. It strikes me as unsatisfactory if that is indeed the case. However, I must consider the relevant jurisprudence, as the point has apparently not been completely decided.

35. As F points out, Article 5(1) of the 1996 Hague Convention differs from Article 8 of BIIa which at (1) specifically states that:

"*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 seised"*** [emphasis added].

There is no doubt that in BIIa cases (of which very few are extant in this country since the departure of the United Kingdom from the European Union, and this case is not one of them), the relevant date is the institution of proceedings (in this case 2 June 2021). But Article 5(1) of the 1996 Hague Convention is not in like terms.

36. The Explanatory Report of Paul Lagarde (1997) at para 42 says as follows:

> *"Where the change of habitual residence of the child from one State to another occurs at a time when the authorities of the first habitual residence are seised of a request for a measure of protection, the question arises as to whether these authorities retain their competence to take this measure (perpetuatio fori) or whether the change of habitual residence deprives them ipso facto of this jurisdiction and obliges them to decline its exercise. The Commission rejected by a strong majority 27 a proposal by the Australian, Irish, British and United States delegations favourable to the perpetuatio fori. Certain delegations explained their negative vote by their hostility to the very principle of perpetuatio fori in this field and wanted jurisdiction to change automatically in case of a change of habitual residence, while other delegations thought that it would be more simple for the Convention not to say anything on this subject thereby abandoning to the procedural law the decision on perpetuatio fori. The first opinion appeared to be the more exact in the case of a change of habitual residence from one Contracting State to another Contracting State. Indeed it is not acceptable that in such a situation, which is located entirely within the interior of the scope of application of the Convention, the determination of jurisdiction be left to the law of each of the Contracting States. Moreover this solution is one which currently prevails for the interpretation of the Convention of 5 October 1961."*

37. A plain reading of this passage suggests that a change of habitual residence during proceedings leads to a change of jurisdiction from the outgoing Contracting State to the receiving Contracting State. The principle of perpetuatio fori is excluded. On the face of it, therefore, the court looks at habitual residence at the date of trial (in this case April 2022) for if, by then, habitual residence lies in the recipient Contracting State, jurisdiction will also have moved to the recipient Contracting State.

38. I confess to having some misgivings about the state of the law if this is indeed the case. I have already remarked upon the opportunity for unscrupulous abductors to take advantage of delay, or indeed to manufacture delay, so as to engineer a change of habitual residence. An innocent party may act promptly and properly, yet find themselves in a habitual residence race against time, powerless as the court proceedings take their course.

39. However, in this case, different principles may apply because Libya is not a Contracting State under the 1996 Hague Convention. The Lagarde report goes on as follows:
"On the other hand, in the case of a change of habitual residence from a Contracting State to a non-Contracting State, Article 5 ceases to be applicable from the time of the change of residence and nothing stands in the way of retention of jurisdiction, under the national law of procedure, by the authority of the Contracting State of the first habitual residence which has been seised of the matter, although the other Contracting States are not bound by the Convention to recognise the measures which may be taken by this authority."

40. Again, on a plain reading, this suggests to me that the position is different where the other state is a non Contracting State. If at the date of the final hearing, habitual residence lies in the country of origin, then so does jurisdiction. If, however, between issue and final hearing habitual residence moves to the non Contracting State, jurisdiction does not travel with it, but nor does it remain with the Contracting State under the Convention. Therefore, as the report says, Article 5 ceases to apply and national law takes over. I accept that there is no specific Article to this effect, but the report is clear, and, in my view, it is logical that jurisdiction should not transfer to a non Contracting State. After all, why should a non Contracting State be fixed with jurisdiction pursuant to a Convention which it has not signed? It is equally logical that if perpetuatio fori does not apply, then the 1996 Convention gives no answer to the issue of jurisdiction if habitual residence is lost from the country of origin, and, as the Lagarde report says, the position then reverts to domestic law. This outcome avoids the unsatisfactory situation where children are in a non Contracting State, and lengthy proceedings play into the hands of a party who seeks to dispute the jurisdiction of England and Wales, including, as here, raising a challenge to jurisdiction very late in the day, so as to fix habitual residence and jurisdiction in a State with which this country has no reciprocal Treaty arrangements.

41. There are a number of cases on these points, none of which are, in my judgment, directly of assistance. In **Re NH (1996 Child Protection Convention: Habitual Residence) [2016] 1 FCR 16**, Cobb J expressed the view that the relevant date for the purpose of Article 5 should be as at the hearing, but acknowledged that his remarks were obiter,

and in any event the case concerned two Contracting States (England and Switzerland). In **Warrington Borough Council v W (Care Proceedings: Jurisdiction) [2022] 2 WLR 299**, MacDonald J, faced with a case concerning care proceedings where the other country was Gabon, a non Contracting State, adopted the view of Cobb J in **Re NH**, which in turn had been based on two Contracting States and was obiter. It does not appear that the second half of para 42 of the Lagarde report (cited by me above) was argued in front of MacDonald J; certainly, there is no reference to it in his judgment, nor any reference to the apparent difference between a Contracting State and a non Contracting State in the application of Article 5.

42. In other cases in which the court has considered this aspect, either the Lagarde report was not referred to, or the court did not determine the issue, or habitual residence was considered on both date of issue and date of trial, or counsel agreed on the relevant date:

i) **SW v MW (Transnational Abandonment) [2021] EWHC 3411**

ii) **Re FA (Hague Convention) [2021] EWHC 3024**

iii) **MZ v RZ (Hague Convention 1996, Habitual Residence, Inward Return) [2021] EWHC 2490**

iv) **JC v PC [2021] EWHC 2305**

v) **Re D (Care Proceedings: 1996 Hague Convention: Article 9 Request) [2021] EWHC 1970**

43. I have been referred to a French Cour de Cassation case which ruled that habitual residence transferred during the proceedings to Switzerland (a Contracting State), and accordingly the French court did not retain jurisdiction: **ECLI:FR: CCASS:2020:C100557 = Cour de cassation, civile, Chambre civile 1, 30 septembre 2020, sous le n° de pourvoi 19-14.761**. That does not directly assist me on the position between a Contracting State and a non Contracting State.

44. I do not propose to opine on the appropriate date as between two Contracting States; to do so would be obiter as that is not the situation here. I repeat my concerns about the apparent consequences of the 1996 Convention if, indeed, the relevant date is to be taken as the date of trial.

45. However, it seems to me that where the other country (in this case Libya) is a non Contracting State, the second part of the Lagarde report accurately reflects the position. If habitual residence lies in England at the date of trial before me, Article 5 is operative and on any view, England retains jurisdiction. If, however, between issue in June 2021 and hearing in April 2022, habitual residence transferred to Libya, then Article 5 ceased to apply, and national law became operative.

46. It follows that, on that second scenario (i.e at the date of hearing habitual residence lay in Libya), jurisdiction is then governed by domestic law i.e the Family Law Act 1986 ss1, 2 3 and 7 which cumulatively provide that the court has jurisdiction under English law if:

i) The order sought is a s1(1)(d) order under the inherent jurisdiction giving care of the children to any person which, for reasons already given is, in my judgment, the case here; and

ii) The children were habitually resident in England and Wales at the relevant date, which is defined as the date of application.

47. As Moylan LJ put it in **Re M [2020] EWCA Civ 922 (**when considering exercise of the parens patriae jurisdiction):

"the scheme of the 1986 Act is to give jurisdiction to make one of the substantive orders listed in s.1 only when the child is either habitually resident or is present in England and Wales"

Absent the jurisdictional basis of habitual residence, the court may not make a s1(1)(d) order under the inherent jurisdiction. The alternative route of making an order under the parents patriae jurisdiction, which does not depend on habitual residence, is only available to British citizens which is not the case here.

48. I therefore take the view that the relevant date for habitual residence is the date of the application (2 June 2021) in accordance with the 1986 Act.

49. Had the application been for a s8 specific issue return order, beyond doubt the test would have been habitual residence at the date of the application, it being an application for a s1(1)(a) order. It is somewhat odd, to my mind, that a bare application for inward return under the inherent jurisdiction (with no element of care or contact sought) would lack jurisdiction under the 1986 Act even though the relief sought is identical; that, however, is the conclusion of Baroness Hale in **A v A**. The difficulty for applicants is that these problematic cases involving alleged wrongful abduction/retention overseas in a non 1980 Hague Convention country are brought via wardship so as to invoke the full powers of the High Court. If the application is to be made by s8 of the Children Act 1989 so as to ensure that the date of habitual residence is fixed at date of issue, rather than risk the date being fixed at date of trial, the ability to seek appropriate orders may be diminished. It may be that applications under the inherent jurisdiction should include relief by way of care and/or contact so as to come within s1(1)(d).

The order of 17 June 2021

50. A substantive order for the children to be returned to this country and placed in the initial care of M was made by Poole J on 17 June 2021. Enforcement of that order is stayed. F's own application of 9 November 2021, although it does not say so in terms, obviously seeks a discharge of that order on the grounds of lack of jurisdiction. Any judge conducting a welfare analysis will consider that application. When I first read the papers, my immediate thought was that jurisdiction was determined on 17 June 2021 day on two possible grounds. First, that the judge had decided habitual residence at the date of the application (as the Recitals imply), and proceeded to make orders. Second, that even if the date of hearing is the relevant date under Article 5, as F submits, then that date was 17 June 2021 (which is so close to the date of issue as to be immaterial for these purposes). The judge made return and care orders. F did not oppose the orders made on that occasion and did not appeal. He agreed to recitals proving for a return mechanism. He agreed that upon return to England, the children be placed in the care

of M. It is in fact F who now seeks to discharge the orders made on 17 June 2021. It is arguably illogical for F to say that the court now cannot make welfare orders for jurisdictional reasons, when in fact those welfare orders have already been made at an earlier hearing. It is unattractive for F to have participated in proceedings between June 2021 and November 2021, raised no opposition to jurisdiction and consented to various orders, only to reverse his stance completely in November 2021. However, M did not pursue a submission, either in writing or orally, that jurisdiction was established by Poole J on 17 June 2021 such that res judicata applied, nor did she run an argument that the relevant hearing date (if F's analysis of Article 5 is correct) was 17 June 2021. In the circumstances, it seems to me that I should not reach a conclusion based upon these grounds and, in the event, I have determined by a different route that the relevant date is issue.

Article 7 of the 1996 Hague Convention

51. M submitted in counsel's skeleton that in any event Article 7 of the 1996 Hague Convention applies, although by the end of the hearing he, rightly in my view, abandoned that part of his case. Nevertheless, I propose to deal with it for completeness.

52. The relevant provision (drafted in similar terms to the equivalent provision under article 10 of BIIa) is as follows:

> *"(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) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention;and*
>
> *b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.*
>
> *(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."*

53. In November 2020, in **SS v MCP [2020] EWHC 2971 (Fam)**, Mostyn J made a referral to the CJEU inviting consideration of the following question:

"Does Article 10 of Brussels 2 retain jurisdiction, without limit of time, in a member state if a child habitually resident in that member state was wrongfully removed to (or retained in) a non-member state where she, following such removal (or retention), in due course became habitually resident?":

54. On 24 March 2021, the CJEU delivered its judgment in **SS v MCP (Case C-603/20 PPU) [2021] 2 FLR 297**, and concluded that article 10 of BIIa is confined to abductions from one EU Member State to another EU Member State.

55. Further, the CJEU considered that its conclusions applied equally to the equivalent provision in the 1996 Hague Convention at para 62:

"It follows from the foregoing that there is no justification for an interpretation of Article 10 of Regulation No 2201/2003 that would result in indefinite retention of jurisdiction in the Member State of origin in a case of child abduction to a third State, neither in the wording of that article, nor in its context, nor in the travaux préparatoires, nor in the objectives of that regulation. ***Such an interpretation would also deprive of effect the provisions of the 1996 Hague Convention in a case of child abduction to a third State which is a contracting party to that convention, and would be contrary to the logic of the 1980 Hague Convention."*** [emphasis added]

56. In **SS v MCP (No.2) [2021] 4 FLR 140** – the hearing that took place following the decision of the CJEU - Mostyn J adopted and followed that reasoning:

"9. There is no applicable bilateral treaty governing jurisdiction and recognition and enforcement of judgments in parental responsibility matters between United Kingdom and India. India is not a party to the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children. ***Article 7 of that convention, which is the counterpart of article 10 of Brussels 2 bis, does not retain jurisdiction in England and Wales as it only applies where the wrongful removal is to another contracting state – see article 7(3). It is my opinion that the reasoning of the Court of Justice must apply equally to article 7 of the 1996 Hague Convention.****"* [emphasis added]

57. In **MZ v RZ (Hague Convention 1996: Habitual Residence: Inward Return) [2021] EWHC 2490 (Fam)** I similarly took the view that the CJEU's decision on article 10 of BIIa applies equally to article 7 of the 1996 Hague Convention.

58. I am accordingly satisfied that Article 7 does not assist M.

Habitual residence

59. The Supreme Court has had cause to consider habitual residence in no fewer than five cases between 2013 and 2016. In **Re B (A Child) (Custody Rights: Habitual Residence) [2016] 4 WLR 156**, Hayden J set out the key propositions that could be derived from those cases, as set out below. That summary has been endorsed by the Court of Appeal in **Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention) [2020] 4 WLR 137**, save in respect of (viii) which has been omitted in accordance with Moylan LJ's views:

i. *The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A, adopting the European test).*

ii. *The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, Re KL).*

iii. *In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': A v A (paragraph 80(ii)); Re B (paragraph 42) applying Mercredi v Chaffe at paragraph 46).*

iv. *It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (Re R);*

v. *A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (Re LC). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows, the child's integration which is under consideration.*

vi. *Parental intention is relevant to the assessment, but not determinative (Re KL, Re R and Re B);*

vii. *It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (Re B); (emphasis added);*

viii. *[…]*

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

x. *The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (Re R) (emphasis added);*

x. *The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (A v A; Re B). In the latter case Lord Wilson referred (para 45) those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move;*

xi. *Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (Re R).*

xii. *The structure of Brussels IIa, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term*

adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, "if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former" (Re B supra)."

60. The omitted (viii) above is a reference to Lord Wilson's "see saw" analogy in **Re B [2016].** In deciding that (viii) should be omitted, Moylan LJ in **Re M [2020]** stated as follows:

"[61] In conclusion on this issue, while Lord Wilson's see-saw analogy can assist the court when deciding the question of habitual residence, it does not replace the core guidance given in A v A and other cases to the approach which should be taken to the determination of the habitual residence. This requires an analysis of the child's situation in and connections with the state or states in which he or she is said to be habitually resident for the purpose of determining in which state he or she has the requisite degree of integration to mean that their residence there is habitual.

[62] Further, the analogy needs to be used with caution because if it is applied as though it is the test for habitual residence it can, as in my view is demonstrated by the present case, result in the court's focus being disproportionately on the extent of a child's continuing roots or connections with and/or on an historical analysis of their previous roots or connections rather than focusing, as is required, on the child's current situation (at the relevant date). This is not to say continuing or historical connections are not relevant but they are part of, not the primary focus of, the court's analysis when deciding the critical question which is where is the child habitually resident and not, simply, when was a previous habitual residence lost.

[63] In many cases, as in the present case, the parties and the court have used the summary of the law set out by Hayden J in Re B, at [17]. I agree that this is a helpful summary save that, for the same reasons given above, what is set out in sub-para (viii) (which I quote below) might distract the court from the essential task of analysing 'the situation of the child' at the date relevant for the purposes of establishing jurisdiction or, as in the present case, whether a retention was wrongful. Accordingly, in future I would suggest that, if Hayden J's summary is being considered, this subparagraph should be omitted so that the court is not diverted from applying a keen focus on the child's situation at the relevant date: […]"

61. I accept, as submitted on behalf of F, that an older child's state of mind is relevant to the court's assessment of habitual residence; **re LC (Children) (International Abduction: Child's Objections to Return) [2014] AC 1038** at **[37].**

62. Bearing these authorities in mind, I turn to a determination of habitual residence as at June 2021.

63. The starting point, in my view, is that in August 2020 the children were undoubtedly habitually resident in England, and nobody has suggested otherwise. Were they, by June 2021, habitually resident in Libya?

64. I acknowledge that the children have lived in Libya since August 2020, and have attended school there since September 2020. I have already referred to their registration

with a doctor and dentist there, extra-curricular activities and friendships. It is of relevance that they appear generally happy and well cared for.

65. It seems to me that the point about the children's wishes is more nuanced than is submitted by F. Both children have expressed a wish to live in Libya but certainly in B's case (it is not clear if A was asked the same question, but it seems likely that she would have a similar view) more important to him is being with his parents. Both children clearly miss their parents and want to be with them. It seems to me that this strength of bond with their parents, and obvious yearning to be with them, demonstrates that their preferred family environment would be with their mother and father. As cited above, children's habitual residence will usually (but not invariably) follow the habitual residence of their parents. In this case, both parents live in this country, and are habitually resident here, unlike some cases where children are living overseas with one or other parent. In other words, their familial integration, in my view, should primarily be seen in a parental context rather than a grandparent/aunt context, and the children's wishes are consistent with that.

66. I also take the view that in circumstances where the children have not seen M since July 2020, or F since April 2021, their time in Libya is in something of a state of limbo, particularly in emotional terms, until these issues are resolved. It is hard to conceive, given the importance of the parent/child relationship, that the children have acquired habitual residence in Libya when they are deprived of contact with either parent, when each parent has sought their return to England (in M's case consistently, in F's case until November 2021), including by making applications to the Libyan courts, and when they have been retained in Libya by the parental family against both parents' wishes (in F's case until November 2021).

67. The historic links of the children with England are relevant because of their relationship with their parents in this country, rather than because of the country per se. For the entirety of their lives, they were brought up in England, in a family and societal environment here. Their centre of interests was this country, in large measure because of their parents. Those deep links with their parents have been abruptly severed, without parental consent. To my mind it is the ties with the parents which lie at the heart of these children's "*degree of integration".*

68. It is the case of both parents that the children should have been returned to this country in August 2020; M because it was a removal without her consent, F because it was a planned, and temporary, holiday. Neither M nor F (on his case) consented to the retention of the children in Libya. This was not an intended, pre-planned permanent or long-term move. The fact that the children made allegations, and F's family then took action, including through the Libyan courts, to prevent their return, does not in my view undermine the nature and intention behind what the parents wanted and intended. On the contrary, it undermines the case that habitual residence transferred to Libya; the inability of the children to return to this country has arisen because of the coercive steps taken by the paternal family. Clearly, in my view, the intention has always been for the children to return. It is common ground that there have been negotiations until the end of 2021 which have included discussions about the children's return. It is of note that the children themselves say they were told it was a trip for a holiday only. It is also of note that even the paternal grandfather on 30 October 2020 told the English school that the children would return once the issue between the parents is resolved.

69. I regard it as of some significance on this issue that the children's UK residence permits expired in June 2021, and by paragraphs 5 and 6 of the order of Poole J dated 17 June 2021 the parents agreed to apply to extend the residence permits. That, in my judgment, was a very clear indication of where the parents intended the children's centre of interests to be. It was consistent with the parents having obtained indefinite leave to remain here in 2020 and 2021.

70. Finally, although not determinative as to the fact of habitual residence, the order of Poole J dated 17 June 2021 incorporated a number of agreements as to substantive provisions covering return order, handover mechanism and the children to live with M in England. It hard to view this other than as acceptance by both parties that at that time they saw their, and the children's, lives as being centred in the UK.

71. In my judgment, the habitual residence of the children remained in this country on 2 June 2021, and this court has jurisdiction to make further welfare orders.

72. Further or alternatively, I am in any event satisfied that as at today's date (April 2022) the children's habitual residence remains in England. I accept that a further 10 months have elapsed since June 2021, and that in November 2021 F changed his mind about the children returning to England, but essentially for the reasons already given, in my judgment the children's centre of interests has not disengaged from England. At the risk of repetition, I regard the emotional context and integration as between children and parents as central to the issue of habitual residence.

Forum conveniens

73. Should I stay the English proceedings in favour of the Libyan proceedings?

74. I bear in mind the well known principles set out in **Spiliada Maritime Corpn v Cansulex Ltd [1987] AC 460** and **Re K (A Child) (Stranding: Forum Conveniens: Anti-Suit Injunction) [2019] 4 WLR 38**. Counsel for F emphasised that the best interests of the children form part of the balancing exercise; **Re K [2019] 4 WLR 38** at para 34. I accept also the general proposition that respect should be afforded to a foreign state and its court process; **Al Habtoor v Fotheringham [2001] 1 FLR 951** at **[44].** I have, on that point, been helpfully referred to the summary of the principle of comity as offered in **Rayden & Jackson on Relationship Breakdown, Finances and Children (2016)** at **[45.132]:**

> *The principle in its modern context may be said to have a number of elements:*
> - *taking into account the actual or potential jurisdiction of the courts of another state;*
> - *avoiding the imposition of conflicting obligations upon an individual;*
> - *giving 'great weight' to the orders of other courts, even if no reciprocal enforcement obligation arises under international instruments;*
> - *according respect to the laws and practices of different legal and child welfare systems;*
> - *seeking interpretations of instruments which allow them to work harmoniously together and not in conflict.*
>
> *The best interests of the child will usually work in harmony with comity, as Baroness Hale recognised in Re B*

75. It was suggested by counsel for F that I should not engage with the forum conveniens issue, but rather I should leave it to be considered with any welfare orders as there is a link between the two. In my judgment it is preferable to dispose of all jurisdictional issues today, and I see no good reason not to.

76. A representative of the Libyan Embassy presented me with a Note Verbal in which the position of the Libyan Government was set out, namely that this is an internal matter for the Libyan courts as the children are Libyan nationals, hold Libyan passports, and the case is subject to the Libyan jurisdiction. He reminds me that the Libyan court is not obliged to carry out any orders made by this court. I respect those submissions and have paid close regard to the views of the Libyan state. I take on board also, as submitted by F, that there are ongoing proceedings in Libya, that the children are there, M and F would (if passport orders are lifted) be able to travel there and engage in proceedings, M has instructed a Libyan lawyer and the proceedings are underway.

77. As against that, I have determined that the children's habitual residence at the date of M's application lay in England, and remains so to this day. Both parties have participated in the English proceedings and until F's change of position in November 2021, both agreed that they should be returned to this country. Until August 2020 the children had lived almost the entirely of their lives here. The courts in this country are engaged, and we have the benefit of Dr Edge's report and that of Ms Demery. If there are to be pursued any allegations of abuse by M towards the children, those took place in this country. Both M and F live here, and it is clearly far more convenient for them to litigate here.

78. I conclude that the appropriate forum is England and Wales and decline to stay these proceedings.

Welfare

79. Having reached these determinations on jurisdiction, I decline to make (or rather enforce) a return order at this stage. I accept F's submission that a fuller welfare enquiry is needed, including the giving of oral evidence and perhaps further investigations by Ms Demery. Consideration must be given as to how (or indeed whether) to deal with the allegations of abuse. This will take time, which is not available at this hearing even if all the evidence were ready. The case is not easy. The children are separated from their parents but, on the other hand, they are apparently well looked after in Libya, and they are reasonably settled there. I will invite counsel to consider directions. My preliminary observations are that the following direction are needed:

    i) Final statements from the parties on welfare arrangements, limited to 10 pages;

    ii) A welfare report by Ms Demery;

    iii) Oral evidence at final hearing to be given by M, F and Ms Demery;

    iv) There is no need, in my view, to inquire into cross allegations of domestic abuse which on my reading of the papers is not necessary for the purposes of the welfare hearing;

v) It may be necessary to inquire into the allegations made by the children against M;

vi) It may be necessary to inquire into the circumstances of the children's departure from England and events thereafter;

vii) A final hearing should be fixed, with a time estimate of (say) 4 days on the assumption of (a) 1 day of judicial pre-reading, (b) 2 days of evidence and submissions and (c) 1 day for judgment.

viii) The hearing will be formally adjourned part heard, rather than listed as a new hearing, not least so that there can be no question of yet another jurisdictional inquiry at the later date. It need not be reserved to me; more important is to find the first available date before a judge of the Division or a s9 judge.