Neutral Citation Number: [2022] EWHC 1494 (Fam)

Case No: RG21C01173 & RG21C01174

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Before :

HHJ MORADIFAR
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

In the matter of;

Re B
(Children: Care Proceedings: Jurisdiction: Transfer of Proceedings)

- -
- -

In the first proceedings

Nick Goodwin QC (instructed by **the Joint Legal Team**) for the applicant local authority
Sheila Phil-Ebosie (instructed by **All Family Matters**) for the **mother (in the first proceedings)**
Christopher Poole (instructed by **Rayat & Co**) for the **father (in the first proceedings)**
Andrew Norton QC and Jasbinder Dail (instructed by and the latter of **Rowberry Morris**) for the child **LB** through her Guardian.

In the second proceedings

Nick Goodwin QC (instructed by **the Joint Legal Team**) for the applicant local authority
Andrew Norton QC and Jasbinder Dail (instructed by and the latter of **Rowberry Morris**) for the **mother LB (a minor)**
Aidan Vine QC and Paul Murray (instructed by **Barrett and Thomson**) for the **father AB (a minor)**
Paternal grandparents (in person and did not attent this hearing)
Tom Harrill (instructed by **Griffiths Robertson**) for the child **S** through her guardian.

Hearing dates: 20 May 2022

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Approved Judgment

HHJ MORADIFAR:

1. There are four applications before me that concern two children in connected proceedings. Both children are Romanian nationals. The first set of proceedings concerns a sixteen year old child whom I will identify as LB. The second set of proceedings concerns LB's young child who is six months old. I will identify her as S. In September 2021, when LB was fifteen years old, she presented unaccompanied to a hospital where S was born.
2. Concerns about both children's circumstances caused the police to exercise their protective powers. Subsequently, the local authority applied to the court for public law orders in respect of both children. The local authority's concerns included child trafficking and the possibility of LB being forced to marry. Both children were placed in a 'mother and baby' foster placement pursuant to an interim care plan that was approved by the court on 1 October 2021 when the court made each of the subject children subject to an interim care order.
3. On 3 November 2021, LB left the placement, leaving S behind. The local authority asserts that LB was wrongfully removed from the jurisdiction and this was facilitated by her family. LB's whereabouts have been uncertain, although more recently there is evidence to suggest that she is residing in Romania with her parents. She wishes to remain living in Romania and for S to join her. The local authority contends that in circumstances in which it is unable to exercise its shared parental responsibility for LB, she should be made a ward of the court and the court should continue to demand her return to England ('this jurisdiction') until at least the conclusion of the provisional fact finding hearing that is listed to commence in September of this year. Finally, S's father ('AB'), who has been seeing his daughter remotely, wishes to progress his contact to face to face meetings. He invites the court to order that contact should progress as soon as possible.
4. Therefore, the applications that are before me are;
    a. An application by the local authority that LB is made a ward of the court,
    b. Applications by LB;
        i. To challenge the court's jurisdiction to continue to hear her case on the grounds that she is not habitually resident in this jurisdiction, and
        ii. If the court finds that it has jurisdiction, both sets of proceedings are transferred to the Romanian courts pursuant to Art. 8 of the

Convention on Jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (1996) ('the 1996 Convention'), and

c. AB's application for contact with S.

5. The applications by LB are supported by the family that includes LB's parents and AB. These applications are also supported by LB's guardian in the first proceedings, although latterly, it is conceded that the guardian has no say in respect of the proceedings concerning S where S is separately represented through her own guardian. S's guardian opposes the applications for transfer in respect of S. The local authority asserts that this court has jurisdiction over LB and opposes the applications for the transfer of the proceedings.

The broad issues

6. Given the nature of the applications before me, the first issue to address is the question of the court's jurisdiction. This turns on the question of habitual residence. If I am satisfied that this court has jurisdiction to conduct proceedings in relation to LB, then I must next consider LB's application for transfer of the two sets of proceedings. Finally, if I refuse the applications, I must consider the local authority's application to make LB a ward of the court. Finally, subject to my decision on the first two issues, I must consider the issue of contact. Therefore, I must address the applications in the following order;
    a. Jurisdiction and habitual residence of LB,
    b. Transfer of LB's proceedings,
    c. Transfer of SB's proceedings,
    d. Wardship, and
    e. Contact

The law

Jurisdiction and habitual residence

7. These proceedings are brought under Part IV of the Children Act 1989 (the 'Act'). Following the United Kingdom's exit from the European Union, issues of the jurisdiction of the courts of England and Wales over nationals of a contracting member state in proceedings that are initiated after 11 pm on 31 December 2020 are governed by the 1996 Convention (see *Warrington Borough Council v T and Others* [2021] EWFC 68, [2022] Fam 107). The exercise of jurisdiction by the courts of

England and Wales in proceedings under Parts I and II of the Act are governed by the Family Law Act 1986.

8. Art. 5 of the Convention provides that;

> *"(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."*

These provisions clearly provide for the habitual residence of the subject child to be determinative of the court's primary jurisdiction.

9. The contracting member states cannot assert jurisdiction or acquire jurisdiction outside the terms of the Convention. The Lagarde Explanatory Report (1997) provides as follows

> ***"38.*** *This article in its first paragraph entrusts to the authorities of the Contracting State of the habitual residence of the child the principal jurisdiction to take measures of protection of his or her person and property, and it sets out in its second paragraph that, subject to Article 7 (wrongful removal or retention of the child), in case of a change of the child's habitual residence to another Contracting State, the jurisdiction passes to the authorities of the State of the new habitual residence. The question of the survival of measures taken in the first State is dealt with in Article 14 (see below).*
>
> ***39.*** *Article 5 is based on the supposition that the child has his or her habitual residence in a Contracting State. In the contrary case, Article 5 is not applicable and the authorities of the Contracting States have jurisdiction under the Convention only on the basis of provisions other than this one (Art. 11 and 12). But nothing prevents these authorities from finding themselves to have jurisdiction, outside of the Convention, on the basis of the rules of private international law of the State to which they belong.*

> …
>
> ***42.*** *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 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. 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."*

10. The courts of this jurisdiction have given very helpful guidance on the issue of habitual residence of a child. In *Re B (A child) (Custody Rights: Habitual*

Residence) [2016] EWHC 2174, Hayden J provided most helpful guidance in the following terms:

> "*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 (para 80(ii)); Re B (para 42) applying Mercredi v Chaffe at para 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 loses a pre-existing habitual residence at the same time as gaining a new one (Re B); (emphasis added);*
>
> *viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (Re B – see in particular the guidance at para 46);*

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);

xi) 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) to those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move;

xii) 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).

xiii) 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);

> *If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child. The approach must always be child driven…"*

11. In *Re B (A child) (Reunite International Child Abduction Centre and others Intervening)* [2016] AC 606, Moylan LJ stated that:

> "*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.*
>
> *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*".

12. In light of the above, later in *Re M (children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105, Moylan LJ approved Hayden J's approach and his helpful list of considerations, save that he considered

the terms of paragraph (viii) should be omitted so as to not divert the court *"from applying a keen focus on the child's situation at the relevant date".*

13. In assessing a child's habitual residence, McFarlane LJ in *Re R (a child)* [2015] EWCA Civ 674 most helpfully observed that:

> *"When determining habitual residence there is no requirement that, to be sufficient to support a finding, the individual needs to be happy, well cared for or free from abuse. The 'social and family environment' into which a child might be integrated may include both positive and negative factors. These will not be irrelevant."*

14. In 2015 another decision of the High Court of Justice in *Re NH (1996 Child Protection Convention Habitual Residence)* [2015] EWHC 2299 (Fam), [2016] 1 FCR provided further guidance on what is the relevant date to assess the child's habitual residence. Cobb J addressed this issue in the following terms;

> ***"24**. Although like BIIa, the 1996 Child Protection Convention founds primary jurisdiction on the country of the child's habitual residence, unlike BIIa, the 1996 Child Protection Convention does not specify the time at which habitual residence is to be determined; in BIIa it is specifically said to be "at the time the court is seised", words which are absent from the equivalent provision of the 1996 Convention. Ms. Lucey and Mr. Barda presented their respective submissions as if the words "at the time the court is seised" were imported into Article 5. It is not on the facts material for a determination of the issues in this case for me to identify specifically the date at which habitual residence is to be assessed; whether the evidence were to be evaluated as at 12 May 2015 (the date on which the proceedings were issued) or 21 July 2015 (the date of the hearing), the test would be unlikely to produce a different result. But as the principle of perpetuatio fori does not apply under the 1996 Child Protection Convention as it does under BIIa (see in this context Article 13 of the 1996 Child Protection Convention) it seems to me that the phrase should be applied as at the date of the hearing (see generally, paragraphs 38-43 of the Explanatory Report of Paul Lagarde, 1997)."*

15. More recently MacDonald J in the Warrington case (*ibid*) observed that;

> *"**32.** With respect to the provisions of article 6(2), having regard to the Lagarde Explanatory Report for the 1996 Convention at para 45, it would appear that the words "whose habitual residence cannot be established" encompass a child who does not, as a matter of fact, have a habitual residence. It has been said that the modern concept of habitual residence operates so that it is highly unlikely that a child will be left without a habitual residence (see* In re B (A Child) *[2016] AC 606, para 45), although there have been cases where that has been the outcome (see for example,* In re F (Habitual Residence: Peripatetic Existence) *[2015] 1 FLR 1303 per Peter Jackson J (as he then was) and* CL v AL *[2018] 1 FCR 101 per Keehan J). Within this context, I also note that the Lagarde Explanatory Report notes as follows at para 41:*
>
> *"The change of habitual residence implies both the loss of the former habitual residence and the acquisition of a new habitual residence. It may be that a certain lapse of time exists between these two elements, but the acquisition of this new habitual residence may also be instantaneous in the simple hypothesis of a move of a family from one country to another. This is then a question of fact which is for the authorities called upon to make a decision to assess …"*
>
> *And para 4.17 of the Practical Handbook on the Operation of the 1996 Hague Child Protection Convention (2014) states that:*
>
> *"However, there are circumstances where it might not be possible to establish the habitual residence of a child. Such circumstances could include, for example: (1) when a child moves frequently between two or more states, (2) where a child is unaccompanied or abandoned and it is difficult to find evidence to establish his/her habitual residence or (3) where a child's previous habitual residence has been lost and there is*

> *insufficient evidence to support the acquisition of a new habitual residence.*

Later in the same judgment he further stated that;

> ***"42.*** *As Mr Spencer further submits, the provisions regarding the effect on jurisdiction of a change of residence during the course of proceedings pursuant to article 5(2) of the 1996 Convention, namely that the principle of perpetuatio fori does not form part of the Convention and thus a change of habitual residence during proceedings leads to a change of jurisdiction, tends also to support the proposition that the question of habitual residence falls to be determined at the point the contracting state in question is tasked with answering that question. Within this context, I am inclined to share the obiter view expressed by Cobb J in* In re NH (1996 Child Protection Convention: Habitual Residence) *that the question of habitual residence for the purposes of articles 5 and 6 of the 1996 Hague Convention falls to be decided as at the date on which that question comes before the court for determination, in this case at this hearing. The corollary of this conclusion is, of course, that it will be important that the question of habitual residence in cases engaging the 1996 Hague Convention is determined without delay, in order to avoid the question of habitual residence being determined simply by mere effluxion of time over the course of protracted proceedings."*

16. Finally, Williams J in *FA v MA*[2021] EWHC 3024 (Fam) stated that:

> ***"Application of the legal principles to the evidence***
>
> ***40****. In the hierarchy of jurisdictions contained within the 1996 Hague Convention as applied by section 2 FLA 1986 the starting point would be to ask whether AA was habitually resident in England at the time the proceedings were commenced. This is what the father describes in his skeleton argument as the habitual residence basis of jurisdiction. Indeed, in contrast to BIIA, which contains a lex perpetuato fori provision in the 1996 Hague Convention makes provision for*

jurisdiction to transfer where habitual residence changes to another contracting state, but as Nepal is not a contracting state, I need not consider how that operates in the abstract. I'm prepared to accept that the proper interpretation of article 5 requires the court to consider habitual residence at the time the court was seized of the application in these circumstances."

Art. 7 and jurisdiction

17. Art.5(2) governs the issue of jurisdiction when habitual residence of the subject child has transferred from one contracting state to another. These provisions are subject to the terms that are set out in Art.7 of the convention that provide:

"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) 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."

18. Therefore, Art.7 provides an important exception to the operation of Art.5 and the change in the habitual residence of a child in circumstances where the child has been wrongfully removed from the jurisdiction of a contracting state or where the child was habitually resident immediately prior to being wrongfully removed or wrongfully retained in another member state. The operation of Art.7 is however, limited by its internal exception of acquiescence or the passage of time.

Art.8 and transfer of proceedings

19. Where the courts of a contracting state have jurisdiction by operation of Art.5 and 6, the Convention provides for provisions (*"exception")* that permit the said court to transfer the proceedings to another contracting state. Art. 8 provides:

"(1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, it if 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 seised of an application for divorce or legal separation of the child's parents, or for an 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."

20. By way of some guidance, the Lagarde Explanatory Report, 1997, provides as follows:

"Article 8 (transfer of jurisdiction to an appropriate forum)

Paragraph 1

53. *Jurisdiction in principle belongs to the authorities of the habitual residence or, in the cases mentioned in Article 6, to those of the State on the territory of which the child is present. As an exception to this jurisdiction in principle, the Convention envisages the possibility for the authority which normally has jurisdiction to transfer jurisdiction to the authority of another Contracting State if it thinks that the latter 'would be better placed in the particular case to assess the best interests of the child'. This might be the case if a child habitually resides with his or her parents in a Contracting State other than that of the child's nationality and both parents are killed in an accident. The child will be very likely to return to the State of nationality where the other members of his or her*

family reside, and the authorities of the habitual residence may think that the best interests of the child are for his or her protection to be organised by the authorities of the country of nationality".

21. In *Child and Family Agency of Ireland v. AB* [2021] EWHC 1774 (Fam), Keehan J observed that:

"Mr Setright QC and Mr Barnes submitted that there are no differences or distinctions of material significance between the provisions of Article 15 of BIIR and Article 8 of the 1996 Convention. Accordingly they submitted that the court should adopt the procedure set out in the authorities above, especially in Re LM and In the Matter of HJ. I agree and I have adopted this procedure in determining the outcome in this case."

22. *Re N (Children) (Adoption: Jurisdiction)*[2016] UKSC is the leading guidance on transfers under BIIA. Baroness Hale states:

"It is the case, as argued on behalf of the mother, that the "better placed" and "best interests" questions are inter-related. Some of the same factors may be relevant to both. But it is clear that they are separate questions and must be addressed separately. The second one does not inexorably follow from the first. The question remains, what is encompassed in the "best interests" requirement? The distinction drawn in In re I [2010] 1 AC 319 remains valid. The court is deciding whether to request a transfer of the case. The question is whether the transfer is in the child's best interests. This is a different question from what eventual outcome to the case will be in the child's best interests. The focus of the inquiry is different, but it is wrong to call it "attenuated". The factors relevant to deciding the question will vary according to the circumstances. It is impossible to be definitive. But there is no reason at all to exclude the impact upon the child's welfare, in the short or the longer term, of the transfer itself. What will be its immediate consequences? What impact will it have on the choices available to the court deciding upon the eventual outcome? This is not the same as deciding what outcome will be in the child's best interests. It is deciding whether it is in the child's best interests for the court currently seised of the case to retain it or whether it is in the child's best interests for the case to be transferred to the requested court."

Wardship

23. Wardship orders are made pursuant to the inherent jurisdiction of this court. As Lord Denning put it, such power in respect of children is derived from the *"right and duty of the Crown as parens patriae to take care of those who are not able to take care of themselves"* (*Re L (an Infant)* [1968] 1 All ER 20). Importantly, this jurisdiction to protect children is exercisable by the High Court irrespective of the proceedings. Waite LJ defined the court's inherent jurisdiction in *Re M & N (Minors)* [1990] 1 All ER 205 (at 537) as follows:

> **"***the prerogative jurisdiction has shown striking versatility throughout its long history in adapting its powers to the protective needs of children, encompassing all kinds of different situations***.** *Although the jurisdiction is theoretically boundless, the courts have, nevertheless, found it necessary to set self-imposed limits upon its exercise, for the sake of clarity and consistency and of avoiding conflict between child welfare and other public advantages*."

24. Lord Donaldson MR in *Re J (A Minor) (Wardship: Medical Treatment* [1991] (Fam) 33 (41D) observed that:

> *'The parents owe the child a duty to give or to withhold consent in the best interests of the child and without regard to their own interests.*
> *The Court, when exercising the parens patriae jurisdiction, takes over the rights and duties of the parents, although this is not to say that the parents would be excluded from the decision making process. Nevertheless, in the end, responsibility for the decision, whether to give or withhold consent, is that of the Court alone".*

25. Although, unlike the present case, *Re M* (*Children) (Wardship: Jurisdiction and Powers)* [2015] EWHC 1433 (Fam) concerned children who were British nationals, the judgment of the former President of the Family Division, Sir James Munby P. provides a very helpful guide where he stated that:

"32. This is not the occasion, and there is no need for me, to explore the range of circumstances in which it may be appropriate to make a child who is outside the jurisdiction a ward of court. I merely observe that cases such as this demonstrate the continuing need for a remedy which, despite its antiquity, has shown, is showing and must continue to show a remarkable adaptability to meet the ever emerging needs of an ever changing world. I add that the use of the jurisdiction in cases where the risk to a child is of harm of the type that would engage Articles 2 or 3 of the Convention – risk to life or risk of degrading or inhuman treatment – is surely unproblematic. So wardship is surely an appropriate remedy, even if the child has already left the jurisdiction, in cases where the fear is that a child has been taken abroad for the purposes of a forced marriage (as in Re KR and Re B) or so that she can be subjected to female genital mutilation or (as here) where the fear is that a child has been taken abroad to travel to a dangerous war-zone. There is no need for me to go any further, so I need not consider whether there are other kinds of situation where a child who is already abroad should be made a ward of court or whether wardship is an appropriate remedy where the risk to the child is of harm falling short of harm of the type that would engage Articles 2 or 3 of the Convention.

33. In the Tower Hamlets case, Hayden J recognised (para 11) that the relief he was being asked to grant arose in circumstances without recent precedent, but rightly saw that as no obstacle. He said (paras 57-58), and I entirely agree:

"57 The family court system, particularly the Family Division, is, and always has been, in my view, in the vanguard of change in life and society. Where there are changes in medicine or in technology or cultural change, so often they resonate first within the family. Here, the type of harm I have been asked to evaluate is a different facet of vulnerability for children than that which the courts have had to deal with in the past.

58 What, however, is clear is that the conventional safeguarding principles will still afford the best protection."

> *34. For these reasons, I concluded, therefore, that I had jurisdiction to make the children wards of court, because they are British subjects, notwithstanding the fact that they were at the time out of the jurisdiction.*
>
> *35. Having jurisdiction, it was plain that I must exercise it, for the children's future welfare demanded imperatively that I do so. And in exercising the jurisdiction, I sought to apply the well known words of Lord Eldon LC in Wellesley v Duke of Beaufort (1827) 2 Russ 1 , at 18: "it has always been the principle of this court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done."*
> *These words are as apposite today as they were over 180 years ago: see M v B, A and S (By the Official Solicitor) [2005] EWHC 1681 (Fam), [2006] 1 FLR 117 , para 108, and Re SA (Vulnerable Adult with Capacity: Marriage) [2005] EWHC 2942 (Fam), [2006] 1 FLR 867 , para 103."*

26. The court's inherent jurisdiction is not without limitations. This has been recently commented upon by MacDonald J in *A City Council v LS* [2019] 1384 (Fam) where at paragraphs 35 and 36 he observed;

> "*35.The jurisdiction of the High Court with respect to children derives from the Royal Prerogative, as parens patriae, to take care of those who are not able to take care of themselves (see Re L (An Infant) [1968] 1 All ER 20 at 24G). As I noted in HB v A Local Authority and Anor (Wardship: Costs Funding Order) [2017] EWHC 524 (Fam), its origins lie in the feudal period when, as an incidence of tenure, upon a tenant's death, the lord became guardian of the surviving infant heir's land and body (see Lowe, N. and White, R. Wards of Court 1986, 2nd edn). The inherent jurisdiction with respect to children is exercised by reference to the child's best interests, which are the court's paramount concern. Whilst under its inherent jurisdiction, the court may make any order or determine any issue in respect of a child and whilst, therefore, the jurisdiction of the court under the inherent jurisdiction is theoretically*

unlimited, there are, in fact, far-reaching limitations on the exercise of the jurisdiction (see Re X (A Minor)(Wardship: Restriction on Publication) [1975] All ER 697 at 706G). The boundaries of the inherent jurisdiction, whilst malleable and moveable in response to changing societal values, are not unconstrained.

36. Prior to the implementation of the Children Act 1989, the most frequent example of the exercise by the High Court of its inherent jurisdiction over children was in wardship. However, wardship is only one manifestation of the inherent jurisdiction with respect to children. Subject to the distinguishing characteristics of wardship being that custody of the child is vested in the court and that, although day to day control is vested in the individual or local authority, no important step can be taken in the child's life without the court's consent, the jurisdiction in wardship and the inherent jurisdiction of the High Court are the same (see Re Z (a minor)(freedom of publication) [1997] Fam 1). In the circumstances, the inherent jurisdiction in respect of children can be invoked without the use of wardship (see Re W (A Minor)(Medical Treatment: Court's Jurisdiction) [1993] Fam 64). This is sometimes known, for convenience, as the 'residual' inherent jurisdiction of the High Court."

27. PD12D of the Family Procedure Rules 2010 provides important guidance in the exercise of the court's inherent jurisdiction by providing that:

"1.1 It is the duty of the court under its inherent jurisdiction to ensure that a child who is the subject of proceedings is protected and properly taken care of. The court may in exercising its inherent jurisdiction make any order or determine any issue in respect of a child unless limited by case law or statute. Such proceedings should not be commenced unless it is clear that the issues concerning the child cannot be resolved under the Children Act 1989 (see below).

1.2 The court may under its inherent jurisdiction, in addition to all of the orders which can be made in family proceedings, make a wide range

of injunctions for the child's protection of which the following are the most common –

(a) orders to restrain publicity; orders to prevent an undesirable association;
(b) orders relating to medical treatment
(c) orders to protect abducted children, or children where the case has another substantial foreign element; and
(d) orders for the return of children to and from another state.

1.3 The court's wardship jurisdiction is part of and not separate from the court's inherent jurisdiction. The distinguishing characteristics of wardship are that –

(a) custody of a child who is a ward is vested in the court; and
(b) although day to day care and control of the ward is given to an individual or to a local authority, no important step can be taken in the child's life without the court's consent"

Discussion

28. The family are Romanian nationals and are from the Roma tradition. S was born in England. Her mother, LB, was at this time fifteen years old and attended hospital on her own. There were significant professional concerns about the mother's circumstances. When interviewed at the hospital, she maintained that she had only been in the UK for two weeks. She provided little information about her life in the UK, Romania or in any other jurisdiction. It is evident that she came to the UK some two years previously when she was thirteen years old. She appears to have remained living in the UK for that period. Her parents were unable to provide any meaningful detail about LB's circumstances, save to state that she arrived in the UK in 2019 on holiday but insisted on staying in the UK where she resided with extended family members. The family members are AB's parents. AB was named as S's father which has been confirmed by genetic testing.
29. The police were so concerned about LB's circumstances that they exercised their protective powers. Subsequently the local authority made public law applications in respect of both LB and S out of concerns including child trafficking and forced marriage of a minor. They were both made the subject of an Interim Care Order

('ICO') on 1 October 2021. LB and S were placed in a mother and baby foster placement.

30. Later in October LB's parents stated that she had visited the UK some two years ago for a holiday but insisted on staying. The global pandemic and the expiration of her passport resulted in her staying for two years. Her parents had arrived in the UK some ten days before to facilitate her return. This version of events, the version given by LB and subsequently by AB's family contained significant contradictions.
31. Pursuant to the court's invitation, the Romanian Embassy confirmed that it did not seek to challenge this court's jurisdiction in respect of either child and that it did not seek to participate in these proceedings. This position has prevailed to date. Given the concerns about 'flight risk', LB had very little contact with her parents before they left the jurisdiction in the same month. Shortly thereafter, on 3 November 2021 LB absconded from her foster placement leaving S behind. S continues to reside in foster care. S has video contact with both of her parents.
32. There followed a series of hearings and attempts at locating LB and securing her return to this jurisdiction. Members of her maternal family attended court and gave their assurance to cooperate with locating and returning LB. The Romanian Consulate assisted by contacting Romanian Children Services to verify LB's whereabouts. LB contacted her social worker in this jurisdiction and stated that she was with her parents in Romania, but the parents did not confirm this. In the meantime, Romanian Children Services tried to undertake a welfare check on LB. The Romanian social worker stated that:

> *"Accompanied by the representatives of the Tandarei City Council, I visited the address; however the family could not be found there. We found* [X], *a fourth grade relative (who refused to identify himself), who facilitated a telephone conversation with … the father of the minor child in this case. During the telephone conversation, the father provided a short history of his daughter's circumstances.*
>
> *I can inform you that the … family has been living in Spain for several years, where all their children attend school as per their ages, the mother takes care of the children and their upbringing, and the father provides an income for the family. The … family travel to Tandarei only during the children's holidays, and then return to Spain*
>
> *…*

> "*In conclusion of the assessment of* [LB's] *social, domestic and legal circumstances, we are of the opinion that each people is different from other peoples through its traditions, which characterize its way of living and thinking.*
>
> *Despite the impact of our society's progress, they continue to be a people's symbol and pride, and they are kept alive in the collective consciousness of that people as value, recognition and identification marks.*
>
> *…*
>
> *From a legal point of view, a young girl aged 16 can get married only with both her parents' consent. Moreover, a Social Services asessment needs to be carried out by the Local Authority to establish the cohabitting relationship with the future husband and/or a possible pregnancy, which should not happen before the age of 15, thus becoming ilegal.*
>
> *In this specific case, considering the best interest of minor child* [LB] *and of her baby* [S]*, respectively to live in a stable and safe environment, in the event the British authorities are of the opinion they cannot be returned to their family, and a repatriation of the mother and baby couple becomes necessary, I suggest the repatriation into a residential unit under the jurisdiction of our institution*"
>
> *…*
>
> *Romania is proposing that the care proceedings continue to run in the UK and if at the conclusion of the proceedings it is proposed that neither child returns to their parents' care and the Court decides to repatriate the children, the LA expressed their agreement for these children to be repatriated in their care.*"

33. Subsequently, on 16 November 2021, the Romanian Embassy confirmed that LB's parents live in Spain and with the consent of her parents, LB left Romanian in 2019 to live with a Roma family in the UK. The correspondance further stated that;

> "*in the situation the Court in the UK considers it is not safe for the two children to return into their family's care, LA in Ialomita expresses its*

agreement for the repatriation of the two children, in the care of LA Ialomita"

34. Thus the local authority argues that nothing in the communication with the Romanian authorities can be interpreted as a challenge to this court's jurisdiction. In my judgment, this is an entirely correct analysis of the communications from the Romanian authorities who have agreed to cooperate with the repatriation of either child if the courts in this jurisdiction assess this to be an outcome that best meets the welfare interest of either child. Furthermore, I do not read any of the said correspondence as seeking the transfer of the proceedings. Unsurprisingly, this court has since made declarations that it has jurisdiction in respect of both children. This is subject to challenge.
35. Little is known about LB's early life. On one account she came to the UK when aged thirteen, fell in love and insisted that she stayed living in the UK. By another account, this was a visit that was prolonged by the expiration of her passport and the global pandemic. There is a profound professional concern about LB's circumstances and welfare. Such are the concerns that the local authority now seeks very serious findings about the family. Broadly, the local authority alleges that the adults have conspired to arrange for LB to be married to AB despite her (their) young age, conspired to lie to the UK authorities about her circumstances, kept her invisible to the UK authorities by not registering her with any health and education services, failed to protect her from AB who has allegedly raped another child under the age of sixteen, S has been neglected through a lack of antenatal care and both children have been abandoned with LB initially in this jurisdiction and latterly her wrongful removal from this jurisdiction by the family, abandoning S. The local authority's allegations are now provisionally listed to be determined in September of this year.
36. In her short statement, LB gives little detail about how and when she came to the UK. She mentions coming to this jurisdiction for a holiday. She stayed with AB's parents and the two commenced a relationship after falling in love. The relationship was kept a secret from the adults and she maintains that she was unaware of the police investigations concerning AB. Following S's birth, she was scared and lonely in foster care. This was the first time she had lived outside of her culture and the language barrier contributed to her sense of loneliness. In November 2021, she was crying in a nearby park. She came across a Romanian woman who offered to take

her to Spain. She denies any of her family members were involved in any arrangements to move her away from this jurisdiction. LB is very clear that she loves S and wants to care for her in Romania with the help of her parents.

37. In his statement, AB states that he was born in Romania and came to the UK when he was a few months old. He has lived in England since. He is studying mechanical engineering at a local college. He largely confirms the mother's account, by stating that she is his second cousin who came to the UK for a visit. Their relationship blossomed but this was kept a secret until after S was born. He was concerned about the family's reaction if they found out that he was in a relationship with his second cousin. He was shocked when LB fell pregnant but they decided that they wanted to keep the baby.

38. LB's mother, MOB gives a little more detail in her statement. She states she and her children lived in Spain and this was where LB lived for most of her life. They travelled to Romania for holidays and during one such visit LB and AB met. Eventually, LB persuaded her parents to allow her to visit the UK. This was never intended to be for more than two months, although in her first statement she states that this was to be for no more than four or five months. However, LB kept prolonging her stay and eventually the global pandemic intervened by prolonging her stay even further. She and her husband ('MAB') gave her cousins (AB's parents) a power of attorney that allowed LB to travel with them to England for tourism between 13 September 2019 and 13 September 2021. LB arrived in England on 17 September 2019. MB expressed her concern about LB not being registered with the health authority and that she had missed her education in Spain. She was informed by AB's mother ('LET') that LB was pregnant. LB was about six to eight months pregnant at the time. She further states that when in hospital, AB's parents lied about LB's circumstances as they were ashamed of their son and the pregnancy. She further concedes that her husband lied to maintain a consistent account. Finally, the family had planned to arrange for LB to go back to Romania before the proceedings had commenced. Her account as set out in her first statement is corroborated by MAB.

39. As Mr Norton QC and Miss Dail submit, the issue of habitual residence and the court's jurisdiction is complex. The evidence that is before the court raises two opposing scenarios, one in which the two children are at grave risk of harm and the other in which a child has determined that she wished to stay in England where she

fell in love and later became pregnant. Subsequently she made a decision to leave the jurisdiction without involving her family. On any view this illustrates the necessity and the importance of determining the factual issues in this case. This can only happen in the English courts if I determine that this court has jurisdiction to do so.

40. I entirely agree with Mr Vine QC and Mr Murray in submitting that unlike BIIa, *lex perpetuatio fori* does not apply to the 1996 Convention and that the habitual residence of an individual can change during the proceedings. Furthermore, the authorities make it clear that under the provisions of the 1996 Convention, the question of habitual residence is determined at the time of the hearing. However, in my judgment, where wrongful removal or retention is alleged, the court must determine the child's habitual residence at the time of the said wrongful act. To do otherwise would be perverse and would render the provisions of Art. 7 superfluous or meaningless. The terms of Art. 7(2) are very clear in this regard.

41. This court has already declared its jurisdiction. This is subject to review particularly where the principle of *perpetuatio fori* is not in operation. Furthermore, the Romanian authorities have not sought to challenge this court's jurisdiction. This is an important factor but it is not determinative. The evidence before me would suggest that before her arrival in England, LB was habitually resident in Spain. Whatever the intention of LB or her parents in September 2019, notwithstanding the lack of detail in the evidence that is before me, it is clear to me that over time LB became increasingly integrated within the family in England and within life in this jurisdiction. Her conduct and intentions must be assessed in light of her culture and family practices. She was not registered with health or education authorities, these being classic examples of integration that can support a finding of a change in habitual residence. It is not necessary for me to determine at this stage whether there was an instantaneous change in her habitual residence or whether this was over a longer period of time. It is however clear to me that at some time before her arrival in this jurisdiction or soon thereafter, she was involved in a significant relationship which persisted for a significant period and a child has been born from this relationship. In my judgment this illustrates a degree of integration within the family and within life in England. On her parents' evidence LB has prolonged her stay in England which is to some degree illustrative of her intentions. Her parents' evidence also seems to suggest that her care was effectively delegated to her

relatives in England. For example, the mother did not raise any concerns about the lack of registration with health authorities until these proceedings had commenced and her family in this jurisdiction appear to have assumed a degree of financial responsibility for her. I note that by November 2021, LB had lived in England for two years.

42. For reasons that I have set out above, the evidence that is before me leads me to conclude that as at November 2021, LB was habitually resident in England. Therefore, I must consider whether she was wrongfully removed (or wrongfully retained away) from this jurisdiction on or about 3 November 2021. The evidence in this regard is very limited indeed. The local authority's case inevitably relies on a number of inferences being drawn from the relevant circumstances at the time and such evidence that is available. Lord Sumption LSC in *Prest v Prest (SC(E))* [2013] 2 AC most helpfully observed that;

> *"44 In Herrington v British Railways Board [1972] AC 877, 930—931, Lord Diplock, dealing with the liability of a railway undertaking for injury suffered by trespassers on the line, said:*
>
> > *"The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold. A court may take judicial notice that railway lines are regularly patrolled by linesmen and Bangers. In the absence of evidence to the contrary, it is entitled to infer that one or more of them in the course of several weeks noticed what was plain for all to see. Anyone of common sense would realise the danger that the state of the fence so close to the live rail created for little children coming to the meadow to play. As the appellants elected to call none of the persons who patrolled the line there is nothing to rebut the inference that they*

> *did not lack the common sense to realise the danger. A court is accordingly entitled to infer from the*
>
> *inaction of the appellants that one or more of their employees decided to allow the risk to continue of some child crossing the boundary and being injured or killed by the live rail rather than to incur the trivial trouble and expense of repairing the gap in the fence."*

The courts have tended to recoil from some of the fiercer parts of this statement, which appear to convert open-ended speculation into findings of fact. There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it. For my part I would adopt, with a modification which I shall come to, the more balanced view expressed by Lord Lowry with the support of the rest of the committee in R v Inland Revenue Comrs, Ex p TC Coombs&Co [1991] 2 AC 283, 300:

> *"In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."*
>
> *Cf Wisniewski v Central Manchester Health Authority [1998] PIQR P324, P340.*

45 The modification to which I have referred concerns the drawing of adverse inferences in claims for ancillary financial relief in matrimonial proceedings, which have some important distinctive features. There is a public interest in the proper maintenance of the wife by her former husband, especially (but not only) where the interests of the children are engaged. Partly for that reason, the proceedings although in form

> *adversarial have a substantial inquisitorial element. The family finances will commonly have been the responsibility of the husband, so that although technically a claimant, the wife is in reality dependent on the disclosure and evidence of the husband to ascertain the extent of her proper claim. The concept of the burden of proof, which has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence or disclosure, cannot be applied in the same way to proceedings of this kind as it is in ordinary civil litigation. These considerations are not a licence to engage in pure speculation. But judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing. I refer to the husband because the husband is usually the economically dominant party, but of course the same applies to the economically dominant spouse whoever it is."*

43. I note all of LB's stated difficulties whilst in foster care including the language barriers and cultural differences that may have contributed to her feeling isolated. At that time she had limited organised contact with her family. She was sixteen years old and capable of making decisions for herself. I also note that she has been assessed by Dr Dumitrache who is a Chartered Registered Clinical and Forensic Psychologist. In response to further questions by the parties, she observed that;

> "[LB] *is a very vulnerable child and unless her circumstances are clarified and deemed safe both herself and her daughter are at risk. In my opinion the clarification would be in terms of making sure that she has stability and connection to a secure basis and solid support and care, both herself and her daughter; also that the adults in her life are safe and can provide protection …*
>
> If she were to be in Romania, *"...given her gullibility, naivete and immature psychological mind (she showed some "street wise wisdom", but still may struggle to make sound important decisions about herself and her daughter), she might need considerable amount of consistent support and care from a caregiver to thrive and be able to protect herself and her daughter from any potential harm …*

> [LB] *is a minor whose origins and life circumstances across Romania Spain and UK remain unclear and permeated by discordant information regarding the whereabouts of her family; these factors when taken together with* [LB's] *own personal vulnerabilities, exacerbate her lack of safety and stability that may put her at high risk*"

44. I further note, that on the parents' case their return to the UK in the summer of 2021 was intended to facilitate the renewal of LB's passport that had since lapsed and her subsequent return to Romania, although at that time the family did not appear to be living in Romania. Indeed, LB states that she travelled to Spain to her family home where she found her parents. LB's evidence about how she came to leave the jurisdiction is very limited and lacks meaningful detail. The identity of the family who she is said to have travelled with remains uncertain, as do their numbers and how they travelled to Spain. It remains unclear how LB gained entry to Spain and what documents were used to facilitate her travel, including her renewed passport. It remains unclear how she may have come to have her travel documents on her person when she was alone crying in the park. I note that her parents have persistently failed to secure her return to this jurisdiction despite the steps taken by the local authority and the orders of this court.
45. I am concerned that LB's parents' engagement in these proceedings have, at best been sporadic and they appear to be intent on keeping LB outside of this jurisdiction with little apparent regard for S and her needs. In my judgment, there is sufficient evidence for me to conclude that LB as a vulnerable child has been wrongfully retained in another jurisdiction. The terms of Art. 7 are drafted in the alternative, but they are not mutually exclusive. In the circumstances, for the purpose of this hearing I need not consider whether LB was wrongfully removed from this jurisdiction. LB has clearly been out of this jurisdiction for less than a year. Furthermore, the procedural chronology of these proceedings alone illustrates that in the circumstances of this case the local authority has taken all reasonable steps to secure LB's return to the jurisdiction and to engage her parents. In my judgment, any argument that the local authority has acquiesced in LB's wrongful retention outside of this jurisdiction is unsustainable. Accordingly, I do not find that the internal exception within Art 7 applies to the facts of this case and conclude that LB remains habitually resident in this jurisdiction.

46. Turning to the application for the transfer of proceedings in respect of both children under Art 8 of the 1996 Convention, I must consider the application in respect of each child separately. I note that to date, LB and her parents have raised no issue about their ability to participate in these proceedings remotely. There is no evidence before me that would point to any impediment to the family accessing appropriate devices to properly participate in these proceedings. I note that LB's parents own two houses in Spain and Romania and regularly travel between the two countries. I have little doubt that with the assistance of their respective expert legal teams, they can make such appropriate arrangements as are necessary to fully participate in the proceedings. In any event, should these proceedings continue to a more substantive hearing, they will have every facility to attend the hearing in person.
47. Furthermore, AB and his family live in England and have done so for a significant period. AB faces serious allegations that involve complainants who also live in this jurisdiction. A significant portion of the local authority's allegations do not concern or require detailed investigations outside of this jurisdiction. Furthermore, a significant majority of key witnesses, including those who have made serious allegations against AB reside in this jurisdiction. I appreciate that a transfer of the proceedings is sought by LB and as a relevant child her welfare is a relevant consideration when considering her application. For reasons that I have detailed earlier in my judgment, I remain profoundly concerned about LB's welfare which can only be addressed once the serious allegations have been adjudicated upon. For entirely understandable reasons, the Romanian authorities have not contended that they are better placed to deal with those issues. Whilst I appreciate LB's desires, I cannot see how the Romanian courts would be better placed to deal with the issues in this case.
48. The question of what is best for LB's interest is a separate issue that must also be addressed. For convenience, I have addressed the Guardian's welfare and best interest analysis below which apply under this consideration and are not repeated here. LB is sixteen years old and her views must be given significant weight in assessing what is best for her. However those views are not determinative and must be considered in the context of all of the evidence before the court that includes her vulnerabilities and her life circumstances. As I have set out earlier in this judgment, it would be inappropriate for me to speculate what the final outcome in these proceedings may be. It may be that LB's wishes do come to fruition. These do not

form part of my assessment of what is best for her when considering this application. Given the concerns about her as detailed in the local authority's schedule of findings and what I have observed further below I do not find that it would be in LB's interest that these proceedings be transferred. Accordingly, I refuse the application to transfer the proceedings concerning LB to the Romanian courts. The grounds for refusing the application in respect of S are even stronger and I do not believe that the application in respect of S's proceedings is pursued in the event that LB's proceedings are heard in this jurisdiction. However, for completeness I dismiss the second Art. 8 transfer application and adopt the arguments that are set out by Miss Isaacs QC and Mr Bowe as advanced by Mr Harrill on behalf of S.

49. In the unusual circumstances of this case, on 31 March 2022 I gave the local authority permission to apply to invoke the inherent jurisdiction of this court and made LB a ward of court. These orders were made without prejudice to any subsequent challenge by the parties. With familiar perspicacity Mr Goodwin QC submits that there is a continuing need for LB to be a ward of this court in circumstances where the local authority cannot satisfy its multi-faceted statutory duties that would come into operation under an interim care order. Furthermore, the statutory route through which a child who is subject to public law orders may be placed in another jurisdiction was not intended to apply to these circumstances, where in the absence of the court's permission pursuant to Schedule 2 paragraph 19 of the Children Act 1989, LB cannot be lawfully placed in Spain or Romania. Any such placement would be unlawful and constitute a contempt of court.

50. There is no dispute that the grounds for invoking the court's inherent jurisdiction are made out. Furthermore, there is no dispute that the grounds for making LB a ward of court are also made out. The challenge to the local authority's application is made in the premise of LB's welfare. Her guardian has filed a very helpful and detailed analysis in support of LB's application for the transfer of these proceedings and opposition to making her a ward of court. The guardian most helpfully sets out the relevant cultural issues that have contributed to both children's circumstances. Having considered the relevant information that is available, she opines that LB is likely to be safer in the care of her parents in Romania than in a placement outside of her family in this jurisdiction. She observes that LB has been clear about not wishing to return to the UK and even if the practical difficulties in returning her

could be overcome, she is likely to abscond from any placement and place herself in greater danger. Such an order would add to her fears and anxieties.

51. LB's guardian, whose expertise and opinion I hold in the highest regard, has a distinct advantage of familiarity with the culture and the language of the family. Her careful analysis has inevitably involved an element of risk assessment that has informed her conclusions on what best serves LB's interest. I am slow to disagree with the opinion of a guardian whose experience and expertise are of the highest calibre. However, in this instance, her opinion seems to place little weight on the serious allegations against LB's parents, AB and other members of the family. Whilst the cultural norms must be respected and tolerated even when they are in conflict with the customs and conventions in this jurisdiction, illegality and disregard for the law cannot be ignored. Furthermore, LB's apparent vulnerabilities as cited above and the influence of the adults in her life cannot be disregarded or understated. LB is a child who now appears to be in the care of her parents. Her parents have thus far failed to facilitate her return to this jurisdiction despite being ordered to do so. Her needs include a need to bond and care for her own child. In my judgment, the unusual circumstances of this case demand that LB is protected and that she remains a ward of the court. I give no directions for any arrangements concerning where and with whom she is to live but repeat the previous orders that she must be returned to this jurisdiction.
52. Turning to the arrangements concerning S's contact with her father, I note that he had his first and thus far last direct contact with S in December 2021. I also note that this was a largely positive contact. AB has since maintained a consistent desire to see his daughter. This desire has been not been met as the local authority remains concerned about a possible risk of sexual harm that he may present to S and the risk that S may be abducted. As to the former, I am not aware of any evidence that suggests that S would be at risk of sexual harm, particularly in the confines of a supervised setting. This issue may be further assessed once the fact finding in this case has concluded. The latter issue is much more present and is a major limb of the findings that the local authority is seeking.
53. In previous hearings, I have been informed that the father has not taken up the opportunity of all of the virtual contact sessions and has missed a significant proportion of them. This has raised further concerns about the father's commitment to maintaining contact with S. To address the latter two concerns, I have invited the

father to demonstrate a period of commitment by attending all of the available virtual contact sessions and engaging in some supportive work with the allocated social work team so that the local authority can better manage the perceived risk of abduction and meaningful contact can progress and be sustained. This work was intended to be concluded within weeks. Regrettably, AB has not engaged with the programme that was on offer and has missed more of his contact with S.

54. I note that AB is a teenager and understandably feeling a great deal of frustration that his contact with S has not progressed at the speed that he had hoped for. I have no doubt that this has contributed to his lack of engagement in all of the contact sessions and giving the impression that he is perhaps less committed that he would want to be. Despite his youth, AB is now a father and as a parent he must prioritise the needs of his child over and above others, including himself. S's welfare is my paramount consideration and I must decide this issue by reference to the welfare checklist as set out in s1(3) of the Act. The real issue is AB's capacity as a parent to commit and maintain a consistent and safe pattern of contact which would serve S's best interest. Sadly, the evidence that is before me does not at this stage allow me to conclude that AB can do this. Therefore, all I can do at this stage is to offer the father another opportunity to commit to contact with S and to undertake a short, focused piece of work that has been offered by the local authority before face to face contact can begin. I know that at present the father has a great deal to contend with and if he requires more time, then he must be frank with himself and the professionals about what he can realistically commit to. I have every confidence that the local authority will accommodate any reasonable request that he makes to ensure that he has had every fair opportunity to deal with the identified concerns and to begin regular face to face contact with his daughter. Accordingly, I decline the invitation to make a contact order under s34 of the Act.

Conclusion

55. For reasons that I have set out above I find and declare that:

    a. On 3 November 2021 LB was habitually resident in this jurisdiction, and
    b. She has been wrongfully retained away from this jurisdiction in the jurisdiction of another contracting member state, and
    c. The courts of England and Wales retain jurisdiction.

These findings as set out in pargarphs 55 a. to c. may be reviewed following the conclusion of the aforementioned fact finding hearing.

In respect of the applications before me:

d. Applications for the transfer of proceedings in respect of LB and S are dismissed.
e. LB is made a ward of this court.
f. Orders for LB's return to this jurisdiction shall continue.
g. The application for contact between AB and S is dismissed.

56. Given the UK's departure from the European Union at 23:00 hrs on 31 December 2020, it may be helpful to broadly summarise the law applicable to cases that are instituted (or issued) after the said date and where the jurisdiction of the courts in England and Wales are under consideration. From the relevant law that is detailed earlier in this judgment, the following broad principles may be deduced.

a. The exercise of jurisdiction by the courts of England and Wales in proceedings under Parts I and II of the Children Act (1989) are governed by Family Law Act (1986).
b. The exercise of jurisdiction by the courts of England and Wales in proceedings under Part IV of the said Act are governed by the 1996 Convention (*Warrington Borough Council v T and Others* [2021] EWFC 68, [2022] Fam 107).
c. Habitual residence of the subject child is determinative of the jurisdiction of the courts of the member state (Art.5 of the 1996 Convention) and such jurisdiction cannot be acquired outside the terms of the 1996 Convention (Explanatory Report by Paul Lagarde 1997).
d. Habitual residence is a factual determination by the court and the following factors are important considerations when making such a determination;

> "*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 (para 80(ii)); Re B (para 42) applying Mercredi v Chaffe at para 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 loses a pre-existing habitual residence at the same time as gaining a new one (Re B); (emphasis added);

…

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);

xi) 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) to those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move;

xii) 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).

xiii) 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);

If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family

environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child. The approach must always be child driven…" (Per Hyden J in Re B (A child)(Custody Rights: Habitual Residence) [2016] EWHC 2174 and subsequent qualified approval by the Court of Appeal in *Re M (children)(Habitual Residence: 1980 Hague Child Abduction Convention)*[2020] EWCA Civ 1105, see also *Re B (A child)(reunite International Child Abduction Centre and others Intervening)*[2016] AC 606).

e. When assessing the question of habitual residence, the court must have a keen focus on the child's situation at the relevant date (*Re M* above per Moylan LJ).

f. A child's social and family environment may include positive and negative factors. These are not relevant to the determination of the child's habitual residence. (Per McFarlane LJ in *Re R (a child)* [2015] EWCA Civ 674).

g. The principle of *perpetuatio fori* does not apply to the determination of habitual residence under the 1996 Convention, and

h. Subject to the provisions of Art. 7 of the 1996 Convention, habitual residence of the subject child can change during proceedings which necessitates any determination of the child's habitual residence to be made at the time of the hearing. (*Re NH (1996 Child Protection Convention Habitual Residence)* [2015] EWHC 2299 (Fam), [2016] 1 FCR, *Warrington Borough Council v T and Others* [2021] EWFC 68, [2022] Fam 107, *FA v MA*[2021] EWHC 3024 (Fam)).

i. Where the courts of a contracting state had jurisdiction at the time the child was wrongfully removed or wrongfully detained in the jurisdiction of another member state, the court who had jurisdiction prior to the wrongful acts will retain jurisdiction (Art. 7). Therefore, in such circumstances the court must determine whether it had jurisdiction at the time the wrongful act was committed. The internal exceptions to these

provisions (Art. 7(2)) are based on the passage of time or acquiescence to the wrongful act by "*each person, institution or other body having rights of custody"* to the said removal or retention.

j. Applications to transfer proceedings to the jurisdiction of another member state are governed by Art. 8 of the 1996 Convention.

k. There is no material difference in the approach to such an application between the provision of BIIa or the 1996 Convention (per Keehan J *Child and Family Agency of Ireland v. AB* [2021] EWHC 1774 (Fam)).

l. In such applications there are two questions for the court to address. Namely whether another member state is *"better placed"* to hear the case and whether it is in the *"best interest"* of the relevant child that the proceedings are transferred. These are separate but interrelated questions, the answers to which may be informed by common relevant factors. The second question is separate and different to any welfare determination or final outcome of the case. The second question asks the court to decide if the transfer would be in the child's best interest. This will includes consideration of the impact of any transfer (or refusal) on the child's welfare and may encompass considerations of the impact of any transfer on the child's short and long term welfare. This is different to the decisions of the court about the child's welfare at the conclusion of the proceedings [Baroness Hale in *Re N (Children) (Adoption: Jurisdiction)*].