Neutral Citation Number: [2024] EWHC 1658 (Fam)

Case No: CF19P01478

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2024

Before :

MS JUSTICE HENKE

- -

Between :

A Mother — **Applicant**

- and -

(1) A Local Authority — **Respondents**

(2) A Father

(3) D

(by her Children's Guardian)

Re: D (Wardship: Jurisdiction: Cutting Across Statutory Schemes)

- -

- -

Michael Gration KC and Mani Basi (instructed by **Dawson Cornwell LLP**) for the **Applicant**
Dominic Boothroyd instructed by and for the **First Respondent**
The **Second Respondent** appearing as a **Litigant in Person**
Rebecca Foulkes (instructed by **Legal Services for Children**) for the **Third Respondent**

Hearing dates: 4-6 March 2024
Draft judgment circulated: 29 May 2024

- -

Approved Judgment

This judgment was handed down remotely at 2pm on 26 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives, having been circulated in draft form to the parties on 29 May 2024.

.....

MS JUSTICE HENKE

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.

Ms Justice Henke :

Introduction

1. This is an application on behalf of the mother, or "M", to set aside orders made by this court on 27 September 2019, 5 November 2019, 21 November 2019, 30 June 2020, 6 August 2020, 24 November 2020, 9 December 2020, 9 February 2021 and 18 March 2021. The orders all relate to proceedings brought under the inherent jurisdiction of the High Court in relation to the child, D. The basis of M's application is that she says they were made without jurisdiction. The child's father is F. F supports M's application. The local authority and the Guardian appointed for D in the public law proceedings oppose the application.

Background

2. The child at the heart of this case is D.

3. D is the father's third child and the mother's first child. Mr Justice Moor found at the conclusion of a fact-finding hearing in 2014, that the father had injured his first child, S, on a number of occasions; the last resulting in her death. The mother of S was found to have failed to protect her. Their second child was removed from their care and made subject to care and placement orders.

4. D is the child of the father's subsequent relationship with her mother, the applicant. D's parents were married in an Islamic ceremony in the summer of 2016. Their relationship appears to have endured.

5. As a direct result of the findings Mr Justice Moor made against the father, the local authority undertook pre-birth assessments in relation to D and instigated all proper avenues of child protection discussion and enquiries. In the latter stages of that process, the mother had the benefit of a solicitor experienced in child protection. The judgments of Mr Justice Moor were shared with the family to ensure a proper factual basis for future working. At the end of the process of assessment, the conclusion within the local authority was that the mother was vulnerable by reasons of her own background and was unlikely to be a protective factor as she and the maternal family believed the findings of Mr Justice Moor were wrong and that the father was innocent as he claimed. The local authority therefore proposed a safety plan. A child protection case conference was to be held to see if the mother could parent the baby-to-be D away from the father. If that could be achieved then the risk assessment would focus on the father and what, if any role, he should play in the baby's life. That plan was communicated to the mother.

6. Against that background, in early September 2019 the mother, heavily pregnant, was driven to the airport by the father and boarded a plane. She left the UK and travelled to Iraq where she was met by the paternal family. The mother told the midwife she intended to return to the UK on 19 September 2019 and told her own solicitor she would return on 18 September 2019.

7. D was born in late September 2019 in Iraq. D is now 4 years old. She has remained in Iraq to date.

8. Initially, the mother remained in email communication with her solicitor and by that means she communicated that she and D would return to this jurisdiction once she had recovered from giving birth and another medical procedure that she had recently undergone. However, as time passed the communication stopped and D and her mother failed to return to this jurisdiction.

9. Consequently, on 27 September 2019 the local authority applied for permission to invoke the inherent jurisdiction in relation to D and to make her a ward of court to "*secure her return to the UK and to protect [her] from the harm that she is likely to suffer in the care of either parent*". The local authority relied on the risk assessment they attached to the application.

10. The application made by the local authority came before Mr Justice Francis on 27 September 2019. It appears he dealt with the application on the papers. The recitals state:

> "*Recitals*
>
> *3. This order was made on consideration of the papers without notice to the respondents. The reason why the order was made without notice to the respondent is because: a. The first respondent cannot be located; b. The second respondent cannot be located;*
>
> *4. The judge read the following documents: a. Local Authority Risk Assessment*
>
> *5. The court was satisfied and declared on a provisional basis on the basis of the evidence filed that: a. The courts of England and Wales have primary jurisdiction in matters of parental responsibility over the child pursuant to Articles [8] [10] of BIIR.*"

11. On 27 September 2019, Mr Justice Francis made D a ward of court. He directed that the mother should return the child forthwith to the jurisdiction of England and Wales. He directed that every person within the jurisdiction who was in a position to do so should co-operate in assisting and securing the immediate return of the child to the jurisdiction. In addition, he made a number of ancillary orders including listing a return date for 9 October 2019.

12. The order of 27 September 2019 was personally served on the father the next day, but he did not attend the return hearing set for 9 October 2019. The mother did not return D to the jurisdiction. Mr Justice Francis thus made a number of case management directions and directed the father to answer 10 questions to help locate D. That order was hand delivered to the father on 14 October 2019. Mr Justice Francis had made orders for the mother's, the father's and the child's passport and travel documents to be seized by the Tipstaff. On 18 October 2019, the court was informed that the order had been executed against the father and his passport and travel documents had been seized. The Tipstaff also managed to obtain the first real information about the child. Her name was confirmed and she was with her mother and paternal aunt in Northern Iraq.

13. A further hearing took place before Mr Justice Francis on 5 November 2019. The father attended this hearing and had the benefit of an interpreter. The father gave evidence before Mr Justice Francis in which he denied that the trip to Iraq was anything to do with him and claimed to only have communication with the mother via her solicitors.

14. On 5 November 2019, Mr Justice Francis heard evidence from the father and gave a short ex tempore judgment. The learned judge said he was "*gravely concerned about the welfare of D*" and that he was not inclined to believe anything the father had told him. The following recitals were made on the face of the order: -

> "*14. The child is a ward of this court and is currently outside England and Wales, in [Northern Iraq] with the respondent Mother, Maternal Grandmother, Paternal Grandmother and Paternal Aunt.*
>
> *15. In consequence of the fact that this court has ordered that the child shall remain a ward of this court whilst they remain a minor, this court is empowered and required to exercise its custodial jurisdiction over them and to ascertain their best interests and to facilitate and promote those best interests.*"

15. The next hearing before Mr Justice Francis was on 21 November 2019. The mother was not present, but all other parties were present and represented, I have a transcript of that hearing. It includes the following:

> "*MR JUSTICE FRANCIS: Right. What is the basis of our jurisdiction in this case?*
>
> *LOCAL AUTHORITY ADVOCATE: Mother is a British citizen. It appears she was travelling abroad, the father would say on what is effectively a holiday, had a child abroad, but I know this was dealt with by [the previous local authority advocate] at the initial hearing----*
>
> *MR JUSTICE FRANCIS: Yes.*
>
> *LOCAL AUTHORITY ADVOCATE: -- that case law suggested in those circumstances D is effectively a British child, for want of a better term, and therefore comes under your Lordship's jurisdiction.*
>
> *MR JUSTICE FRANCIS: So the jurisdiction is based on nationality.*
>
> *LOCAL AUTHORITY ADVOCATE: I would assert that at the moment, my Lord, yes.*
>
> *MR JUSTICE FRANCIS: I am busy writing a judgment-- a reserved judgment on this very subject at the moment. It is not entirely straightforward.*
>
> *LOCAL AUTHORITY ADVOCATE: No, it is not, my Lord.*
>
> *MR JUSTICE FRANCIS: And I am having to decide between on the one hand Baroness Hale and, on the other, Lord Sumption as to which one I prefer, which is an invidious task for a Puisne judge. I think what seems to be coming over from the authorities is that I have to be satisfied that there is a real danger.*"

Later in the hearing there is this exchange with the solicitor advocate for the father:

> "*FATHER'S ADVOCATE: My Lord, my reading of the authorities is exactly as my learned friend has suggested to you. By virtue of mother being a British citizen, if the court is sufficiently concerned about D's welfare----*
>
> *MR JUSTICE FRANCIS: Right.*

FATHER'S ADVOCATE: -- regardless as to where the child is, then I think the authorities also say that she cannot be habitually resident in a country she has never been to.

MR JUSTICE FRANCIS: We cannot base-- I am pretty sure we cannot base it on habitual residence.

FATHER'S ADVOCATE: Yes. I am not really in doubt about that.

FATHER'S ADVOCATE: So, it will have to be inherent jurisdiction which my reading of the authorities is that the court has jurisdiction as a result of mother being a British citizen.

MR JUSTICE FRANCIS: Well I think next Tuesday I am delivering-- I am supposed to be delivering the judgment which I am still writing, so I will let you know whether I agree.

FATHER'S ADVOCATE: Of course.

MR JUSTICE FRANCIS: Certainly one side in that case suggested that a baby that is born in another country and that has never been here that I have got no jurisdiction unless there is serious danger. It may be that the serious danger in this case is more evident than in that case anyway, but there we are. All right. So, do you agree that it is appropriate to have a fact-find hearing?

FATHER'S ADVOCATE: I think it is a matter I would say-- It is a matter for yourself, my Lord. It goes to, in some ways to welfare rather than securing the child's being brought back to England and Wales. If the court feels it is necessary, and instruct it, then my client will try and assist the court.

MR JUSTICE FRANCIS: Well, I am assuming that some of the facts- The local authority have not pleaded the medicals but some of the facts are going to be whether your client has told us everything he knows about what happened. So I think that is not just welfare. [Local authority advocate], am I right about that, that you are going to be looking at--in this matter based on the nationality of D."

16. On 21 November 2019, Mr Justice Francis proceeded to make a final declaration that this court had jurisdiction in relation to D on the basis of nationality. He noted again the child had not been returned and the mother was not co-operating. Port alerts and passport orders were extended to the conclusion of the proceedings. He made case management directions and listed the matter for a fact-finding hearing.

17. That fact finding hearing came before HHJ Lloyd sitting as a s.9 Judge on 3 March 2020. The learned judge heard evidence from social workers and the father. She considered the papers that had been placed before her. She found that the father has "*a fixed agenda, and has shown considerable skill in avoiding answering the simplest of questions*". The learned judge was satisfied that the father had not come to the court "*with an intention of assisting me in locating his daughter*".

18. HHJ Lloyd made directions allowing the father to put his case before the court on all the issues to which by then he objected, including the continuation of the wardship orders and the retention of his documents by the Tipstaff. Future hearing dates were scheduled to enable a full hearing. That hearing was scheduled to take place in June 2020 but had to be re-timetabled to August 2020 because of technical difficulties.

19. On 6 August 2020 after hearing two days of evidence from social workers, the Guardian and the father, HHJ Lloyd continued the wardship order and stated the following:

> "*For the avoidance of doubt, I remain satisfied that this court has jurisdiction to deal with this matter. That was the initial finding of Francis J and I gave all of the parties an opportunity to consider whether this was raised as an issue and when the father was fully represented it was confirmed that there was no issue about jurisdiction. In fact, the father's case has always been that he and his wife intended for their child to be born in the United Kingdom and be raised here and that was the evidence the father gave on oath. Declarations as to jurisdiction have already been made by consent when the father was legally represented and no reason or change of circumstances has been put before me to persuade me that I should reconsider earlier decisions made about this.*"

20. The recital to her order then includes the following matters:

> "*a) The court is satisfied that it has jurisdiction to maintain the Wardship order first made by Mr Justice Francis on the 27th September 2019, and*
>
> *b) Is satisfied that there remains a high index of risk to D from both her parents;*
>
> *c) Is satisfied that the legal test under Section 100 (4)(g) of the Children Act 1989 continues to be met*
>
> *d) Is satisfied that the mother has placed D at further risk of harm by fleeing the jurisdiction of England and Wales to Iraq*
>
> *e) That the mother must return the child forthwith to the UK for the purposes of further assessment of her capacity to care for the child.*
>
> *f) Failure by mother to comply with the requirement for the child to be returned to the UK will be considered evidence of the mother exposing the child to further elevated risk of harm.*
>
> *g) That on the evidence before the court, and upon the findings of Moor J, the father poses a significant risk of harm to D. Further, the mother and father reject that the father poses any risk to the child. The court is satisfied that any opportunity for them to reunite in a third country would place this child at overwhelming risk of harm and possibly death.*
>
> *h) Any application by father for the return of his travel documents is rejected on the basis that it is inappropriate in the circumstances where he and mother continue to flout the orders of this court, and he continues to obstruct attempts to communicate with and locate the mother.*
>
> *i) The father has indicated that he does not require any of the court documents including HHJ Gaynor Lloyd's judgment in March 2020 to be translated into Kurdish.*
>
> *j) Father has promised to the court that he will contact mother and inform her that she must engage in these proceedings and seek urgent legal advice.*"

21. The case was next listed before Mr Justice Francis on 9 December 2020. From the papers before me, it appears that this was a brief hearing. The father had failed to

comply with the previous court order to provide specified evidence. Mr Justice Francis granted the father further time to comply but warned that if he did not comply, he would face contempt proceedings. From the transcript of that hearing and for the purposes of this judgment, I take the following:

> "*a) The court remained satisfied that it has jurisdiction to maintain the Wardship order first made on the 27th September 2019, and*
>
> *b) Is satisfied that there remains a high index of risk to D from both her parents;*
>
> *c) Is satisfied that the legal test under Section 100 (4)(g) of the Children Act 1989 continues to be met*
>
> *d) Is satisfied that the mother has placed D at further risk of harm by fleeing the jurisdiction of England and Wales to Iraq*
>
> *e) That the mother must return the child forthwith to the UK for the purposes of further assessment of her capacity to care for the child.*
>
> *f) Failure by mother to comply with the requirement for the child to be returned to the UK will be considered evidence of the mother exposing the child to further elevated risk of harm.*
>
> *g) That on the evidence before the court, and upon the findings of Moor J, the father poses a significant risk of harm to D. Further, the mother and father reject that the father poses any risk to the child. The court `satisfied that any opportunity for them to reunite in a third country would place this child at overwhelming risk of harm and possibly death.*
>
> *h) Any application by father for the return of his travel documents is rejected on the basis that it is inappropriate in the circumstances where he and mother continue to flout the orders of this court, and he continues to obstruct attempts to communicate with and locate the mother.*"

22. The father did not comply with the further order Mr Justice Francis had made for the father to provide specific evidence. The local authority therefore issued proceedings for contempt which came before me sitting as a Deputy High Court Judge on 22 December 2020. I found the father to be in contempt of court and listed the matter for sentence on a date in the New Year. In the meantime, I required the father to file in full his reasons for objecting to the wardship order; his position on the provision of a restricted travel document for his daughter; his reasons for requiring release of his own travel documents and any objection he may have for the release of his asylum application which the Home Office was at that time considering in relation to him. The hope and expectation was that the father would cooperate with the court's process.

23. The sentencing hearing was initially listed before me on 9 February 2021 but that hearing had to be adjourned because there was no court interpreter. Thus, the sentencing hearing came before me in March 2021. By that time, the father had complied with the order at the heart of the contempt proceedings; namely he had provided the required evidence. Therefore, I decided on 18 March 2021 that no separate penalty was required. However, in relation to costs, I ordered him to pay £1000 towards the costs of the local authority. I did so because the evidence he produced could have been produced much earlier, in line with the orders of HHJ Lloyd and Mr Justice Francis. Had it been so produced, two further hearings would not have been necessary.

24. In relation to the wardship, having heard his oral evidence on 17 March 2021, I found that "*[D's] safety demands that they [the orders previously made including the wardship orders] remain in place, I find that the findings of Mr Justice Francis as made on 9 December 2020 [...] are as valid now as they were when he made them*". In the circumstances, I ordered that D should remain a ward throughout her majority or until further court order, whichever is the soonest. Any application to set aside or challenge that wardship was to be made on 48 hours' notice to all parties and was to be heard by myself or Mr Justice Francis. I repeated the salient orders made by Mr Justice Francis on 9 December 2020.

25. Despite provision for set aside in the order of 18 March 2021, no application to set aside or vary that order was received at the time. Instead, on 6 April 2023, the mother lodged an application for permission to appeal out of time all the orders she now seeks to set aside. Lord Justice Moylan refused permission to appeal on 27 October 2023. Permission to appeal was refused almost entirely on the basis that "*none of the matters raised in the grounds have yet been considered by the High Court because no application has been made to the High Court to vary or set aside the orders made*". In the circumstances, it was considered "*premature to seek permission to appeal to the court of appeal*". The mother should, if she has grounds for doing so, "*make an application to the High Court to vary or set aside its orders*". Thus, the mother applied on 15 December 2023 to this court to set aside the orders.

26. That application came before Mr Justice Francis in February 2024, and he gave case management directions. Those directions included setting the matter down for a hearing before me.

The Law

Legislation

27. I begin this section of the judgment by setting out the Family Law Act 1986 in so far as is relevant to the issue I must determine. It states as follows: -

> Section 1
>
> (1) Subject to the following provisions of this section, in this Part "Part I order" means—
>
> (a) a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order; […]
>
> (d) an order made by a court in England and Wales in 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; but
>
> (ii) excluding an order varying or revoking such an order;

28. If the order in question is a Part 1 order then ss. 2-3 provides relevantly as follows: -

Section 2

(1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless–

(a) it has jurisdiction under the Hague Convention, or

(b) the Hague Convention does not apply but–

(i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2A of this Act is satisfied, or

(ii) the condition in section 3 of this Act is satisfied.

[…]

(3) A court in England and Wales shall not make a section 1(1)(d) order 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, or

(ii) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection.

Section 3

(1) The condition referred to in section 2(1)(b)(ii) 1 of this Act is that on the relevant date the child concerned—

(a) is habitually resident in England and Wales, or

(b) is present in England and Wales and is not habitually resident in any part of the United Kingdom,

and, in either case, the jurisdiction of the court is not excluded by subsection (2) below.

(2) For the purposes of subsection (1) above, the jurisdiction of the court is excluded if, on the relevant date, matrimonial proceedings or civil partnership proceedings] are continuing in a court in Scotland or Northern Ireland in

> respect of the marriage or civil partnership of the parents of the child concerned.
>
> (3) Subsection (2) above shall not apply if the court in which the other proceedings there referred to are continuing has made—
>
> (a) an order under section 13(6) or 19A(4) 5 of this Act (not being an order made by virtue of section 13(6)(a)(i)), or
>
> (b) an order under section 14(2) or 22(2) of this Act which is recorded as made for the purpose of enabling Part I proceedings with respect to the child concerned to be taken in England and Wales, and that order is in force.

29. The net effect of the above is that it restricts the making of orders giving care of or contact with a child to any person to those cases where the court has jurisdiction under Council Regulation 2201/2003 or the Hague Convention 1996 or if not, where the child is:

    a) Habitually resident in England and Wales, or

    b) Present in England and Wales and either (i) is not habitually resident in any part of the UK or (ii) the court considers that the immediate exercise of its powers is necessary for the child's protection.

30. I note from the above that the relevant sections do not mention public law orders in relation to England and Wales. That contrasts with the provisions relevant to Scotland.

31. In so far as s.8 of the Children Act 1989 is concerned:

> (1) In this Act –
>
> "child arrangements order" means an order regulating arrangements relating to any of the following –
>
> (a) with whom a child is to live, spend time or otherwise have contact, and
>
> (b) when a child is to live, spend time or otherwise have contact with any person;
>
> a "prohibited steps order" means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court;
>
> a "specific issue order" means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

32. As the application in this case is made by a local authority, s.100 of the Children Act 1989 is relevant. It states as follows:

> (1) Section 7 of the Family Law Reform Act 1969 (which gives the High Court power to place a ward of court in the care, or under the supervision, of a local authority) shall cease to have effect.
>
> (2) No court shall exercise the High Court's inherent jurisdiction with respect to children—
>
> > (a) so as to require a child to be placed in the care, or put under the supervision, of a local authority;
> >
> > (b) so as to require a child to be accommodated by or on behalf of a local authority;
> >
> > (c) so as to make a child who is the subject of a care order a ward of court; or
> >
> > (d) for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.
>
> (3) No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority have obtained the leave of the court.
>
> (4) The court may only grant leave if it is satisfied that—
>
> > (a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and
> >
> > (b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.
>
> (5) This subsection applies to any order—
>
> > (a) made otherwise than in the exercise of the court's inherent jurisdiction; and
> >
> > (b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted).

33. The above provides the parameters for the exercise of the inherent jurisdiction by a local authority. The High Court cannot exercise its inherent jurisdiction to place a child in the care or under the supervision of a local authority or so as to require a child to be accommodated by a local authority. No applications can be made by a local authority for the court to exercise its inherent jurisdiction with respect to a child unless that local authority has obtained the leave of the court. Such leave may only be granted if there is

"*reasonable cause to believe*" that if the court's inherent jurisdiction was not exercised, the child was "*likely to suffer significant harm*" and the order could not be made otherwise than in the exercise of the court's jurisdiction.

Case Law

34. I am grateful for the bundle of authorities with which I have been provided.

Jurisdiction

35. I begin my consideration of the authorities with the first report in that bundle - *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60 - wherein the Supreme Court considered whether the High Court had the jurisdiction to order the return to this country of a small child who has never lived nor been here, on the basis that he (in that case) is either habitually resident in this jurisdiction or that he has British Nationality. In answering that question, the Supreme Court decided that presence was a necessary precursor for habitual residence, with Baroness Hale stating the following at paragraph 55:

> "*So which approach accords most closely with the factual situation of the child - an approach which holds that presence is a necessary precursor to residence and thus to habitual residence or an approach which focusses on the relationship between the child and his primary carer? In my view, it is the former. It is one thing to say that a child's integration in the place where he is at present depends on the degree of integration of his primary carer. It is another thing to say that he can be integrated in a place to which his primary carer has never taken him. It is one thing to say that a person can remain habitually resident in a country from which he is temporarily absent. It is another thing to say that a person can acquire a habitual residence without ever setting foot in a country. It is one thing to say that a child is integrated in the family environment of his primary carer and siblings. It is another thing to say that he is also integrated into the social environment of a country where he has never been."*

36. Within the judgment, Baroness Hale addressed the linked question - "*Is there another basis for jurisdiction?*" - at paragraph 59 and following in her judgment. Therein, she stated the following at paragraphs 60-63:

> "*We have already established that the prohibition in section 2 of the 1986 Act does not apply to the orders made in this case. The common law rules as to the inherent jurisdiction of the High Court continue to apply. There is no doubt that this jurisdiction can be exercised if the child is a British national. The original basis of the jurisdiction was that the child owed allegiance to the Crown and in return the Crown had a protective or parens patriae jurisdiction over the child wherever he was. As Lord Cranworth LC explained in Hope v Hope (1854) 4 De GM & G 328, 344—345: The jurisdiction of this court, which is entrusted to the holder of the Great Seal as the representative of the Crown, with regard to the custody of infants rests upon this ground, that it is the interest of the state and of the Sovereign that children should be properly brought up and educated; and according to the principle of our law, the Sovereign, as parens patriae, is bound to look to the*

maintenance and education (as far as it has the means of judging) of all his subjects. The first question then is, whether this principle applies to children born out of the allegiance of the Crown; and I confess that I do not entertain any doubt upon the point, because the moment that it is established by statute that the children of a natural born father born out of the Queens allegiance are to all intents and purposes to be treated as British born subjects, of course it is clear that one of the incidents of a British born subject is, that he or she is entitled to the protection of the Crown, as parens patriae.

The continued existence of this basis of jurisdiction was recognised by the Court of Appeal in In re P (GE) (An Infant) [1965] Ch 568, 582 where Lord Denning MR said: The court here always retains a jurisdiction over a British subject wherever he may be, though it will only exercise it abroad where the circumstances clearly warrant it: see Hope v Hope (1854); In re Willoughby (1885) 30 Ch D 324; R v Sandbach Justices, Ex p Smith [1951] 1 KB 62. The Law Commissions in their report also recognised its continued existence, while pointing out that there appears to be no reported decision in which jurisdiction to make a wardship order has been based on the allegiance of a child who was neither resident nor present in England and Wales: see Law Com No 138, paras 2.9 and 4.41. In fact, Hope v Hope was just such a case, as the boys in question had been born in France to British parents, had never lived here (although they had been brought here for a few days by their father), and were in France when the proceedings were begun.

However, in Al Habtoor v Fotheringham [2001] 1 FLR 951*, para 42 Thorpe LJ advised that the court should be extremely circumspect and must refrain from exhorbitant jurisdictional claims founded on nationality over a child who was neither habitually resident nor present here, because such claims were outdated, eccentric and liable to put at risk the development of understanding and co-operation between nations. But in In re B (Forced Marriage: Wardship: Jurisdiction) [2008] 2 FLR 1624, Hogg J did exercise the jurisdiction in respect of a 15-year-old girl born and brought up in Pakistan, who had never been here but did have dual Pakistani and British nationality. She had gone to the High commission in Islamabad asking to be rescued from a forced marriage and helped to come to Scotland to live with her half-brother. The High Commission wanted to help her but felt unable to do so without the backing of a court order. Hogg J made the girl a ward of court and ordered that she be brought to this country. The half-brother was assessed as offering a suitable home and in fact she went to him. Hogg J explained that she thought the circumstances sufficiently dire and exceptional: para 10. In In re N (Abduction: Appeal) [2013] 1 FLR 457, para 29 McFarlane LJ commented that if the jurisdiction exists in the manner described by Hogg J then it exists in cases which are at the very extreme end of the spectrum. The facts of that case were certainly not such as to require the High Court to assume jurisdiction over the child in question.*

In my view, there is no doubt that the jurisdiction exists, in so far as it has not been taken away by the provisions of the 1986 Act. The question is whether it is appropriate to exercise it in the particular circumstances of the case."

37. Baroness Hale then proceeded to address the question of whether or not it was appropriate to exercise the parens patriae jurisdiction, stating at paragraphs 64-65 the following

> "*Mr Setright, with the able assistance of Mr Manjit Gill QC, has raised a number of important general considerations which may militate against its exercise. It is inconsistent with and potentially disruptive of the modern trend towards habitual residence as the principal basis of jurisdiction; it may encourage conflicting orders in competing jurisdictions; using it to order the child to come here may disrupt the scheme of the 1986 Act by enabling the child's future to be decided in a country other than that where he or she is habitually resident. In a completely different context, there are also rules of public international law for determining which is the effective nationality where a person holds dual nationality.*
>
> *All of these are reasons for, as Thorpe LJ put it in Al Habtoor v Fotheringham [2001] 1 FLR 951, para 42, extreme circumspection in deciding to exercise the jurisdiction. But all must depend on the circumstances of the particular case.*"

38. The next authority in the series of cases to which I have been taken is *Re F (A child)* [2014] EWCA Civ 789. It is authority for the propositions that (i) jurisdiction is determined at the time the court is seized and (ii) that *Re E (Brussells II Revised: Vienna Convention: Reporting Restrictions)* 2014 EWHC 6 (Fam) applies in principle to all care cases with a foreign dimension. Within his judgment, Sir James Munby P (as he then was) spelt out the consequence of that decision in paragraphs 11 and 12 of his judgment as follows:

> "*11.* […]
>
> *a)* "*Where BIIR applies, the courts of England and Wales do not have jurisdiction merely because the child is present within England and Wales. The basic principle, set out in Article 8(1), is that jurisdiction under BIIR is dependent upon habitual residence. It is well established by both European and domestic case-law that BIIR applies to care proceedings. It follows that the courts of England and Wales do not have jurisdiction to make a care order merely because the child is present within England and Wales. The starting point in every such case where there is a foreign dimension is, therefore, an inquiry as to where the child is habitually resident.*
>
> *b) In determining questions of habitual residence, the courts will apply the principles explained in A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening) [2013] UKSC 60, [2014] AC 1. For present purposes the key principles (para 54) are that the test of habitual residence is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned and that, as the social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent, it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.*

c) Jurisdiction under Article 8(1) depends upon where the child is habitually resident "at the time the court is seized".

d) Since the point goes to jurisdiction, it is imperative that the issue is addressed at the outset. In every care case with a foreign dimension jurisdiction must be considered at the earliest opportunity, that is, when the proceedings are issued and at the Case Management Hearing: see Nottingham City Council v LM and others [2014] EWCA Civ 152, paras 47, 58.

e) Good practice requires that in every care case with a foreign dimension the court sets out explicitly, both in its judgment and in its order, the basis upon which, in accordance with the relevant provisions of BIIR, it has either accepted or rejected jurisdiction. This is necessary to demonstrate that the court has actually addressed the issue and to identify, so there is no room for argument, the precise basis upon which the court has proceeded: see Re E (above), paras 35, 36.

f) Judges must be astute to raise the issue of jurisdiction even if it has been overlooked by the parties: Re E (above), para 36.

12. There is a further point to which it is convenient to draw attention. If it is, as it is, imperative that the issue of jurisdiction is addressed at the outset of the proceedings, it is also imperative that it is dealt with in a procedurally appropriate manner:

i) The form of the order is important. While it is now possible to make an interim declaration, a declaration made on a 'without notice' application is valueless, potentially misleading and should accordingly never be granted: see St George's Healthcare NHS Trust v S, R v Collins and Others ex p S [1999] Fam 26. If it is necessary to address the issue before there has been time for proper investigation and determination, the order should contain a recital along the lines of "Upon it provisionally appearing that the child is habitually resident …" Once the matter has been finally determined the order can contain either a declaration ("It is declared that …") or a recital ("Upon the court being satisfied that …") as to the child's habitual residence.

ii) The court cannot come to any final determination as to habitual residence until a proper opportunity has been given to all relevant parties to adduce evidence and make submissions. If they choose not to avail themselves of the opportunity then that, of course, is a matter for them, though it is important to bear in mind that a declaration cannot be made by default, concession or agreement, but only if the court is satisfied by evidence: see Wallersteiner v Moir [1974] 1 WLR 991."

39. The next relevant authority is *Re B (A Child: Fair Hearing)* [2016] UKSC 16. The central issue therein was the relevant date for determining a child's habitual residence but in dicta, the Supreme Court considered the issue of jurisdiction based on nationality.

Baroness Hale and Lord Toulson gave a joint judgment in which they stated at paragraphs 58-61 that:

> "*Lord Wilson JSCs conclusion on the issue of habitual residence makes it unnecessary to reach a decision on the hypothetical question whether it would have been right for the court to exercise its jurisdiction founded on Bs nationality if she had no habitual residence at the time when these proceedings began. It is not in doubt that the restrictions on the use of the inherent or parens patriae jurisdiction of the High Court in the Family Law Act 1986 do not exclude its use so as to order the return of a British child to this country: this court so held in A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2014] AC 1. The Court of Appeal, ante, p 614, devoted a large proportion of their judgment to this aspect of the case. Their approach is summed up in para 45:*
>
> > *"Various words have been used down the years to describe the kind of circumstances in which it may be appropriate to make an order: only under extraordinary circumstances, the rarest possible thing, very unusual, really exceptional, dire and exceptional at the very extreme end of the spectrum. The jurisdiction, it has been said must be exercised sparingly, with great caution . . . and with extreme circumspection. We quote these words not because they or any of them are definitive -they are not - but because, taken together, they indicate very clearly just how limited the occasions will be when there can properly be recourse to the jurisdiction."*
>
> *Lord Wilson JSC has listed a number of important issues to which that question would have given rise and which must wait for another day. It is, however, one thing to approach the use of the jurisdiction with great caution or circumspection. It is another thing to conclude that the circumstances justifying its use must always be dire and exceptional or at the very extreme end of the spectrum. There are three main reasons for caution when deciding whether to exercise the jurisdiction: first, that to do so may conflict with the jurisdictional scheme applicable between the countries in question; second, that it may result in conflicting decisions in those two countries; and third, that it may result in unenforceable orders. It is, to say the least, arguable that none of those objections has much force in this case: there is no applicable Treaty between the UK and Pakistan; it is highly unlikely that the courts in Pakistan would entertain an application from the appellant; and it is possible that there are steps which an English court could take to persuade the respondent to obey the order.*
>
> *The basis of the jurisdiction, as was pointed out by Pearson LJ in In re P (GE) (An Infant) [1965] Ch 568, 587, is that an infant of British nationality, whether he is in or outside this country, owes a duty of allegiance to the Sovereign and so is entitled to protection. The real question is whether the circumstances are such that this British child requires that protection. For our part we do not consider that the inherent jurisdiction is to be confined by a classification which limits its exercise to cases which are at the extreme end of the spectrum, per McFarlane LJ in In re N (Abduction: Appeal) [2013] 1 FLR 457, para 29. The judgment was ex tempore and it was not necessary to lay down a rule of general application, if indeed that was intended. It may be that McFarlane LJ did not so intend, because he did not attempt to define what he meant or to explain why an inherent jurisdiction to*

protect a child's welfare should be confined to extreme cases. The judge observed that niceties as to quite where the existing extremity of the jurisdiction under the inherent jurisdiction maybe do not come into the equation in this case: para 31.

There is strong reason to approach the exercise of the jurisdiction with great caution, because the very nature of the subject involves international problems for which there is an international legal framework (or frameworks) to which this country has subscribed. Exercising a nationality-based inherent jurisdiction may run counter to the concept of comity […]"

40. Although Lord Wilson gave the lead judgment on habitual residence in *Re B* (above), he agreed with Baroness Hale and Lord Toulson, stating at paragraph 53: "*I do, however, agree with Baroness Hale of Richmond DPSC and Lord Toulson JSC when, in para 60 below, they reject the suggestion that the nationality-based jurisdiction falls for exercise only in cases at the extreme end of the spectrum. I consider that, by asking, analogously, whether the circumstances were sufficiently dire and exceptional to justify exercise of the jurisdiction, Hogg J may have distracted herself from addressing the three main reasons for the courts usual inhibition about exercising it*".

41. In *Re B* (above), Lord Sumption and Lord Clarke gave dissenting judgments. In relation to jurisdiction based on nationality and the exercise of the inherent jurisdiction Lord Sumption stated at paragraphs 81-87 that:

"*The inherent jurisdiction of the High Court with respect to children originated in an age where the civil courts had no statutory family jurisdiction. It is based on the concept of a quasi-parental relationship between the Sovereign and a child of British nationality. It enables the courts to make a British child a ward of court, even if the child is outside the jurisdiction when the order is made. The continued existence of an inherent jurisdiction in an age of detailed and comprehensive statutory provision is something of an anomaly. The basis of the jurisdiction is, moreover, difficult to reconcile with the content of the statutory rules about jurisdiction. It is based on nationality, whereas the statutory rules are based on habitual residence and presence. None the less, its survival was implicitly recognized by sections 1(1)(d) and 2(3) of the Family Law Act 1986, which prohibited the exercise of the jurisdiction so as to give care of a child to any person or provide for contact with or the education of a child, unless either the court had jurisdiction under the Council Regulation or the 1996 Hague Convention or, if neither of these applied, the child is present or habitually resident in the United Kingdom. Its survival in other cases was acknowledged by this court in A v A, supra, subject to the proviso that its exercise would call for extreme circumspection: paras 63, 65. The case law, which fully bears out that proviso, is summarized in the judgment of the Court of Appeal, and I will not repeat that exercise here.*

The appellant in the present case invites the court, on the footing that there is no statutory jurisdiction, to use its inherent jurisdiction to order the return of the child to the United Kingdom. Such orders have been made in two classes of case, both of which can broadly be described as protective. The first comprises abduction cases before the enactment of a statutory jurisdiction to deal with them. The second comprises cases where the child is in need of protection against some personal

danger, for example where she has been removed for the purpose of undergoing a forced marriage or female genital mutilation. All of the modern cases fall into this last category.

A dissenting judgment is not the place for a detailed examination of the ambit of the inherent jurisdiction. Nor is such an examination required in order to determine this appeal. For present purposes, it is enough to make three points.

First, the jurisdiction is discretionary, and should not be overturned in the absence of some error of principle or misunderstanding of the facts, unless the judge has reached a conclusion that no judge could reasonably have reached. […]

Secondly, the inherent jurisdiction should not be exercised in a manner which cuts across the statutory scheme. If, as Baroness Hale DPSC and Lord Toulson JSC suggest, the use of the inherent jurisdiction is not reserved for exceptional cases, the potential for it to cut across the statutory scheme is very considerable. I have no doubt that it would do so in this case. In the first place, it would fall to be exercised at a time when the child will have been with her mother in Pakistan for at least two years, and will probably have become habitually resident there. Secondly, it seems plain that if an application under the inherent jurisdiction had been made by, say, an aunt or a sister of the respondent, there could be no ground for acceding to it. It is necessary to make this point in order to remind ourselves that it is to protect her relationship with the child on the basis that she should be regarded as a co-parent that the appellant is invoking the inherent jurisdiction of the court. The real object of exercising it would be to bring the child within the jurisdiction of the English courts (i) so that the court could exercise the wider statutory powers which it is prevented by statute from exercising while she is in Pakistan, and (ii) so that they could do so on different and perhaps better principles than those which would apply in a Court of family jurisdiction in Pakistan. Thirdly, this last point is reinforced by the consideration that the appellants application in the English courts is for contact and shared residence. This is not relief which the statute permits to be ordered under the inherent jurisdiction, in a case where there is no jurisdiction under the Council Regulation or the 1996 Hague Convention. I do not accept that the inherent jurisdiction can be used to circumvent principled limitations which Parliament has placed upon the jurisdiction of the court. For these reasons, in addition to those given by the judge and the Court of Appeal, I do not think that an order for the child's return could be a proper exercise of the court's powers.

Third, if there were grounds for believing the child to be in danger, or some other extreme facts justifying the exercise of the inherent jurisdiction, it would no doubt be possible in the exercise of the courts inherent jurisdiction to direct an independent assessment of the situation of the child in Pakistan. Unless the facts were already clear, that would be the least that a court should do before it could be satisfied that she should be compulsorily returned to this country. In the present case, that assessment would also have to take account of the impact on the child of her removal for the second time of her life from a place where she is by now presumably settled, as well as the impact on her of the disruption of her primary carers life which would be involved in requiring her to abandon her life and job in Pakistan to return to a country where she has no job, is estranged from her family

> *and has no desire to reside. But we are not in that territory. The courts below have held that there are no such grounds, and we have no basis on which to disagree with them. The mere absence of statutory jurisdiction in the English courts cannot possibly be a reason for exercising the inherent jurisdiction. On the contrary, in a case like this it is a reason for not doing so.*
>
> *Given that the inherent jurisdiction exists to enable the English court to exercise the Sovereigns protective role in relation to children, from what is it said that B needs to be protected? As I understand it, the suggestion is that she needs to be protected from the presumed unwillingness of the courts of Pakistan to recognise the status of the appellant in relation to the child in the way that the English court would now do if they had statutory jurisdiction. I cannot regard this as a peril from which the courts should rescue the child by the exercise of what is on any view an exceptional and exorbitant jurisdiction.*"

42. Lord Clarke agreed with Lord Sumption that the appeal from the decision on the exercise of the inherent jurisdiction should be dismissed. He also agreed with Baroness Hale and Lord Toulson's comments about the need for great caution and circumspection for the reasons they give, but added that he agreed with Lord Sumption that on the facts of the case they were considering, the court should not use the inherent jurisdiction to order a child to be returned to the jurisdiction in order to enable a court to exercise its statutory jurisdiction in circumstances in which it would not otherwise have that jurisdiction.

43. In *Re M (A Child)* [2020] EWCA Civ 922, Lord Justice Moylan analysed in depth the previous case law, including the judgments of both the Court of Appeal and the Supreme Court in *Re B* (above). Lord Justice Moylan started his consideration of the law at paragraph 43:

> "*The courts inherent jurisdiction is, of course, not statutorily defined. It is also a jurisdiction which can potentially apply in a very wide range of circumstances and under which the court can make many orders relating to children, as referred to by Baroness Hale of Richmond DPSC, at para 26, in A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2014] AC 1. Context is, therefore, very important for any analysis of the circumstances in which and the form or manner in which it is appropriate for the jurisdiction to be exercised.*"

44. Within paragraphs 54-61 of his judgment, Lord Justice Moylan analysed the Supreme Court's consideration in *A v A* (above) of whether the order in that case which made the children wards fell afoul of s.1(1)(a) or (d) of the FLA 1986. Baroness Hale in her judgment made a distinction between orders made when a court exercises its powers under the inherent jurisdiction and those made under the Children Act 1989. In that context, at paragraph 61, Lord Justice Moylan stated as follows:

> "*I would also suggest that, whilst the power which the court is purporting to exercise is clearly important and may be determinative, the court will need to consider whether the order which it is proposing to make is, in reality, an order within section 1(1)(a) or, in particular, section 1(1)(d), for the reasons I give below.*"

45. Lord Justice Moylan then turned to deal with the court's inherent jurisdiction in relation to children who are British nationals and when that jurisdiction should be exercised. He began by considering Baroness Hale's judgment in relation to that issue in *A v A* (above) before turning to Lady Justice Black's in the Court of Appeal in *Re B* (above) before turning to the judgments given in the Supreme Court in that case. Thereafter, he considered a number of first instance decisions which postdated *Re B* before turning to his conclusions at paragraph 87.

46. He began by stating that it is clear that apart from the very significant limitations prescribed by the FLA 1986, the court has jurisdiction based on nationality even though the child concerned is neither habitually resident nor present in England (see paragraph 88), before proceeding to the "*important question*" of what test or guide the courts should use when deciding whether it is appropriate to exercise that jurisdiction. Ultimately, that will depend on the circumstances of the case and on the nature of the order sought. As to the broader issue of what is the legal position in the light of *Re B* (above), he sets out his conclusions on that issue in the paragraphs 104-108 as follows:

> "*I understand why, given the wide potential circumstances, concern was expressed in In re B (A Child) [2016] AC 606 that the exercise of the jurisdiction should not necessarily be confined to the extreme end or to circumstances which are dire and exceptional. But I do not consider that this means that there is no test or guide other than that the use of the jurisdiction must be approached with great caution and circumspection. The difficulty with this as a test was demonstrated by the difficulty counsel in this case had in describing how it might operate in practice.*
>
> *In my view, following the obiter observations in In re B (A Child), whilst the exercise of the inherent jurisdiction when the child is habitually resident outside the United Kingdom is not confined to the dire and exceptional or the very extreme end of the spectrum, there must be circumstances which are sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction. If the circumstances are sufficiently compelling then the exercise of the jurisdiction can be justified as being required or necessary, using those words as having, broadly, the meanings referred to above.*
>
> *In my view the need for such a substantive threshold is also supported by the consequences if there was a lower threshold and the jurisdiction could be exercised more broadly; say, for example, whenever the court considered that this would be in a child's interests. It would, again, be difficult to see how this would be consistent with the need to approach the use of the jurisdiction with great caution or circumspection, at para 59. It is not just a matter of procedural caution; the need to use great caution must have some substantive content. In this context, I have already explained why I consider that the three reasons set out in In re B (A Child) would not provide a substantive test and, in practice, would not result in great circumspection being exercised.*
>
> *The final factor, which in my view supports the existence of a substantive threshold, is that the 1986 Act prohibits the inherent jurisdiction being used to give care of a child to any person or provide for contact. It is also relevant that it limits the circumstances in which the court can make a section 8 order. Given the wide range*

> *of orders covered by these provisions, a low threshold to the exercise of the inherent jurisdiction would increase the prospect of the court making orders which would, in effect, cut across the statutory scheme as suggested by Lord Sumption JSC in In re B (A Child), para 85. This can, of course, apply whenever the jurisdiction is exercised but, in my view, it provides an additional reason for limiting the exercise of the jurisdiction to compelling circumstances. As Henderson LJ observed during the hearing, the statutory limitations support the conclusion that the inherent jurisdiction, while not being wholly excluded, has been confined to a supporting, residual role.*
>
> *In summary, therefore, the court demonstrates that it has been circumspect (to repeat, as a substantive and not merely a procedural question) by exercising the jurisdiction only when the circumstances are sufficiently compelling. Otherwise, and I am now further repeating myself, I do not see, in practice, how the need for great circumspection would operate.*"

47. In addition, I have been taken to *UD V XB* [2019] 1 FLR 289 in which the Court of Justice of the European Union held that habitual residence could not be established in a Member State that the child had never been to. Physical presence in a Member State was vital and such presence could not be temporary or intermittent. The recognition of a child's habitual residence in a Member State required at least that the child had been physically present in that Member State and that condition was satisfied before the stability of that presence could be assessed. However, I note paragraphs 66 and 67 of the judgment accepts that Member states may, on a residual basis, confer jurisdiction on their courts under their national laws. Such a residual jurisdiction exists in this court in the form of parens patriae jurisdiction which applies to British citizens at the discretion of the national court.

48. The most recent authority placed before me is that of *London Borough of Hackney v P* [2023] EWCA Civ 1213. The principal issue raised on appeal is the date upon which the court should consider jurisdiction based on habitual residence in relation to the 1996 Hague Convention. Lord Justice Moylan decided that the issue of habitual residence should be considered at the commencement of public law proceedings (see paragraph 113). From that, I note that at paragraph 63 Lord Justice Moylan stated the following in relation to the FLA 1986:

> "*The FLA 1986, as referred to above, only deals with private law proceedings. However, of relevance is that fact that it gives the court alternative grounds of jurisdiction in the event that, as set out in s.2(1)(b) and s.2(3)(b), the 1996 Convention "does not apply". These alternative grounds include the child's presence in England and Wales. I would also note that the relevant date for the purposes of determining jurisdiction, under s.7 of the FLA 1996, is the date of the application or, if no application has been made, the date on which the court is making an order.*"

49. Later in his judgment, in the context of considering when the issue of jurisdiction should be determined, Lord Justice Moylan stated at paragraphs 87-88 that:

> *It is clear, as noted by the judge, that the court must determine whether it has jurisdiction and the basis of its jurisdiction at the outset of proceedings. That this*

> *is required is clear, for example, from what Sir James Munby P said in Re F when he used the word "imperative". It is also required by the provisions of the Public Law Outline, as referred to above. The court cannot simply postpone that decision until a significantly later hearing. If there is any substantive question as to the court's jurisdiction, directions would need to be given for this to be determined at the earliest possible opportunity.*
>
> *The reason why the court needs to determine what jurisdiction it has to make a Part IV order is obvious. The court needs to know the nature and extent of its powers, if any. If there needs to be further investigation then, as suggested by Sir James Munby P in Re F, at [12(i)], the first order should include a recital along the lines of "Upon it provisionally appearing that the child is habitually resident …" or, I would add, "Upon the child being present in England and Wales and appearing to be in need of urgent protection""*

Passports

50. I have been taken to *Re B (A child) (Wrongful Removal: Orders against Non-Parties)* [2014] EWCA Civ 843**,** wherein the Court of Appeal held that it was not a permissible exercise of the courts power to require a non-party, whether an adult or a child, who had no parental responsibility or any other form of power or control over an abducted child to lodge his or her passport with the court in order to coerce him or her to put pressure on the abductor to return the child to the jurisdiction; and that, accordingly, the judge had been wrong to order the half-brother and the grandparents in that case to lodge their passports with the court.

51. *Re L (A Child)* [2017] 1 FLR has also been placed before me. That case deals primarily with breaches of procedure which were fatal defects in an application for committal. Its import in the proceedings before me in relation to the factors in that case which justified the discharge of the collection orders. They were:

    a) it was wholly wrong in principle that a collection order should be left in place, hanging over peoples' heads like the sword of Damocles, for anything remotely approaching the 11 years throughout which this collection order had been in force;

    b) it was undesirable, to put it no higher, to allow an order to remain in force which was not compliant with FPR 2010 r.37.9(1); and

    c) the perpetuation, beyond a comparatively short period, of the passport order essentially for purposes of coercion, was wrong in principle and fundamentally objectionable: *Re B (A Child) (Wrongful Removal: Orders against Non-Parties)* [2014] EWCA Civ 843, *sub nom Re B (A Child: Evidence Passport Order)* [2015] 1 FLR 871.

52. Lastly and by no means least, I have been taken to Mr Justice Cobb's decision in *Re P (Discharge of Passport Order)* [2020] EWHC 3009 (Fam) wherein he stated the following at paragraphs 31-32:

"*A Tipstaff passport order is a useful tool in the judicial armoury, particularly in circumstances where: (i) a court needs to take urgent action to try to prevent a parent from removing a child out of the country (see Wilson J as he then was in B v B (Injunction: Restraint on Leaving Jurisdiction) [1998] 1 WLR 329, [1997] 2 FLR 148 remarked, at 333 and 153 respectively: 'B v B'); (ii) where there is an assessed risk that a foreign parent may misuse a period of contact in England in order to remove a child overseas (again, B v B at 333 and 153 respectively); (iii) where (as here) the court wishes to ensure the attendance of a person at a court hearing within the jurisdiction, and there is a risk that, absent such an order, the person may flee the country before doing so (see for instance Thorpe J as he then was in Re S (Financial Provision: Non-Resident) [1996] 1 FCR 148); and (iv) where without such an order the execution of an interlocutory order may be stymied (B v B at 334 and 154 respectively).*

But a passport order is a potent order, with significant implications, and whose use, it seems to me, should be tightly controlled; thus:

> *(i) A passport order should only ever be made for a finite period of time (this is likely to be, as it was in this case, for a period of 6 months before it would have expired unexecuted) (see Re L (A Child), Re Oddin [2016] EWCA Civ 173, [2017] 1 FLR 1135);*
>
> *(ii) A passport order should not be made where the sole purpose is to coerce the respondent into action of a particular kind; in his submissions, the father rightly referenced in this regard Hobhouse LJ's judgment in Re B (Child Abduction: Wardship: Power to Detain) [1994] 2 FLR 479 at 486 and Sir James Munby P in Re B (A Child) (Wrongful Removal: Orders against Non-Parties) [2015] Fam 209, sub nom Re B (A Child: Evidence: Passport Order) [2015] 1 FLR 871 at para [33].*

Furthermore, once granted and passports are seized:

> *(iii) The passport order is unlikely to endure beyond the conclusion of the proceedings in which the order is made (Re M (Children) (Care Proceedings: Passport Orders) [2017] EWCA Civ 69, [2017] 4 WLR 41). If an order for a passport to be held indefinitely can ever be justified (ie after the conclusion of proceedings), it is likely only to be in an unusual and probably quite extreme case where it can be demonstrated, after a close evaluation of the degree of risk to the children and of the harm to which they will be exposed if the risk becomes a reality, that such a serious invasion of the passport-holder's rights is proportionate and necessary: Re M (above); cf, Re A (A Child) [2016] EWCA Civ 572, [2016] 4 WLR 111, paras [69]–[70];*
>
> *(iv) Consistent with the principles above, and the observations from the authorities, it seems to me to be incumbent on the court to keep under careful review during ongoing proceedings the need to deprive a person of their passport, under a Tipstaff passport order; such an order should not remain in place for any longer than is necessary to achieve the legitimate desired protection or outcome. The removal of an individual's passport, even on a temporary basis, be that of an adult or child, is a very significant incursion*

> *into the individual's freedom and personal autonomy. It is never an order that can be made lightly (Hayden J in London Borough of Tower Hamlets v M [2015] EWHC 869 (Fam), [2015] 2 FLR 1431, [2016] 1 All ER 182); a passport order should rarely if ever be more than a temporary measure.*"

The Hearing Before Me

53. The applicant mother was represented before me by Michael Gration KC and Mani Basi, the respondent local authority by Dominic Boothroyd, and the child through her Guardian by Rebecca Foulkes. I am grateful to each for their eloquent and focused submissions.

54. The respondent father chose to represent himself. He had the benefit of an interpreter when making his submissions to me, but often chose to interact with me directly in English.

55. In the hearing, I was referred to five bundles in total: a main bundle of 181 pages; a supplemental bundle of 77 pages; a further supplemental bundle of 113 pages which had been prepared for the application for permission to appeal; a bundle of authorities of 411 pages; and a bundle prepared for the hearing on 17-18 March 2021 of 1441 pages.

56. The hearing before me was listed over three days beginning on 5 March 2024. The time estimate had been given to accommodate judgment writing. However, on the first day the father appeared remotely. His connection was poor, and he did not have an interpreter. He was able to understand what was being said, but not able to communicate with the court effectively. With his consent, I was able to proceed to hear the submissions on behalf of the mother on the first day. However, such was the poor connection and the father's inability to communicate, I adjourned his submissions for his attendance in person the next day. These submissions were followed by those on behalf of the local authority and those on behalf of the Guardian with the applicant taking the opportunity to reply on the third day. Thus, I reserved this judgment which has been handed down at the first realistic opportunity.

The Parties' Positions and their Arguments

The Applicant Mother

57. The mother seeks to set aside the orders which, she asserts, the courts of England and Wales do not (and never had) jurisdiction to make in relation to D. It is said that the court has not previously addressed in any real substance (or at all) the jurisdictional issues in this case. In particular, the following submissions are made:

    a) D has never been present in England and Wales, the mother having left Wales for Iraq whilst pregnant.

    b) The first orders were made on the basis of habitual residence. That was an incorrect basis, and it set the tone of all the orders that followed.

    c) That upon realising, as a consequence of the above, that the courts of England and Wales could not exercise jurisdiction in relation to D on the basis of habitual

residence, it was decided that jurisdiction could be exercised in relation to her on the basis that D is a British citizen.

d) There has never been a meaningful hearing in relation to jurisdiction, which the court simply signed off with the then represented parties' agreement. There has been no or no proper consideration of the limitations on the parens patriae.

e) It is said that the court has since purported to exercise that jurisdiction by requiring the mother to return D to England and Wales "*for the purposes of further assessment of her capacity to care for the child*" and so it is said to have done so in a manner which cuts across the statutory scheme – *Re B* [2016] UKSC 4 at paragraph 85 and *Re M (a child)* [2021] Fam 163 at page 183, paragraphs 80 and 107. It is argued that the express purpose of the return order was, from the very beginning, to enable the local authority to pursue pubic law orders under the Children Act 1989 (orders for assessment and possibly care or supervision orders) which they could not pursue because D was not habitually resident here.

f) There is no evidence that D is at risk of harm in Iraq. D's father has been unable to travel to Iraq throughout the proceedings.

g) There is no sufficiently compelling reason – applying the test in paragraph 105 of *Re M* (above) – to justify the exercise of the inherent jurisdiction.

58. In addition to the return order, the court has made orders in relation to the passports held by the mother, the child, and the maternal grandmother; the effects of which have been to prevent them obtaining passports and to prevent their travel to any other country but this country. It is asserted that it is likely that those orders were made to force the mother into returning D to the jurisdiction. If that was the purpose, it is said it is an incorrect purpose. They were made to coerce and pressurise the mother to return with the child to this jurisdiction. The maternal grandmother, who is not a party to this case, has had her freedom of movement greatly limited.

59. If the mother's primary argument succeeds, then it is said the passport orders should be dismissed for want of jurisdiction. If it does not, then it is argued that the court below was wrong to make and to continue the passport orders in the way it did, and that they should be discharged.

60. If, contrary to the mother's primary case, I find that this court has jurisdiction then I am asked to list the application for consideration of whether it remains appropriate for this court to exercise that jurisdiction and if it is, the manner in which it should be exercised.

The Father

61. The father supported the mother's case but sought to go further. He continued to assert that he was not a risk to D or anyone else. He does not agree with the findings of Mr Justice Moor. He would like his travel documents back.

The Local Authority

62. On behalf of the local authority, it is accepted that this court has no jurisdiction to make public law orders in relation to an unborn child - *Re F (In Utero)* [1988] Fam 122. Equally, it is accepted that public law orders could not be made in relation to D after her birth as she had never been present in the jurisdiction - *UD v XB* (above). The only basis upon which the court could have jurisdiction was based on her nationality. By reason of section 2 of the British Nationality Act 1981, D is a British citizen.

63. It is argued that jurisdiction in this case has been properly exercised on the basis that D is a British citizen since the hearing before Mr Justice Francis on 21 November 2019.

64. The court had the power to make the orders. The issue is whether the reasons for making the orders were sufficiently compelling. In relation to that, the local authority asserts that the unchallenged factual basis in this case shows that it was.

65. It is said that the issue of jurisdiction was properly grappled with. The transcript for that hearing demonstrates that Mr Justice Francis's interaction with counsel in November 2019 shows that it was. He did have the judgments in *A v A* (above) and *Re B* (above) at the forefront of his mind. The issue of jurisdiction was again considered by HHJ Lloyd in her judgment in August 2020. The issue was again re-visited by me, sitting as a Deputy High Court Judge in 2021. It is said that the unchallenged factual findings that I made, and which restated those of earlier judge's, remained:

    a) D is and was at risk of harm;

    b) The risk of harm arises from both her parents; and

    c) The harm is directly connected to the decision to take D to live in Iraq, where she is in danger.

The Guardian

66. On behalf of the Guardian, it is argued that at the time that the court was first seized of the application, namely on 27 September 2019, Brussels IIa regulation still applied. The decision in *UD V XB* (Case C-393/18 PPU) determined that Article 8(1) of the regulation must be interpreted to the effect that a child must have been physically present in a member State in order to be regarded as habitually resident there. D has never been physically present in England and Wales and thus she cannot be said to have been habitually resident here for the purposes of the regulation. However, I am specifically taken to paragraph 67 of the judgment in *UD V XB* (above) which specifically makes reference to the residual jurisdiction available to the courts of England and Wales under the parens patriae which applies to British nationals at the discretion of the national courts and which permits the courts of England and Wales to protect the interests of a child even in the case of disputes outwith Article 8(1).

67. It is argued that the parens patriae applies in relation to D and should be exercised in this case. The restrictions on the use of parens patriae in the 1986 Act do not exclude its use so as to order the return of a child to this jurisdiction. Whilst endorsing the warning given by Thorpe LJ in *Al Habtoor v Fotheringham* [2001] 1 FLR that there were reasons for "*extreme circumspection*" in exercising the jurisdiction, the Supreme Court observed at paragraph 65 of *A v A* (below) that "*all must depend on the particular*

circumstances of the case". Accordingly, it is argued that the court has the power under the parens patriae to order D's return to this jurisdiction. The issue is said to be whether the court should have exercised its jurisdiction to do so. In *Re M (A Child)* [2020] EWCA Civ 922, the court considered the exercise of the inherent jurisdiction to order the return of a British child. It was in that context that Moylan LJ carried out his extensive review of the authorities. I am specifically taken to paragraphs 104-108 of his judgment. Paragraph 108 begins as follows:

> "*In summary, therefore, the court demonstrates that it has been circumspect (to repeat, as a substantive and not merely a procedural question) by exercising the jurisdiction only when the circumstances are sufficiently compelling […]*"

68. It is said on behalf of the Guardian that it "*is hard to imagine circumstances more compelling than those that exist for [D]*" because:

    a) The position of both her parents was that her absence from the jurisdiction was temporary.

    b) The established risk of harm to D from her father "*could not be graver*". This court was reminded that Moor J found in the welfare hearing in relation to the second child that:

    > "*Indeed the fact that he denies the findings makes managing the risks completely impossible. This is not one isolated short loss of temper. This is a course of conduct over a significant period of time which led to the loss of S' life.*"

    c) The evidence suggested that the mother could not protect D from that risk. Despite the local authority sharing the findings of Mr Justice Moor with the mother and the maternal grandmother, they maintained the father's innocence and the risks to D on birth were thus thought to be "*very high indeed*".

    d) The mother had travelled at the very late stage of pregnancy to a country where the FCDO advises against all but essential travel, exposing D to a further risk of harm.

    e) At the time the final order was made, the above concerns had been upheld as findings of fact.

    f) It is noteworthy that the mother now asserts that there is no evidence of a risk of harm to D. That, it is said, is a fallacious argument, as the reason her father was unable to travel to Iraq and join D and her mother was the exercise of the *parens patriae* jurisdiction in which a Tipstaff order was made seizing his travel documents.

69. In response to the mother's argument that the orders made cut across the statutory scheme in FLA 1986, it is argued on behalf of the Guardian that it is "*almost inevitable if the circumstances are sufficiently compelling so as to justify the use of the parens patriae jurisdiction to make protective orders for a child, there is a possibility if not a*

likelihood that, upon the child's return to this jurisdiction, the court may be asked to undertake a welfare enquiry". The FLA 1986 prohibits the court from making an order under the inherent jurisdiction giving care of D to any person or from providing contact to her - "*The orders made in respect of D self-evidently did not offend this restriction*". *Re M* (above) was a decision in a private law case. Whilst there was local authority involvement in that case, it was in the background. The wording of the prohibition in FLA 1986 and the reference to "*any person*" does not fit easily with the envisaged public law proceedings in this case. The extent to which a local authority can exercise the inherent jurisdiction is limited by s.100(2) of the Children Act 1989 and thus, on behalf of the Guardian, it is hard to see how any order made on an application by a local authority under the inherent jurisdiction could ever offend the FLA 1986. The purpose of the orders in this case were protective for reasons which were more than "*sufficiently compelling*".

70. As to the passport orders, their purpose was to avoid the risk of the mother circumventing the return order by undertaking further international travel. It was not to punish or coerce. On the facts of this case, they cannot be said to be disproportionate.

My Consideration and Conclusions

71. The application on behalf of the mother to set aside the various orders (set out above) was lodged with the court on 15 December 2023. I have reminded myself that I am not revisiting those orders as an appellate court. The application before me is an application to set aside. PD12D paragraph 8 applies to applications to set aside inherent jurisdiction orders. Such applications must be made promptly when the party becomes aware of new information or of the circumstances which give rise to the application - paragraph 8.3. An application to set aside an inherent jurisdiction order can only be made in the circumstances set out in paragraph 8.4 unless the circumstances in FPR r.18.11 apply. FPR 2010 r.18.11 applies if the applicant had no notice of the original application. Whilst the applicant had instructed solicitors who appear to have maintained contact with her after the application was issued, there is no evidence before me that she was actually served with the original application and no application for substituted service appears to have been made. Thus, rule 18.11 appears to apply although the application cannot be said to have been made promptly. Whilst no formal application has been made to apply out of time, I have decided to extend the time for application for three reasons: (i) it was the refusal of permission to appeal by Lord Justice Moylan and his reasons for refusal that prompted the application; (ii) all parties have been able to argue their case despite the efflux of time; and (iii) it is in D's welfare interests that the issues central to this case are decided.

72. I start at the beginning of this case with the initial application made by the local authority on 27 September 2019. At the time the application was made, D was 5 days old. The short description of relevant information provided supplementing the application in the C1A is that the father had caused multiple injuries and death to his first child and that the mother is unable to accept the risks the father poses to D and thus is unable to protect her. It was said the mother had fled the country to avoid local authority intervention and care proceedings. Consequently, the local authority sought permission to invoke the inherent jurisdiction and an order to protect "*the safety and wellbeing*" of D. On the face of the C66 itself at paragraph 3, it was stated that the local authority wanted the court to invoke the inherent jurisdiction to make orders to secure

D's return to the UK and to protect her from the harm she is likely to suffer in the care of either parent. The local authority relied upon a risk assessment which had been undertaken pre-birth dated 25 September 2019. I have re-read that assessment (found in the bundle for the hearings in March 2021 at D1/1 and following). It is comprehensive. It includes details which indicate that from the local authority's perspective, the mother and the maternal grandmother had a history of being vulnerable to exploitative relationships (see D1/16-23). The assessor concluded that the father continues to pose a high risk to children. He has shown no insight and continued to deny the findings of Mr Justice Moor. D's mother and maternal grandmother did not accept that the father poses a risk to D. D was thus said to be at high risk of suffering significant harm following birth. At the time the assessment concluded the mother had left the country and disengaged with the assessment. The assessor recommendations included the following:

> "*Visit to be undertaken to the home address to try to establish [the mother's] whereabouts.*
>
> *If [the mother] is in the UK or returns to the UK, care proceedings to be issued upon the Local Authority being aware of the baby's birth. Baby to be placed in Foster Care to ensure her/his immediate safety and wellbeing while further assessment undertaken in respect of the family and wider network for consideration of reunification at the end of proceedings.*
>
> *If [the mother] has not returned to the UK, legal advice to be sought in respect of next steps.*"

73. The assessment provides the context to the order made by Mr Justice Francis on the papers on 27 September 2019. On that occasion, the court was satisfied and declared on a provisional basis of the evidence filed that (a) the courts of England and Wales have primary jurisdiction in matters of parental responsibility over the child pursuant to Articles 8, 10 of B11R. He made D a ward of court during her minority or until further order and made an order for her return to the jurisdiction forthwith.

74. The provisional declaration made by Mr Justice Francis on 27 September 2019 are heavily criticised before me on behalf of the mother. It is criticised on the basis that: -

    a) D was not habitually resident in the jurisdiction; and

    b) The initial decision was taken on the papers, without notice and on limited evidence. Hence, it is said to be worthless, citing Sir James Munby P in ***Re F*** - "*a declaration made on a without notice application is valueless, potentially misleading and should never have been granted*".

75. In terms of the form of the order made, I have reminded myself of the full passage at paragraph 12(i) in ***Re F*** above which includes:

> "*If it is necessary to address the issue before there has been time for proper investigation and determination, the order should contain a recital along the lines of "upon it provisionally appearing that the child is habitually resident …"*"

In essence, that is what Mr Justice Francis did. As such, the criticism of the form of order on this occasion seem unduly harsh.

76. The better and unanswerable criticism is that jurisdiction under Article 8(1) depended on where the child was habitually resident at the time the court was seized - *Re F* (above), paragraph 12(iii). In this case, at the time the court was seized of the application, BIIa still applied. At that time, D was not habitually resident within this jurisdiction. It is properly accepted by all parties before me that at the time the court was seized D could not have been habitually resident in this jurisdiction because she had never been physically present here - *UD v XB* (above) and *A v A* (above) at paragraph 55. Since then, Brexit has been implemented and BIIa no longer applied. Nevertheless, it remains the position that as at the date this court was seized, and now, as a matter of fact, D is and was neither present in the jurisdiction nor habitually resident here. Hence, jurisdiction could not at the time, nor could it now, be based on habitual residence or presence.

77. I return to the chronology of the case. Despite service of the order of 27 September 2019 upon him, the father failed to attend the return date on 9 October 2019. Given the factual context of the case, the focus of the hearing was the provision of information by the father to enable D to be located. As set out in the chronology at the beginning of this judgment, passport orders were made at the next hearing on 14 October 2019. The next hearing was on 5 November 2019. I have before me an agreed note of that hearing. The note captures that the court was "*gravely concerned about the welfare for D. She is said to be in the Kurdistani part of Iraq with her mother. Although her mother does not speak Kurdish*". The issue of jurisdiction does not appear to have been revisited but wardship orders were continued.

78. However, the court did return to the basis upon which the court was exercising its jurisdiction in relation to D on 21 November 2019. The transcript for that hearing captures the learned judge's exchange with the parties' legal representatives. That exchange demonstrates Mr Justice Francis engaging with them on the issue of jurisdiction. Jurisdiction was agreed by all parties then before the court to be based on nationality. Mr Justice Francis agreed. In agreeing, it is clear that he had considered the relevant authorities, referring to having to decide in another case between Baroness Hale on the one hand and Lord Sumption on the other which appears to me to be a reference to *A v A* and *Re B.* Later in the transcript, he poses the question – "*On what basis are the local authority asserting that the child is in danger?*". The reply on behalf of the local authority was that "*it is an attempt to effectively keep the child away from professionals in this country and allow father to have unfettered access either in that country or in a third country or indeed in some other way returning her to this country when the eyes of the court are off the situation*", to which the judge responded "*if we do nothing, you say the child and the father will be back together and then the child is at risk because the father was obviously found to be responsible for the death of the child*". Later in the hearing, the learned judge returns to the issue of jurisdiction in an exchange with the father's representative which concludes as follows:

> "*MR JUSTICE FRANCIS: Certainly one side in that case suggested that a baby that is born in another country and that has never been here that I have got no jurisdiction unless there is serious danger. It may be that the serious danger in this*

> *case is more evident than in that case anyway, but there we are. All right. So, do you agree that it is appropriate to have a fact-find hearing?*
>
> *FATHER'S ADVOCATE: I think it is a matter I would say--It is a matter for yourself, my Lord.*"

After that passage, the court proceeded to make an order which recited that all parties agreed that the court had jurisdiction based on D's nationality and set the case down for a fact finding.

79. Mr Justice Francis is criticised on behalf of the mother for "*not addressing in any real substance (or perhaps at all) in relation to the jurisdictional issues*". However, the transcript of the 21 November 2019 demonstrates that he did engage with the issue of jurisdiction and did so with the relevant authorities in mind as the passages to which I have just referred show.

80. I agree with Mr Gration KC that the learned judge did not timetable further evidence on the issue of jurisdiction or direct skeleton arguments upon it. He did not do so because he did not need to; the parties agreed there was jurisdiction on the basis of nationality. It is therefore not surprising that, in accordance with the overriding objective, he did not direct evidence or arguments in relation to an agreed issue. In the presence of agreement, a recording in the recital of his order that the court had jurisdiction based on nationality was sufficient. Whilst a short judgment would be preferable, given the exigencies of a busy court list, it is perhaps not surprising that one was not given.

81. The fact-finding hearing that Mr Justice Francis directed was heard by HHJ Lloyd sitting as a s.9 judge. The local authority and the Guardian were represented. The father self-represented and the mother did not attend. For the purpose of this judgment, I have re-read his statement to that court dated 23 July 2020. It is clear from that statement that the father challenged jurisdiction on the basis that D was an Iraqi not a British national and on the basis that she had never been habitually resident in this jurisdiction. At paragraphs 3 -5 of her judgment, HHJ Lloyd engaged with the issue of jurisdiction:

> "*For the avoidance of doubt, I remain satisfied that this court has jurisdiction to deal with this matter. That was the initial finding of Francis J and I gave all of the parties an opportunity to consider whether this was raised as an issue and when the father was fully represented it was confirmed that there was no issue about jurisdiction. In fact, the father's case has always been that he and his wife intended for their child to be born in the United Kingdom and be raised here and that was the evidence the father gave on oath. Declarations as to jurisdiction have already been made by consent when the father was legally represented and no reason or change of circumstances has been put before me to persuade me that I should reconsider earlier decisions made about this.*
>
> *I remind myself that the findings made by Moor J stand. They are serious findings and both parents continue to reject those findings. I am satisfied that the index of risk to this child has not reduced and there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child she is*

likely to suffer significant harm. The legal test under section 100(4)(b) of the Children Act 1989 continues to be met.

I further reiterate that this mother has placed the child at further risk of harm by feeling the jurisdiction of this court to Iraq to evade social services involvement and the court's oversight."

82. HHJ Lloyd next heard the case on 24 November 2020. Her order demonstrates at recital 5 that she again considered the issue of jurisdiction and set the case down for a final contested hearing to determine whether the wardship should continue, whether a limited passport for D should be issued and continued retention of the father's travel documents. Those issues came before Mr Justice Francis on 9 December 2020. I have the transcript of those proceedings. At that hearing, the learned judge queried what was going to be contested if D did not return to the jurisdiction. Later in the transcript, he points out that the father had not filed any evidence identifying the basis for his objection to the continuation of the wardship orders and his position on D's travel documents or any evidence about his communication with the mother.

83. The order made by Mr Justice Francis made on 9 December 2020 contained the following:

"*a) The court is satisfied that it has jurisdiction to maintain the Wardship order first made by Mr Justice Francis on the 27th September 2019, and*

b) Is satisfied that there remains a high index of risk to D from both her parents;

c) Is satisfied that the legal test under Section 100 (4)(g) of the Children Act 1989 continues to be met

d) Is satisfied that the mother has placed D at further risk of harm by fleeing the jurisdiction of England and Wales to Iraq

e) That the mother must return the child forthwith to the UK for the purposes of further assessment of her capacity to care for the child.

f) Failure by mother to comply with the requirement for the child to be returned to the UK will be considered evidence of the mother exposing the child to further elevated risk of harm.

g) That on the evidence before the court, and upon the findings of Moor J, the father poses a significant risk of harm to D. Further, the mother and father reject that the father poses any risk to the child. The court `satisfied that any opportunity for them to reunite in a third country would place this child at overwhelming risk of harm and possibly death.

h) Any application by father for the return of his travel documents is rejected on the basis that it is inappropriate in the circumstances where he and mother continue to flout the orders of this court and he continues to obstruct attempts to communicate with and locate the mother."

84. It was in the above context that the case was referred to me sitting as a Deputy High Court Judge for committal of the father who had failed to supply the necessary evidence and for final wardship orders. I made final wardship orders on 18 March 2021. I have a transcript of the judgment I gave on that occasion. Paragraphs 3, 4 and 7 of my judgment demonstrate that I based my decisions that day on the findings previously made by HHJ Lloyd and by Mr Justice Francis on 9 December 2020 as well as the oral evidence the father gave to me. The father's oral evidence before me, as summarised in my judgment, appears to have centered on his view that Mr Justice Moor had been wrong to make findings against him in relation to S's injuries and ultimately her death. Thus, he said the wardship was not justified.

85. The application to set aside on behalf of the mother has caused me to reflect at length upon the protracted history of this case and my role in it. I have done so with an open mind. I do not agree with the submission that the order of 27 September 2019 set the tone of the case in relation to jurisdiction, which was then, in effect, unthinkingly followed. The chronology shows that the court did review the issue of jurisdiction specifically on 21 November 2019, again in August 2020 and then again on 9 December 2020. The very fact that the court changed the basis of jurisdiction from habitual residence to nationality shows the court was actively engaged with the issue and reviewed it regularly. In terms of my involvement in the proceedings, I accept that I relied heavily on the findings that had gone before when making the final wardship orders. Given that the last set of findings relevant to jurisdiction had been made by Mr Justice Francis on 9 December 2020 and nothing had changed since then, perhaps the question should be – why wouldn't I?

86. All that said, I accept that the judge must always be astute to raise the issue of jurisdiction even if it has been overlooked by the parties - ***Re E***, paragraph 36. Having reflected on what has happened in this case, I consider and accept that the court at an earlier stage could have proactively considered the issue of jurisdiction with more depth than it did. I accept, with the benefit of the argument now advanced before me, that I should have considered whether the orders made crossed the relevant statutory scheme in relation to jurisdiction.

87. I further accept that a court ought to give all parties a proper opportunity to adduce relevant evidence and make submissions in relation to jurisdiction - ***Re F***, paragraph 12(ii). However, the context of this case highlights an irony: the orders show that active steps were taken to engage the mother in proceedings, and that she failed to take those opportunities. As far as this court is aware, she did not take any steps to have her voice heard until April 2023 when she made an application for permission to appeal. Until the Court of Appeal refused that application, the mother did not take the opportunity that had been there for her throughout on the face of the orders, all of which invariably stated that a party may apply to set aside or vary them upon giving 48 hours' notice. I am left with the conclusion that the arguments which are now advanced on her behalf could have been determined so much earlier, if only she had engaged.

88. The argument based on the limitation of the parens patriae jurisdiction which is now raised on behalf of the applicant mother was not raised by any party until the applicant mother's application for permission to appeal in April 2023. The argument is now presented to this court in support of the application to set aside the orders. The application is not supported by any statement of evidence. It is not asserted that there

has been any change of circumstances which would justify discharging the wardship and its ancillary orders. Instead, the submissions are placed fairly and squarely before this court on the basis of legal argument that: (i) this court does not have jurisdiction; and (ii) if it does, ought not to have exercised it. It is to that argument I now turn.

89. By reason of section 2 of the British Nationality Act 1981, D is a British national. Relying on Baroness Hale in *A v A* above at paragraphs 60-63, I do not have any doubt that the inherent jurisdiction continues to apply to D.

90. On behalf of the applicant, I have been reminded of the limitation on the exercise of the inherent jurisdiction under the FLA 1986. In my view, the FLA 1986 only deals with private law proceedings - *London Borough of Hackney v P* (above) and at first instance ([2023] 1 FLR 512) at paragraph 25. The scope of the FLA 1986 in relation to the jurisdiction of the courts of England and Wales excludes the jurisdiction to make public law orders. The Children Act 1989 does not lay down a jurisdictional test in relation to a court's jurisdiction to make public law orders. However, I agree with the analysis of Mr Justice MacDonald at paragraph 26 and following of *Hackney v* P above. The domestic jurisdictional foundation of public law orders follows a line of authorities which can be traced back to *Re R (Care orders: Jurisdiction)* [1995] 1 FLR 711. Putting matters shortly, the basis of jurisdiction is effectively the same as for private law orders – namely habitual residence, although jurisdiction can be based on presence where a temporary order is required to safeguard a child.

91. In this case, it is not asserted by any party that D was either present or habitually resident in this jurisdiction when the court was seized of the C66. A local authority can only make such an application with the permission of the court if the test within s.100(4) and (5) of the Children Act 1989 is met. On the facts of this case at the time the court was seized of the application, the court had reasonable cause to believe that if the inherent jurisdiction was not exercised D would be likely to suffer significant harm. Section 100(4)(b) of the Children Act 1989 was clearly met. In coming to that decision, I have very firmly in mind the submissions on behalf of the Guardian that it is hard to think of a case which meets that test but does not warrant the exercise of the inherent jurisdiction. I have reminded myself that at the time the court was seized, D was 5 days old. She was out of the jurisdiction with her mother who had a history of vulnerability to exploitative relationships. The father had been found to have killed S and the risk the father posed to other children had been found by Mr Justice Moor to be "*unmanageable*" because: (i) the injuries the father inflicted on S were over a considerable period of time and represented a sustained course of conduct; and (ii) he lacked insight. The mother and the maternal grandmother did not accept the risks and believed the father's proclamation of innocence. D was with her mother who had fled this jurisdiction and was living with the paternal family in Northern Iraq, a location to which she had no connection. She did not speak the language and the FCDO advised against travel there. Standing back and looking at circumstances at the time this court was seized, they were very grave indeed. At that time, the result which the local authority wished to achieve could not be achieved through the making of any other order. Public law orders were not available to them because D was outwith the jurisdiction. Hence the provisions of s.100(4)(a) and (5) of the Children Act 1989 were met.

92. The previous paragraph highlights the tension at the heart of this case. The reason the local authority could not apply for any other order was because the child was not habitually resident in the jurisdiction, nor was she present. Hence the local authority could not bring public law proceedings to protect her. That is the very reason that on behalf of the mother it is argued that the court does not have any jurisdiction to make the orders or alternatively should not have exercised it because the wardship orders cut across the statutory scheme. It is, at the same time, the very reason the local authority made an application under the inherent jurisdiction. It is clear from all the papers in this case and from the reasons given on the face of the application itself that the local authority's application was to protect and safeguard D. It is in that context that I have reminded myself that the local authority's statutory duty to safeguard and promote the welfare of children in need and to provide them with accommodation is based on the child in question being in that local authority's area – ss.17 and 20 of the Children Act 1989 in relation to England, and ss. 21 and 75 of the Social Services and Well-being (Wales) Act 2014 in relation to Wales. Given that D had never been in their area, the local authority actually had no statutory duty in this case to act to safeguard and promote her well-being.

93. Where does all that take me? I consider that in this case the court properly granted the local authority permission to make an application in relation to D under the inherent jurisdiction. After all, the relevant statutory criteria were met.

94. I further consider and so find that the inherent jurisdiction applied to D as a British national. As a British national abroad in the circumstances that existed at the time the court was seized, she was in real danger and at grave risk of harm for the reasons I have set out in paragraph 91 above. The court was acting to protect a British national who could not be protected by any other statutory means. In the circumstances of this case, the inherent jurisdiction was being accessed as a truly residual jurisdiction to act protectively in relation to a child for whom it had jurisdiction.

95. I accept, however, that just because a court has jurisdiction that does not mean that the court should exercise that jurisdiction. In my view, the argument that the orders in this case cut across the statutory scheme goes to the question of how that jurisdiction should be exercised in this case, applying the judgment of Lord Sumption in ***Re B*** (above) at paragraph 85. As Lord Moylan stated at paragraph 43 of ***Re M*** (above), "*[c]ontext is, therefore, very important for any analysis of the circumstances in which and the form or manner in which the jurisdiction is exercised.*".

96. I have reminded myself that I must consider the reality of the application made by the local authority in this case and the orders made by the courts (see Lord Sumption in paragraph 85 in ***Re B*** – "*The real object in exercising it*" - and Lord Justice Moylan ***Re M*** at paragraph 61 who, in the context of the FLA 1986, states that "*the court will need to consider whether the order it is proposing to make is, in reality, an order within* […]". In my view, in this case the court was not making the orders simply to protect a British national abroad. This case is, in my view, very different from those where the court acts to protect a child abroad from the risk of a forced marriage or from FGM. It seems to me that protective jurisdiction could be extended to include protecting her from her father, perhaps by stopping him travelling to be with her. However, in my judgment the orders in this case went too far. They sought to compel D's return to this jurisdiction. Those orders seeking to compel return were made so that the local

authority could exercise their public law duties to safeguard and protect her as a child in need in their area and so that public law proceedings could be taken in relation to her. In my judgment, that is the only reasonable conclusion I can draw from a consideration of the facts of this case. Those facts must be viewed in the context of the risk assessment of 25 September 2019 which clearly stated that if D was "*in the UK or returns to the UK, care proceedings [are] to be issued upon the Local Authority being aware of the baby's birth.*". That recommendation is in my view unequivocal. That assessment was the evidential basis upon which the C66 was issued by the local authority. In reality it sets out the reason the local authority applied for D's return to the jurisdiction. It was to return her to the jurisdiction so that they could exercise a statutory duty to safeguard and protect her and so that public law proceedings could begin in relation to her. That is a use of the inherent jurisdiction which cuts across the statutory scheme in this case and its jurisdictional boundaries.

97. I have reconsidered, in the light of the submissions I have heard, the orders that have actually been made in this case. The first order of Mr Justice Francis was a bare return order. On the face of it, that order would not have crossed the statutory scheme but once it is considered in the context of the recommendations of the risk assessment, the reality is that its purpose was to secure return so that public law proceedings could be instituted. The orders of HHJ Lloyd of 6 August 2020, Mr Justice Francis of 9 December 2020 and myself of 17 March 2021 all stated that "*the first respondent must return with D […] immediately to the UK for the purpose of a further assessment of her parenting capacity*". That was a court ordered assessment rather than one the local authority was required to carry out in the fulfilment of their statutory duties. I have therefore given careful consideration to whether those orders cross a statutory scheme or not. Ultimately, however, I have concluded that you cannot get away in this case from the risk assessment conclusions of 25 September 2019. Given that context, the reality of that assessment was that it would consider whether public law orders would be required in this case. The reality is that those orders cut across a statutory scheme, applying paragraph 61 of ***Re M.*** The fact that in ***Re M*** the issue was whether it cut across the statutory scheme of FLA 1986 does not, in my view, diminish the principle which lies behind the decision and paragraph 61 of the judgment. The court must look at the reality of the situation. The reality of this case is that the purpose of the assessment in the context of this case was to see whether public law orders were required. Those were orders which the local authority could not apply for in relation to D whilst she remained out of the jurisdiction. Given that as a matter of fact, the events since 25 September 2019 can only have aggravated the risk, the reality was that the assessment would be a precursor to public law orders. I agree with the submission that the reality of this case is that, from the start, the local authority have sought inherent jurisdiction orders with a view to securing public law orders in relation to D. In the circumstances of this case, although the residual inherent jurisdiction did exist in this case to protect D, I have decided that it ought not to have been exercised. I frankly acknowledge that from a child protection perspective that is counter intuitive. I see the force of the Guardian's argument that the orders have protected D from her father who on the findings of Mr Justice Moor is a risk to any child in his care. However, I have reminded myself that local authorities do not have a roving child protection mandate and that their duties and powers are circumscribed by their having the jurisdiction to exercise those powers and observe those duties. Hence, after long and hard deliberation, I have had to conclude that D was a child who had never been present in the jurisdiction and that the local

authority was seeking her return to enable them to exercise a statutory jurisdiction which was not available to them had she remained abroad.

98. In the circumstances, I intend at a short hearing that will be convened for the parties' convenience to set aside the wardship orders in this case together with all orders made under that umbrella. At that hearing I will also hear any applications that arise from this judgment and the orders I intend to make.

99. That is my judgment.