Neutral Citation Number: [2024] EWHC 196 (Fam)

Case No: FD22P00457

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2024

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

J	**Applicant**
- and -	
E	**Respondent**

- -
- -

Mr Edward Devereux KC and Professor Rob George (instructed by **Field Seymour Parkes**) for the **Applicant**
Ms Marisa Allman (instructed by **Slater Heelis**) for the **Respondent**

Hearing dates: 13 and 14 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 8 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. This matter has been remitted by the Court of Appeal for re-hearing on the question of habitual residence (see *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659). At this hearing, the court has also received evidence and submissions on the question of forum should this court determine that it has jurisdiction based on habitual residence and on the question of welfare, insofar as it relates to the issue of return, should this court conclude that this jurisdiction is the more appropriate forum. Whilst the answer to the question of habitual residence is in my judgment clear, for the reasons explained below, this is a case in which the questions of forum and return have no wholly satisfactory solutions.

2. This matter concerns A, a girl born in March 2021 and now aged 2 years and 10 months old. A holds British citizenship. In circumstances I shall come to, A is currently in the jurisdiction of the Republic of Zambia in the care of the mother, E (hereafter 'the mother'). The mother is represented by Ms Marisa Allman of counsel. The mother was born in Zambia. A's father, J (hereafter 'the father'), is a British Citizen. The father is represented by Mr Devereux of King's Counsel and Professor Rob George of counsel. The applications before the court are an application by the father dated 23 June 2022, and issued on 6 July 2022, seeking a return of A to the jurisdiction of England and Wales (the Court of Appeal subsequently concluding that the father also sought by that application orders relating to care and contact within the scope of section 1(1)(d) of the Family Law Act 1986 and, very probably, section 1(1)(a) of the 1986 Act) and an application issued on 3 April 2023 for a return order under the *parens patriae* jurisdiction of the High Court.

3. The father's application dated 23 June 2022 was heard by Arbuthnot J in November 2022. Arbuthnot J handed down judgement on 23 December 2022 by which she dismissed the father's application for want of jurisdiction, having determined that as at the date of the father's application A was habitually resident in the jurisdiction of Zambia. The father appealed that decision to the Court of Appeal. On 12 June 2023, the Court of Appeal allowed the father's appeal and, as I have noted, remitted the question of habitual residence to the High Court for re-hearing.

4. The primary reason for the Court of Appeal remitting this matter was the likely need, in the Court of Appeal's assessment, for further oral evidence on the question of habitual residence and this court heard further evidence from the mother and the father. The father presented as a largely straightforward, although at times naïve, witness who had sought to accommodate the mother's changing plans and proposals during what was a difficult relationship. The mother presented as a somewhat immature and self-absorbed individual. In particular, the mother demonstrated virtually no insight into the emotional impact of having separated A from her father and thereafter denying A contact with her father for an extended period. On any given issue the mother was apt to respond almost entirely from the point of view of her own needs, with little understanding of the impact of her decisions on A or the need for the father to be involved in decisions concerning A's welfare in circumstances where he shares parental responsibility. The mother's answers were often evasive and she had a tendency to dissemble.

5. The handing down of this judgment has, regrettably, been significantly delayed by further developments in the case occurring after the conclusion of evidence and submissions. On 17 November 2023 the Foreign, Commonwealth and Development Office (hereafter 'the FCDO') provided the court with further information. Upon the court informing the FCDO that the material was relevant to the court's decision, and would need to be disclosed to the parties, the FCDO gave notice that it may seek to assert that public interest immunity attached to the material in question. After several weeks of deliberation, it was only on 19 January 2024 that the FCDO informed that court that the Minister had declined to sign a PII certificate and that therefore no application would be made. In the circumstances, the additional information was disclosed to the parties and each party made short additional submissions in writing.

BACKGROUND AND EVIDENCE

6. The background to this matter is somewhat involved and the sequential questions of habitual residence, forum and welfare require that background to be considered in some detail.

7. The father was born in 1984 and is 39 years old. He has always lived in England. The extended paternal family all reside in this jurisdiction. The mother was born in Zambia in 1989 and is 34 years old. Members of the extended maternal family reside in Zambia and the mother has a sister who resides in Europe. The mother moved to England in 2001 when aged 12, after the maternal grandmother married a British citizen. The maternal grandmother has dual Zambian and British citizenship. The mother lived with the maternal grandmother in a council property and went to school until 2016. Thereafter, she moved to London to study accounting before moving back to the county in which had lived with her mother. She had employment in that area and then in London until 2017. The mother has not been in employment since 2017. In her statement, the mother contends that she has visited Zambia at least once a year since 2002 and that she has always considered that country to be her home.

8. The parents met in England in 2016 and commenced co-habituation in 2017. Both parties accept that their relationship was a volatile one. The father alleges significant domestic abuse against him by the mother during the relationship, contending that the mother was arrested twice and that he twice received medical treatment for injuries depicted in photographs contained in the bundle. Those injuries included a black eye and scratches to his face, a laceration to the hand, a further black eye, grazes to the face and, on another occasion, a bloody nose. At the outset of the hearing the court made clear that it was not equipped to conduct a fact finding hearing with respect to the allegations of domestic abuse levelled against the mother, which would need to be determined should the court decide it had jurisdiction and that England was the appropriate forum. However, during her evidence, the mother conceded that she had caused the injuries to the father. The mother told the court that "I did cause injuries to [him], I am completely shameful of those", before confirming that the photographs of the injuries contained in the bundle are accurate. In this context, I pause to note that, contrary to her admission under oath in these proceedings, in a sworn affidavit dated 20 January 2023 filed in civil proceedings issued by the mother in Zambia for a protection order, the mother denied the father's allegations of domestic abuse.

9. In August 2019, the father purchased a substantial property in the county in which the mother had lived with her own mother. In her chronology prepared for these

proceedings, the mother describes the parties as having decided to purchase a property in England as their family home. The mother and father renovated the property to a high standard. During cross-examination by Mr Devereux, the mother stated that she had identified the property and had been responsible for the renovations. The mother stated that her aim was to create a comfortable home for the family.

10. During the course of the parents' relationship the mother travelled regularly to Zambia between October 2018 and November 2021, having developed plans for commencing a business in that jurisdiction. The mother rented a flat in Zambia in October 2019. In November 2019 she registered a business in Zambia in the joint ownership of herself and the father, with her being the majority shareholder, and purchased a six acre plot of land. The mother later purchased an additional 1.5 acres of land and bought a car in Zambia. Whilst the bundle contains plans for a salon and spa on the land, no building has yet taken place and the business has not traded to date. The father has had considerable success in business in this jurisdiction and the mother's business plans in Zambia were financed by £850,000 from the father, he says on the understanding that the business would "benefit our household income". The evidence suggests that at this time the parents planned for the mother to travel back and forth between England and Zambia, running the business partly from the United Kingdom and partly when visiting Zambia, allowing the father to maintain his business interests in this jurisdiction.

11. The mother became pregnant with A in June 2020. The mother spent a significant part of her pregnancy in Zambia. The mother states that in November 2020 the father agreed to her and the expected baby staying permanently in Zambia. The father denies this. The mother travelled back to England in December 2020 and the parents visited Europe in December 2020 for a "babymoon". From January 2021, the mother rented a property in Zambia, comprising a four bedroomed house. The mother states she rented that property on a 12 month lease.

12. A was born on 4 March 2021 in England in a private hospital in London. The father rented a flat following her birth before the parties returned to the family home. During her evidence, the mother stated that the flat was rented as it was in close in proximity to the hospital at which she wished to given birth to A. Following the birth of A, the father added the mother's name to the title of the family home in April 2021. Having returned to Zambia, the maternal grandmother came back to England in the summer of 2021. The mother confirmed in cross-examination that the parents had organised a christening for A in England attended by a number of guests, including the maternal grandmother.

13. The parents relationship continued to be volatile. Following an argument in Autumn 2021, the mother travelled to Spain with A for a week without informing the father or seeking his consent to remove A from the jurisdiction. The mother and A later travelled to Zambia for a three week visit between October and November 2021. This was the only period that A spent in Zambia prior to March 2022. In her second statement, the mother states that she "registered" A with a GP in Zambia, who started to receive medical care in that jurisdiction. However, in cross-examination the mother described the visit to the GP in Zambia as simply a routine check-up. The mother conceded during cross-examination that she did not consult the father before taking this course of action and told the court "I did not think I needed to mention it".

14. In December 2021, the mother suffered an adverse reaction to a booster vaccination for Covid-19, leading her to develop what is said to be an auto-immune disease (on 15 August 2022 the mother travelled to Switzerland where she was diagnosed her with post COVID-19 vaccine Syndrome and a number of other conditions). The mother's mental health was adversely affected by this development and she became depressed and paranoid. The father alleges that the mother threatened to harm herself. During this period, which lasted until February 2022, the father asserts that he undertook the majority of care for A, assisted by the maternal grandmother. Whilst the mother has described the care provided by the father to A during this period as "hands on", in her third statement the mother contends that the father was "reluctant to provide the full support I and our daughter needed" and that the father "stated he no longer wished to provide physical and emotional support for me and my daughter on any level". The father denies this.

15. On 8 March 2022, the parents travelled with A to Zambia. The father contends that the primary reason for the trip in March 2022 was to attend a memorial event for the maternal grandfather and to advance the mother's business plans. The father asserts that the family was due to return to England. The mother contends that at the point of departure the father understood that the mother would be remaining in Zambia with A. In so far as it is alleged that the father consented to the mother moving to Zambia with A prior to the family's departure the father denies this and, on the mother's own case, there is no evidence to support that contention.

16. It is accepted by the mother that the family travelled to Zambia on 8 March 2022 on return tickets with only a modest amount of luggage. The mother states that a return flight was booked because it was cheaper. However, in subsequent communications with the father, the mother told the father the date of her return flight was booked, namely 31 March 2022. The mother likewise concedes that most of A's belongings and most of the mother's belongings remained at the family home in England, as did the mother's car, worth some £150,000 and not declared SORN until August 2022, and the family dog, which was placed in a kennel. Before Arbuthnot J, the mother accepted that she had made no arrangements to ship her extensive belongings in England to Zambia. The mother contends that the belongings were left in England because she had already accumulated sufficient items in Zambia.

17. The mother likewise accepts that no step was taken prior to departure to cancel A's nappy and wipes subscription and the mother remained registered with the NHS and BUPA. The mother continued to receive correspondence, including medical correspondence in England. A remained registered with her GP in England at the time of the departure from England in 2022 and no steps were taken to alter that position. As at June 2022, the father was still receiving letters confirming A was due to receive her vaccinations. The mother concedes that she did not tell the GP that she and A were moving to Zambia.

18. When giving evidence before Arbuthnot J, and at this hearing, the mother stated prior to the family's departure on 8 March 2022 she did not tell anyone she was moving to Zambia on a long term basis. She conceded that the parents took enough food for A to Zambia to last 3 to 4 weeks (a period that corresponded roughly with the date for her return flight given to the father in later communications). In her third statement, the mother alleged that the father "clearly wasn't expecting me to come back to England with him at the end of this trip." Whilst the father departed before the

mother, he states that expected the mother would return shortly after he had done. In evidence before Arbuthnot J, the mother conceded that text messages from the father indicated that he expected the mother and A to be returning to England.

19. The father returned to England on 20 March 2022. Each parent accepts that there was an argument on the way to the airport. The mother contends she considered this brought an end to the relationship. The father thought that the relationship subsisted. In oral evidence to Arbuthnot J, the mother accepted that the parents had shared a bed in Zambia prior to this point. In his application form, the father states that the mother and A were expected to fly back to England 7 to 10 days after he flew home. As noted, that return flight had been booked and, in communications, the mother had provided a return date to the father.

20. The mother asserts in her chronology that on 22 April 2022 the father agreed that the mother should remain in Zambia with A. Again, the father denies that he consented to the mother removing A to Zambia permanently. The mother contends the parents interviewed a nanny in Zambia in March 2022. The father says that the parties discussed hiring a nanny, the intention being that someone known to the family would be available for when A was visiting and the mother needed to work on her business, but did not do so. In her written evidence, the mother states that in April 2022 she hired two housekeepers, two day and night guards and a gardener and enrolled A into baby development classes in Zambia. The mother further relies on food deliveries sent to her by the father from England as supporting her contention that a decision had been made that she and A would be remaining in Zambia.

21. The mother asserts that A had the company during this period of an auntie, an uncle, six young cousins, two of whom she is particularly close to, and other extended family members. The maternal grandmother also travelled to Zambia in March 2022, again on a return ticket with a return flight on 31 March 2022. The maternal grandmother maintains links with this jurisdiction. The mother confirmed in evidence that the maternal grandmother's partner is a British Citizen who owns a property here and that the maternal grandmother is currently staying with him in this jurisdiction.

22. In her third statement, the mother states that "at the point we travelled to Zambia we were in a state of flux". Within this context, in her oral evidence the mother accepted, as she had done before Arbuthnot J, that certain discussions that took place between the parents whilst she and A were in Zambia did not demonstrate a settled intention on her part to remain in that jurisdiction with A. The mother accepted that during this period she had raised the possibility of relocating (to use the mother's word in evidence) to South Africa. The mother further conceded that, subsequent to the father departing Zambia, she took A to South Africa and that whilst there viewed potential properties. As had been the case in relation to her trip to Spain with A in Autumn 2021 and taking A to the GP in Zambia in October 2021, the mother conceded that she did not inform the father in advance of her intention to take A to South Africa nor seek his consent as a holder of parental responsibility for A. During the course of cross-examination of the mother, Mr Devereux unearthed a further incident of the mother taking A to another jurisdiction, this time the United States, without notifying or obtaining the consent of the father.

23. Following the father's departure, the mother stopped all contact save for one occasion of indirect contact on 8 April 2022. Father contends that he was prevented from

having any contact with A for 9 weeks following his return to England on 20 March 2022, despite providing six different dates for contact to the mother. The father states that whilst he had been prepared to be flexible in the expectation that the mother would return to England with A as she had done in the past, he came to the realisation in May 2023 that the mother did not intend to return A to the jurisdiction of England and Wales.

24. On 23 May 2022, a little under 11 weeks after the parties had travelled with A to Zambia, the father sent a message to the mother withdrawing his agreement to A spending any further time in that jurisdiction. At the beginning of June 2022, the father travelled to Zambia in order to seek the agreement of the mother regarding returning to England with A. No agreement was forthcoming from the mother and the father again returned to England. During this visit he was able to see A between 3 and 10 June 2022, although the father contends that the mother restricted his contact with A to short, supervised visits.

25. The father's application on Form C66 is dated 23 June 2022, and was issued by the court on 6 July 2022. As alluded to above, before the Court of Appeal there was a dispute as to the precise nature of the father's application, the mother having raised an issue of the nature of the order being sought by the father and whether the order sought was within the scope of the Family Law Act 1986. On this point, the Court of Appeal concluded at [75] that the order sought by the father was within the scope of the Family Law Act 1986. Following the father's application, the mother took further steps in respect of A's welfare without informing the father. In particular, the mother did not consult the father before A received vaccinations in Zambia for PVC13 on 24 June 2022 and MMR on 28 July 2022.

26. When the matter came before the court for the first time on 13 July 2022, Peel J made an order for contact providing that the mother should make A available for video contact on four occasions each week for 30 minutes on each occasion to be agreed between the parties and direct unsupervised contact on at least alternate days when the father was able to travel to Zambia.

27. On 9 August 2022, the mother sent an email to the father outlining proposals with respect to the future. At the outset of the email, the mother referred to the father's contact with A and stated that "It was good seeing you and A really enjoyed father daughter time". The two options presented by the mother to the father were either for her and A to move to South Africa in February 2023 or for her and A to return "permanently to the UK" on 23 August 2022, some 14 days after the date of the email.

28. For the first proposal, the mother set out her financial needs, including property in South Africa and Zambia, the mother and A's expenses and the sums required for her to apply for permanent residency based on financial independence. Within this context, the mother started in respect of the option of moving to South Africa, "So, in conclusion a financial settlement of £950,000 is my request".

29. With respect to the option of return to the United Kingdom, the mother set out what she considered would be the considerable disadvantages for her and A of returning to this jurisdiction. These comprised an adverse impact on her physical and mental health from a lack of access to her immediate and extended family, the inability of her

family to travel to the United Kingdom, the severing of bonds between A and the maternal family, the need for the mother to travel to Zambia for extended periods, the inability to closely manage her business interests and her inability to work in the United Kingdom. It is also clear from the email of 9 August 2022 that the mother's proposal for returning to the United Kingdom involved the maternal grandmother returning to this jurisdiction. Within the foregoing context, the mother concluded her proposal for returning to the United Kingdom within 14 days as follows:

> "As I would be making huge compromises and the risk to A's well-being remains, easing this permanent transition is essential for both of us and I regret to say that it does involve a level of financial "compensation" that takes into account my financial losses, the increased costs to buy a property, my families (*sic*) travel expenses, my travel expenses to Zambia / architecture / interior design and finally medical expenses. So with all that said, I'd make the permanent move based on a share of £1.1M".

Before Arbuthnot J, the mother denied that this communication demonstrated that her willingness to facilitate contact between the father and A was linked to finances.

30. This matter has been rendered considerably more complex by an allegation of sexual abuse thereafter made by the mother against the father in September 2022. The mother alleges that during a contact visit on 13 September 2022, the father sexually assaulted A. The mother alleges that when she picked A up from contact she was not her usual bubbly self, was unusually quiet and refused to eat upon arriving home. Thereafter, the mother asserts that she noticed injuries to A's genitalia when changing A's nappy. At an urgent visit to what is described as a private children's clinic, A was seen by a Dr M. A was referred to Dr G at what the mother contends is a "specialist child abuse centre" at the University Teaching Hospital. It is said that Dr G found signs of injury to A in the area of her genitalia and that photographs were taken and swabs taken for DNA and semen.

31. The court has before it a copy of a report provided from Dr G. A letter from the mother's solicitors to the father's solicitors dated 26 September 2022 states that the appointment with Dr G was made for A the following day, on 14 September 2022, causing the mother concern about delay. The medical report of Dr G is date stamped by the 'Zambia Police Service Paediatric Centre of Excellence' on 14 September 2022. The report states the complaint concerned "suspected sexual abuse". A is recorded as having a small bruise to her left thigh, which the mother said had been sustained during play. A is further recorded as having the injuries to her genitalia described in the report. A's hymen was recorded as being intact but was not clearly visualised. There were no anal injuries or bruising. No medical photography of the alleged injuries has been made available to this court.

32. The medical report further records "swab collected for spermatozoa", but gives no indication of the location from which the sample or samples were taken, nor of any steps taken to preserve the chain of custody of that evidence. At the end of the medical report, in different handwriting, is recorded "Swab results positive for spermatozoa clinical and laboratory evidence consistent with alleged circumstances". This passage appears to have been added to the report later, together with a date stamp of 20 September 2022. A letter from the Zambian Ministry of Health National Food Laboratory dated 20 September 2022 records that the swab was received by that lab

on 16 September 2022 and states the results. In addition to their being no indication of the location from which the sample or samples were taken, the letter from the National Food Laboratory gives no details of the technique applied to determine that the swab taken was positive for spermatozoa. The father's lawyers in Zambia have raised in the Zambian civil proceedings commenced by the mother for a protection order that the mother is in possession of a medical report that they contend should be confidential to the police. Within those proceedings, the father is recorded as having told the court that he did not challenge the authenticity of the medical report.

33. The mother states that her allegation of sexual abuse was referred to the Lusaka Central Police on 15 September 2022. The father was questioned on 17 September 2022 under caution and his passport confiscated. The father further contends, in evidence that was not challenged in cross examination, that when he was interviewed the investigating police officer "suggested twice that I 'employ' him", which the father refused. The father further states that:

> "I was then informed by my contacts in Zambia that there was 'a lot of money' flying around, which confirmed my fears that the investigating officers had been bribed, and that the evidence relating to the prosecution was unsafe."

34. Following interview by the police, the father was released under investigation. On 27 September 2022 the father was re-arrested by police in Zambia for the offence of "defilement of a child" and charged. The father asserts that prior to charge the police did not prepare a timeline, did not request a DNA sample from him and did not check CCTV footage covering the 97 minutes he had contact with A, including from the hotel and videos on his phone showing A playing happily. The father states that he was thereafter bailed but not prohibited from leaving the jurisdiction of Zambia and, fearing for his safety, left Zambia on 1 October 2022. He has not returned to that jurisdiction. The father understands that he would face arrest if he returned to Zambia and does not intend to return due to what he contends is the continuing risk to his safety and the risk of wrongful incarceration.

35. The father emphatically denies sexually abusing A. He further contends that the police service in Zambia is endemically corrupt and points to the fact that the allegations of sexual abuse have been made by a parent seeking not to return to this jurisdiction with A and who has sought to obstruct his contact and any involvement in decisions concerning A. In this context, the father states that he does not know whether A was harmed by another of whether the allegations have been fabricated in order to interfere with these proceedings. The father's lawyers in Zambia have gone further and, having lodged a formal complaint in respect of the conduct of the police investigation, allege that the mother has used named officers in the Zambian police service as a means of framing the father in order to succeed in the proceedings commenced by the father in this jurisdiction.

36. Within the foregoing context, the mother's oral evidence to this court regarding the police investigation was of note. In her fourth statement, dated 19 October 2023, the mother stated that the documents from the Zambian criminal proceedings before this court are incomplete, that she has seen documentation on the file which is not included in the papers before the court, but that since she is not a party to the criminal

proceedings she is not well placed to obtain information and documentation about those proceedings:

> "Since I am not a party to the criminal proceedings, and I don't have any status in those proceedings, it has been difficult for me to access information about what is happening. I have had to engage criminal solicitors privately to try to ascertain the position, and they have written to the DPP on my behalf (Exhibit 8). I do know that the bundle of criminal material that [J] has produced is not complete. I have seen many documents which are not present. They are not, however in my possession or control and not being the party to these proceedings I cannot easily obtain copies of these papers/ information."

37. During her oral evidence however, and having confirmed she is a witness in the criminal investigation, the mother confirmed she has herself met with police officers in Zambia up to *forty* times, and has been allowed on those occasions full access the police investigation file. The mother stated she has been permitted to go through the investigation file and has sat with investigating police officers and critiqued the investigation, including the actions of other agencies. A particular example given by the mother in evidence was that she had seen and read on the investigation file legal advice received by the police that the evidence in the case is insufficient to justify a prosecution and had told the police that, in her view, that advice was wrong. It would also appear that the mother has been provided by the police with sensitive documents from the investigation. The mother exhibits to her statement a communication, marked OFFICIAL-SENSITIVE, between Interpol Manchester and Interpol Lusaka that she contends was given to her by police officers in Zambia.

38. The documents that are available to this court from the Zambian police investigation also refer to issues with the criminal investigation. By a letter dated 9 January 2023 from a S/Supt M, responding to the complaint raised by the father's Zambian lawyers concerning the conduct of the police investigation, the following was stated:

> "…this office sought the opinion of the public prosecutor who handled this matter. In his detailed submissions, he indicated that the case lacked merit to warrant conviction in any court of criminal jurisdiction. It is our considered view that the findings of the prosecutor were factual and no amount of investigation can give life to this case to warrant re-arrest. As to our officers, they have out rightly been told to stay away from this case as there is a clear conflict of interest. To crown it all, we can safely say this matter has completely been closed."

39. There remains an issue between the parties as to whether criminal proceedings in Zambia have been withdrawn and the police investigation closed. The mother asserts that the father did not attend a preliminary hearing in the criminal proceedings on 13 October or plea hearings on 17 and 20 October 2022. The mother states that on 27 October 2022 two sureties stood for the father to attend the next hearing and that an application for a warrant of arrest was made. She states that on 4 November 2022 the father failed to appear and a warrant for his arrest was issued and his sureties fined and imprisoned. The mother alleges that on 10 November 2022, the father again failed to appear and the proceedings were adjourned in order to progress an arrest

warrant and seek the extradition of the father. The father contends that the criminal proceedings were withdrawn due to lack of evidence.

40. Despite the letter from S/Supt M of 9 January 2023, stating that the investigation had been closed, the father was issued with a 'call out' for interview on 15 June 2023. When this was queried by the father's Zambian lawyers by reference to S/Supt M's letter, a letter dated 24 August 2023 from the Deputy Director of Operations of the Inspector General's Office stated:

> "This serves to confirm that the matter was withdrawn from court and currently the Zambia Police Service is not investigating this matter and INTERPOL is not involved in this case."

41. In addition to the correspondence provided to the father's Zambian lawyers, the FCDO has provided correspondence from the Deputy Director of Zambian Police Operations confirming that the case was withdrawn from court on 12 December 2022 due to insufficient evidence and that there are no ongoing police investigations. This, however, does not appear to be a wholly accurate description of the position when compared to what purports to be a transcript of the hearing on 12 December 2022, the transcript recording that the court considered an application made by the Public Prosecutor in the following terms:

> "Having exhausted administrative proceeding relating to this matter, I apply to have this matter withdrawn in accordance with section 88 of the CPC. So that if it is granted the matter will be discharged before this court and be sent back to Zambia Police to look for this person and bring it back once they are successful or the matter can be adjourned and Returnable Upon Arrest."

42. The court granted the application to withdraw the criminal proceedings, holding that it would not be appropriate to adjourn the proceedings to be returnable upon arrest. The court made no comment concerning any further police investigation of the matter. Within this context, on 11 October 2023, the Office of the Inspector General of the Zambian Police stated that the criminal investigation continues. A letter from the National Prosecution Authority dated 31 October 2023, referring to a communication from the Director, Community Services Division, Zambia Police Service of 13 May 2023, states that there *is* sufficient evidence to proceed against the father without DNA tests, in circumstances where there are the findings detailed in a medical report, the father had opportunity and there was no apparent reason to falsely implicate him (it is not clear whether the National Prosecution Office is aware of contentious proceedings concerning A ongoing in this jurisdiction at the time the allegation was made). The letter dated 31 October 2023 states an intention on the part of the National Prosecution Authority to take proactive measures to secure return of the father to Zambia for arrest.

43. Finally with respect to the criminal investigation in Zambia, and as set out above, following the conclusion of evidence and submissions concluding, the FCDO provided the court with further information. That information comprised a letter from the FCDO dated 17 November 2023 which stated as follows:

> "Further to the FCDO's response of 14 November and with regard to the court's original order, on 16 November the British High Commission in Lusaka was advised by the Zambian Ministry of Foreign Affairs that an extradition request for the father's arrest has been submitted by the Zambian authorities via INTERPOL."

44. No family proceedings have been commenced in Zambia, and this remains the position to date. However, on 15 November 2022, the mother applied to the Zambian court for a civil protection order against the father under the Anti-Gender Based Violence Act 2011, relying on the allegation that the father had "defiled" A. The written submissions on behalf of the mother in the Zambian civil proceedings state that she is certain that the father abused A in circumstances where A did not spend time with anyone else on the day in question and there was no explanation for the positive findings of spermatozoa. In evidence in the Zambian proceedings the mother alleged the father had failed to show concern for A's wellbeing following the incident.

45. The father denied the allegation in his response to the application for a protection order dated 9 December 2022 and relied on allegations of domestic abuse by the mother in England. The father contended that he was not aware of any concern in respect of A until he was arrested and testified that he had no knowledge of how the injuries in question were inflicted on A. As I have noted, it would appear from the documentation available from the civil proceedings in Zambia that the father did not challenge the authenticity of the medical report.

46. The judgment of the Subordinate Court of the First Class Holden at Lusaka concluded that the medical report showed A had suffered some form of trauma which in Zambia may constitute an offence, and that A "is under some form of threat to her life". The court acknowledged that the allegation of sexual abuse arose in the context of dispute a between the parents but, referring to its duty to safeguard and protect children, was satisfied that a protection order should be made. The protection order obtained by the mother in Zambia expired at the end of October 2023. During her oral evidence, the mother claimed to have signed an application for a further protection order. It remains unclear whether further civil proceedings have in fact been issued.

47. The Zambian civil court also made an order for supervised contact between the father and A, to be supervised by a social worker, and assigned a Child Welfare Inspector to see A. The Child Welfare Inspector was appointed on 9 May 2023. On 25 October 2022 Arbuthnot J had continued the order for indirect contact made by Peel J, that order providing that the mother shall make A available for video contact on three occasions each week for 30 minutes on each occasion to be agreed between the parties. The father alleges that the mother facilitated only very limited contact and sent no pictures or updates at all between December 2022 and September 2023. On 16 May 2023 the father applied to the Zambian court to for permission to apply to commit the mother for failing to comply with the Zambian contact order, which permission was granted on 14 July 2023. On 18 August 2023 the court approved a consent order providing for contact to the father by way of video calls every Wednesday a 3.00pm for 30 minutes.

48. At the present time the mother remains in Zambia with A. The mother moved from her own property to live with the maternal grandmother sometime between filing her statement on 28 October 2022 and the first final hearing. The mother confirmed in

evidence that she and A have now moved again and reside in a rental property on a rolling month to month tenancy, on which the landlord can give one month's notice. The mother contends that she was required to move out of the maternal grandmother's property due to the presence of unknown persons and vehicles outside the property, that she ascribed to the father. The mother states that she reported the matter to the police but no action was taken.

49. The mother confirmed in evidence that her business in Zambia has not commenced trading and that she receives no income from it. In oral evidence she stated that she has no money to take the business forward at this time. Cross examined by Mr Devereux, the mother confirmed that she has no income other than the money she receives from the father and her family. She stated that she has no money in her bank account at present. In her further submissions concerning the information provided by the FCDO on 17 November 2023, Ms Allman informed the court that direct, supervised contact over a number of days between A and her father has recently taken place in South Africa, with the assistance of a professional social worker.

50. Were the court to order the return of A to this jurisdiction, the father confirmed to the court that he would pay any notice period on the mother's current rental property in Zambia and would fund flights for the mother and A to England. The father further undertakes to vacate the family home for a period of 6 to 8 weeks and thereafter to fund a furnished rental property for the mother and A for a further period of six months whilst agreement is reached on the financial aspects consequent upon the dissolution of the parties' relationship.

51. In this latter context, the mother confirmed in evidence her intention to issue proceedings in this jurisdiction under Schedule 1 of the Children Act 1989 with respect to the financial arrangements for A and proceedings under the Trust of Land and Appointment of Trustees Act 1996 with respect to her interest in the family home. She contended she had provided all of the information to her solicitor required to issue these applications.

52. During cross-examination, the mother said if the court orders the return of A, she will stand by her promise to return if ordered.

SUBMISSIONS

The Father

53. On behalf of the father, Mr Devereux and Professor George submit that A was habitually resident in the jurisdiction of England and Wales as at the date of the father's application on 23 June 2022. In support of this submission, they rely on the following matters:

    i) A was born here and lived her entire life here until 8 March 2022, other than for a three week trip to Zambia in October/November 2021.

    ii) Both parents lived in this country and were well settled here at the time of their departure. The father is a British citizen and has always lived in this jurisdiction. The mother had lived here, first as a child with her mother, who is a British citizen, and then as an adult, for some 20 years. Whilst the mother

retained links to Zambia through short periods in that jurisdiction, England was her home.

iii) The parents co-owned a family home in this jurisdiction, extensively refurbished by the mother with a view to creating a comfortable family home in England.

iv) The father 'was a "hands-on" father particularly during this period' in early 2022 when the mother was unwell.

v) Both parents had wider family living in this country prior to March 2022, who were actively involved in A's life here. The maternal grandmother was involved in day-to-day childcare in early 2022 alongside the father when the mother was unwell. The paternal grandmother was a regular visitor, and was planning a visit to see A after the family returned from the trip to Zambia in March 2022.

vi) The trip to Zambia in March 2022 was intended to be a short visit only, to attend a memorial service for the maternal grandfather and for the mother to advance her business plans. The parents travelled on return tickets booked by the mother. The mother intended to return with A to England at the end of March. The maternal grandmother also travelled on a return ticket, with a return flight booked on 31 March 2022.

vii) There was no pre-planning by the mother for a long term move of her and A to Zambia. A's belongings all remained in the family home. A remained registered with her GP. The mother's own belongings all remained in the family home, as did her £150,000 car, which was not declared SORN until August 2022. The mother did not disengage with her life in England, continuing to receive correspondence from DVLA, the NHS and BUPA. The dog remained in England, put into kennels.

viii) The father did not agree to the relocation of A to the jurisdiction of Zambia or submit to her remaining there. His initial lack of objection to short extensions was consistent with previous arrangements. The parties remained in discussion about the return date until at least early April.

54. Mr Devereux and Professor George submit that, in the foregoing circumstances, A had deep roots in England at the time the family left for Zambia. They further submit that this situation contrasts sharply to A's position in Zambia at 23 June 2022, which is characterised by a lack of stability:

i) A was having no meaningful contact with her father, the mother having prevented all contact following the father's return to England for nine weeks following an online contact on 8 April 2022. This situation would have undermined A's stability in Zambia.

ii) Whilst the mother had property in Zambia, it was almost entirely unknown to A and had never been her home. There is no evidence that it was equipped prior to A's arrival to accommodate a young child.

iii) The mother had no settled intention to remain in Zambia and there was a lack of clarity with respect to what the future would hold. In addition to her clear intention to return to England at the time of her departure for Zambia, once in Zambia the mother also considered moving A to South Africa.

iv) The mother's evidence concerning an acute deterioration in her health during this period further undermined the stability of A's position in Zambia.

v) There is no evidence to support the mother's contention that A was registered with a GP in Zambia, the documents showing only that she had a walk-in clinic visit in October 2021, with mother's chronology stating registration occurred on an unspecified date in June 2022. The father did not consent to the registration of A with a Zambian GP. The immunisation of A was arranged after the father had issued his application and without the father's consent.

vi) The evidence concerning A's interaction with nursery, friends and activities post-dates the father's application. The parties discussed hiring a nanny but did not in fact do so.

vii) The father had to take baby food and other essentials to Zambia in order stock up the mother's supply of provisions for A pending her expected return to England with A.

viii) Whilst the mother contends that A was sufficiently integrated in a family and social environment to establish as at the relevant date, in August 2022 the mother was prepared to move A back to England on a mere 14 days' notice, in return for financial compensation of £1.1M.

55. Evaluating these competing factors side by side, Mr Devereux and Professor George submit that the evidence establishes in this case that, as at 23 June 2022, A remained habitually resident in this jurisdiction and that, accordingly, this court has jurisdiction in respect of A.

56. As noted at the outset of this judgment, in April 2023 the father issued an application under the *parens patriae* jurisdiction based on A's nationality. If the court does not accept their submissions as to habitual residence, and acknowledging that the jurisdiction is available only in limited circumstances and for limited purposes, Mr Devereux and Professor George submit that the sexual abuse that A has suffered, or the mother's willingness to make false allegations and expose A to inappropriate medical examination, the lack of contact being facilitated by the mother and the father's inability to travel to Zambia, justify the invoking of the *parens patriae* jurisdiction in this case to compel the return of A.

57. Mr Devereux and Professor George further submit that, in circumstances where the courts of England and Wales have jurisdiction, this jurisdiction is also plainly the more appropriate forum for the determination of the welfare issue in respect of A for the following reasons:

i) There are no substantive welfare proceedings ongoing in Zambia. The only court engaged with matters relating to A's welfare is the court in England and

Wales. Those proceedings have been ongoing for a considerable time and have resulted in a large amount of evidence relevant to the issue of A's welfare.

ii) Within this context, the mother intends to issue *further* proceedings in this jurisdiction under Schedule 1 to the Children Act 1989 and the Trusts of Land and Appointment of Trustees Act 1996, reinforcing the submission that England is the more appropriate forum in which to determine the issues concerning A's welfare.

iii) By reason of ongoing, and the father submits corrupt, police activity in Zambia, the father is not able to attend to participate in proceedings in Zambia. By contrast, both the father and the mother are participating, continue to participate, in proceedings concerning A's welfare in this jurisdiction.

iv) Within this context, any fact finding hearing into the mother's allegation of sexual abuse and, if necessary, the domestic violence perpetrated on the father by the mother, can more effectively be conducted in this jurisdiction since both parents can attend to give evidence and be cross examined in proceedings here. In so far as there are relevant witnesses in Zambia, they can give evidence by video link and any documents in the Zambian proceedings can be disclosed into family proceedings in this jurisdiction.

v) Following any finding of fact process, a proper welfare assessment of A's best interests can only be achieved in this jurisdiction in circumstances where it is only here that *both* parents can be involved.

vi) In the foregoing circumstances, and in contradistinction to there being no evidence before the court as to the timescales applicable to any welfare application in respect of A made in Zambia or as to the principles that would be applied, the parties already have available to them a known and impartial forum in the form of the English court that is seised of proceedings in which *both* parties can participate.

vii) If the court concludes that it has jurisdiction in respect of A based on her habitual residence, this is a further factor weighing against a stay.

58. Mr Devereux and Professor George further assert that, in the context of the evidence concerning the conduct of the criminal investigation, the father is unlikely to get a fair trial in Zambia on questions concerning A's welfare. They submit that the deficiencies in the police investigation will necessarily impact any civil or family proceedings concerning A. In contending that justice would not be done in Zambia, the father relies on what he contends are the patent deficits in the criminal investigation, the evidence of bribery and corruption in that investigation and the heavy involvement of the mother over the course of some forty meetings with the police, during which she had access to the investigation file and documents that are confidential as between Zambian and international agencies.

59. In the circumstances, even were the court to reject the submission that England is the appropriate more forum, Mr Devereux and Professor George submit the father can

show that there are circumstances by reason of which justice requires that a stay should nevertheless be refused.

60. Mr Devereux and Professor George submit that this analysis is not changed by the recent information from the FCDO. Mr Devereux and Professor George state that the father is not aware of any request having been made for his extradition. In any event, Mr Devereux and Professor George contend that on the evidence available to this court, the father will be able to mount a strong defence to any extradition request, which would take several months to determine.

61. Finally, Mr Devereux and Professor George submit that it is in A's best interests to be returned to the jurisdiction of England and Wales whilst the court determines the welfare issues in respect of her. In seeking to make good this submission, they rely on the following matters:

i) The harmful effects of child abduction are well established and require to be mitigated by returning A to the jurisdiction of her habitual residence. The passage of time in itself does not detract from the importance of providing a robust response to an abduction, and the on-going harms being caused to A from her wrongful retention in Zambia are significant.

ii) The removal of A from the jurisdiction of England and Wales has had a serious impact on her relationship with her father and her wider paternal family and hence on her emotional welfare, which has been substantially worsened by the mother's approach to contact.

iii) A is at the critical developmental age where attachments are formed. The mother has demonstrated that she is not, and will not be, able to promote A's emotional needs by promoting a relationship between A and her father or the paternal family. This failure will not be addressed whilst A remains in Zambia. The only way that A's relationship with her father can be secured is by way of an order for her return to this jurisdiction.

iv) The mother has repeatedly failed to acknowledge that the father has parental responsibility for A. All decisions concerning A's welfare, including medical care, education and foreign travel, made after A left the jurisdiction of England and Wales in March 2022 have been taken unilaterally by the mother. In these circumstances, the father will not be able to effectively exercise parental responsibility whilst A remains in Zambia.

v) Further and in any event, in light of the allegations of sexual abuse made by the mother against the father in the context of the dispute concerning A's removal from the jurisdiction and the father's application for her return, there is no practical way in which A's relationship with her father, or her father's involvement in decisions concerning A's welfare, can be maintained in that jurisdiction. The father risks further false allegations in a system he has experienced as involving bribery and corruption. These difficulties are now further confirmed having regard to the new information concerning a possible extradition request.

vi) The abduction of A from this jurisdiction, with no pre-planning, constituted a dramatic change of circumstances which separated, and continues to separate, A from her father. Whilst an order for return to the jurisdiction of England and Wales will constitute a further change of circumstances, it can be managed in an orderly fashion and will be a return to the family home.

vii) A's current situation in Zambia is not settled, stable or safe. The mother and A have moved accommodation on repeated occasions and now live in a month to month, tenancy. The mother is receiving no income from her business, which is a Chimera, and relies on family support and the father for her income. It is not in A's best interests to remain in an unstable and precarious situation.

viii) With respect to the impact on the mother, notwithstanding the difficulties she claims that a return would create, the mother has already demonstrated her willingness to return A to the jurisdiction of England and Wales on a mere 14 days' notice, provided sufficient financial compensation was forthcoming. The mother's health can be managed in this jurisdiction and the maternal grandmother visits this jurisdiction. The father has provided detailed information regarding the support he would offer the mother should she return.

The Mother

62. On behalf of the mother, Ms Allman concedes that as at the date of A's departure to Zambia in March 2022, she was habitually resident in England and Wales and that if A was still habitually resident in England and Wales at the time of the application, the courts of England and Wales have jurisdiction to make substantive orders in relation to her.

63. However, the mother submits that at the date of the father's application on 23 June 2022, A was by then habitually resident in the jurisdiction of Zambia. In seeking to make good this submission, Ms Allman places significant emphasis on the *mother's* pre-existing links with Zambia, which she submits would have resulted in A settling in that jurisdiction with greater expedition than might otherwise have been the case. Ms Allman relied on the following matters:

i) After 2017, the mother had no job in England, and her only relative in England was her mother, who later returned to Zambia. The mother's life thereafter became very narrowed around her home and relationship with the father when not in Zambia. The mother spent increasing amounts of time in Zambia, making a home and a business there. The mother had few friends in England, with the majority in Zambia.

ii) Since 2018, the mother rented a home in Zambia for her use while in that country, had bought a car there, and was establishing a business there. The mother had always considered Zambia to be her home where she had continued to maintain longstanding friendships and it is where her immediate family reside.

iii) The mother's connections in Zambia were much closer than her connections in England, to the point that even when pregnant with A in 2020 she wanted to

have A in Zambia and her agreement to return to give birth was on the basis that she would be spending significant periods of time in Zambia.

iv) There was a lack of stability in the mother's own life in the years prior to A's birth, with a difficult relationship between the parents and a number of house moves between 2017 and 2021. It was not until a month or so after A was born that the parents established themselves in the more permanent environment of the family home, which was not a well-established and longstanding home for them.

v) From December 2021 the mother was very unwell. The mother was so unwell that she and A rarely left the house.

vi) There is no evidence before the court of A regularly attending parent and baby activities, family functions or gatherings of parents and children. A's world was based around her parents and her home and her maternal grandmother. A had no developed relationship with the wider paternal family.

vii) Within this context, whilst habitually resident in England and Wales as at March 2022, A's roots were "not deeply embedded" in England, particularly in circumstances where the mother retained strong connections with Zambia.

viii) A went to Zambia in March 2022 with the agreement of both parents and accompanied by them. The father did not withdraw his consent to A being in Zambia until 24 May 2022. During the period in which A was settling in Zambia, she was in that jurisdiction with the father's consent. This supports the acquisition of habitual residence during this period.

ix) On her arrival in March 2022, Zambia was not entirely new to A, she having spent three weeks in that jurisdiction in October 2021.

x) A travelled to Zambia and remained there with two of the three people who were central to her life, namely the mother and the maternal grandmother. This will have assisted her integration into social and family life in Zambia.

xi) Following her arrival in Zambia, A quickly became part of a wider maternal family and local community. In April 2022 A was enrolled in a baby development/social class. The mother employed a nanny. A spent time at weekends with family and friends. Her maternal grandmother was a key part of her life. A's life in Zambia was "immediately much more expanded and less isolated" than her life in England. A had a far greater familial and social integration in Zambia than she had had in England.

xii) When the mother arrived in Zambia with A she already benefited from having a home, a car, furniture and a large amount of clothing and personal effects, in addition to her social and familial network. In the context of the absence of pre-planning raised by the Court of Appeal, A's position must be distinguished from other cases in which no pre-planning has taken place.

xiii) The mother's exploration of a possible move to South Africa does not indicate a lack of stability for A in Zambia in circumstances where residence does not have to be uninterrupted to become habitual.

64. With respect to the father's application under the *parens patriae* jurisdiction based on A's nationality, Ms Allman invites the court to reject what she characterises as an audacious submission in circumstances where the father is the *only* suspect in relation to the sexual assault perpetrated on A, particularly in circumstances where the only reason for which the proceedings against the father in Zambia are currently withdrawn is that he has failed to attend hearings and is outside the country. Ms Allman submits that the father should not be permitted to rely on the *parens patriae* jurisdiction to address a risk of harm that he himself is the alleged perpetrator of, there being no other risk that could justify the invocation of that jurisdiction.

65. If, contrary to her submission, the English court has jurisdiction, Ms Allman submits that, whilst the mother has more confidence in the process and procedure in this jurisdiction and therefore has what Ms Allman characterised as "conflicted feelings" about the issue of forum, the jurisdiction of Zambia is the appropriate forum for the determination of the remaining welfare issues in respect of A for the following reasons:

i) The key welfare issue is the question of whether the father has perpetrated abuse of A. This is an issue which can be explored by the Zambian court as part of any 'custody' application, which is better placed to do so given that all of the primary evidence and witnesses are located in Zambia. Now that the court knows a request has been made via INTERPOL for the arrest of the father with a view to extradition, proceeding in this jurisdiction would risk competing hearings in two jurisdictions on the same issue.

ii) This court is not in a position to be able to conclude definitively that the evidence concerning the allegation of sexual abuse is unreliable.

iii) If there is a need for police disclosure to inform any welfare proceedings in respect of A, the Zambian police and / or the Zambian criminal court will be more likely to respond to a request from the Zambian civil court than from the English High Court. A pending request for extradition may make the Zambian authorities even more reluctant to respond to requests for disclosure. If the father is extradited, further DNA evidence may become available.

iv) The fact finding process would be substantially hindered if that process did not take place in Zambia.

v) Whilst there are questions regarding the manner in which the police investigation has been conducted, there is no evidence to question the propriety of the civil court proceedings. In the judgment in the Zambian court, the Zambian court recognised the importance of the relationship with father and applied welfare principles that are recognisable to this court.

vi) The father has previously engaged in proceedings in Zambia and has at no point disputed jurisdiction in that country, going so far as to seek the enforcement of contact orders made by the civil court in Zambia.

vii) If the father considers that he is unable to travel to Zambia by reason of any ongoing police investigation, he could give evidence to the Zambian civil court by way of video link. If he is detained as the result of an arrest and extradited to Zambia, the father would not be able to participate in proceedings in England.

66. If the court is against the mother as to forum, finally Ms Allman submits that it is not in A's best interests to be returned to the jurisdiction of England and Wales pending the determination of the welfare issues in respect of her.

67. In the context of the mother's intention to seek permission to permanently remove A from the jurisdiction should this court determine it is the appropriate forum, Ms Allman submits that an order requiring A to return to an environment now unfamiliar to her would be premature and would risk disrupting A for no purpose, particularly given the delay that has occurred in this case. In light of the additional evidence provided by the FCDO on 17 November, Ms Allman further submits that the question of whether A should be brought to England and Wales for the purposes of ensuring observed contact by a CAFCASS officer, for example, or to develop her relationship with her father, would be entirely different if extradition to Zambia took place.

68. In this context, Ms Allman submits that any assessments required by Cafcass or other agencies could be undertaken by the mother visiting England. Supervised contact could take place in South Africa. Ms Allman further submits that an order requiring the return of A to the jurisdiction of England and Wales would be premature in circumstances where the court has reached no conclusion on whether the father presents a risk of sexual harm to A. In such circumstances, Ms Allman submits that making a summary return order would be a drastic step to take absent clarity about whether the purpose of taking that step, namely to restore her relationship with her father, is in A's best interests. Ms Allman further submits that the impact on the mother of a return to England, and the concomitant removal of her support networks, would be negative given her physical and mental health issues, in respect of which the court has no assessment, which in turn would impact on the care of A, particularly where the father it is not an option at this time as a carer for A. Finally, Ms Allman submits that the mother will not be able to return to England without financial support from the father, with a package of support that includes accommodation, maintenance, a car, support with childcare, school provision for A and travel expenses.

LAW

69. The analytical pathway to be followed where jurisdiction in respect of a child is in dispute was clearly set out by McFarlane LJ (as then was) in *Re K* [2015] EWCA Civ 352 at [26] onwards:

> "[26] In setting the scene, I should also make the following observation as a matter of law and structure. It is not necessary for me to descend to detail. The legal structure for these issues in an international private family case is plain. The court first determines whether or not the court in England and Wales has jurisdiction. It does so, depending on the countries involved, with or without reference to various international provisions. In a case such as this, which is not one between Member States of the EU, the approach is straightforward. The court decides jurisdiction and decides it with regard to

> the habitual residence of the child at the relevant time. That determination in this case has been made and is not open to review or challenge and was not open to review or challenge at the hearing before Newton J.
>
> [27] It is then possible, if parties wish to do so, for the English court to be invited, despite a finding that it has jurisdiction, to consider the question of convenient forum. The court, if required to do so, approaches that on the well-known basis applicable to civil proceedings generally which is set out in *Spiliada Maritime Corp v Consulex Ltd* [1987] AC 460.
>
> [28] Again, as a matter of structure, the normal approach is for the party asserting that England and Wales is not the convenient forum to apply for the English proceedings to be stayed. The burden is upon the applicant for such a stay to persuade the court, on the principles of *Spiliada* and related cases, that the stay should be granted and that, despite having jurisdiction, England and Wales should cede to another court which is the more convenient forum.
>
> [29] It is established that the welfare of the child is a relevant consideration in determining the question of convenient forum but it is not an issue, that determination, to which the paramount principle in section 1 of the Children Act applies.
>
> [30] The final structural step is that, if jurisdiction is established and if a stay is not imposed because of *forum conveniens* considerations, then the court is free to go on to make more generally based welfare determinations with respect to the child's future."

Jurisdiction

70. The primary connecting factor by reference to which jurisdiction in respect of children is determined, based on the degree of connection between the child and the state in question, is habitual residence, described by Lord Wilson in *Re B (A Child) (Reunite International Child Abduction Centre Intervening)* [2016] AC 606 as "the internationally recognised threshold to the vesting in the courts of that state of jurisdiction to determine issues in relation to him (or her)".

71. There is no statutory definition of habitual residence in domestic law and the concept is not defined in the private international law Conventions concerning children to which the United Kingdom is party. In these circumstances, the concept of habitual residence has been considered in a plethora of appellate authorities. One result of this is that, unfortunately, it can be somewhat challenging to divine precisely what question the court should be asking itself when it is asked to determine the preliminary issue of whether a child is habitually resident in a given jurisdiction. As noted by the Court of Appeal in *Re M (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] 4 WLR 137 at [43], there is a risk that the number of decisions on habitual residence available to be deployed by parties to proceedings distracts from what is a factual enquiry.

72. The need for a straightforward factual enquiry is also reinforced by the need to remember that the determination of habitual residence simply informs the question of

jurisdiction. It is a *preliminary issue*. In this context, it was made clear in *Re B (Minors) (Abduction) (No 1)* [1993] 1 FLR 988 that, in considering the question of habitual residence, it is not necessary for the court to make a searching and microscopic enquiry. In *Re J (A Child) (Finland) (Habitual Residence)* [2017] 2 FCR 542 Black LJ (as she then was) made clear at [62] that:

> "…the court's review of all of the relevant evidence about habitual residence cannot be allowed to become an unworkable obstacle course, through which the judge must pick his or her way by a prescribed route or risk being said to have made an unsustainable finding."

73. What then, is the correct approach to determining habitual residence on the current authorities?

74. In *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening*) [2014] AC 1, the Supreme Court considered the question of whether the English courts could exercise jurisdiction over a child who had never been in England. As at the date the Supreme Court gave judgment in *A v A*, Council Regulation (EC) No 2201/2003 was directly applicable in English law. In considering the concept of habitual residence in *A v A*, Baroness Hale did so in the context of the question of whether jurisdiction in that case was established under Art 8 of Council Regulation (EC) No 2201/2003. Noting at [34] that it was not strictly necessary to decide the point, Baroness Hale held that the concept of habitual residence should be that adopted by the Court of Justice of the European Union for the purposes of the Regulation. Further noting at [45] that, at that time, in the vast majority of cases jurisdiction would be governed by the Regulation, which the courts in the United Kingdom would have to construe in accordance with the guidance given by the Court of Justice of the European Union, Baroness Hale concluded as follows by reference to the decision of the CJEU in *Proceedings brought by A* (Case C-523/07) [2010] Fam 42:

> "[54] Drawing the threads together, therefore:
>
> (i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.
>
> (ii) It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.
>
> (iii) The test adopted by the European court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends on numerous factors, including the reasons for the family's stay in the country in question.
>
> (iv) It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.

> (v) In my view, the test adopted by the European court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from *R v Barnet London Borough Council, Ex p Nilish Shah* [1983] 2 AC 309 should be abandoned when deciding the habitual residence of a child.
>
> (vi) The social and family environment of an infant or young child is shared with those (whether parents or others) on whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.
>
> (vii) The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.
>
> (viii) As the Advocate General pointed out in opinion, para 45 and the court confirmed in judgment, para 43 of *Proceedings brought by A* (Case C-523/07) [2010] Fam 42, it is possible that a child may have no country of habitual residence at a particular point in time."

75. The conclusions of Baroness Hale in *A v A* set out above, and drawn in the context of the EU Regulation then directly applicable in English law, thus made clear that the task of the court when determining the question of habitual residence is to examine the numerous factors specific to the individual case in order to determine whether the "test" (the word repeatedly used in the foregoing passage) of "some degree of integration by the child in a social and family environment" is made out. The approach in *Proceedings brought by A* (Case C-523/07) [2010] Fam 42 of considering the extent to which factors specific to the individual case inform the criterion of "some degree of integration in a social and family environment" is also reflected in the later decision of the CJEU in *Mercredi v Chaffe* (Case C-497/10PPU) [2012] Fam 22 at [49]. In *A v A*, Lord Hughes noted that the CJEU "had emphasised in both cases the importance of examining the *degree* of integration of the child into a social and family environment" (emphasis added).

76. In *Re L (A Child) (Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] 1 AC 1017, the Supreme Court revisited the concept of habitual residence in a case concerned with the consequences of a child being brought to this jurisdiction pursuant to an order made abroad in proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction which is later overturned on appeal. In considering the concept of habitual residence under Art 3 of the 1980 Hague Convention, the Supreme Court again held at [18] that the courts of England and Wales should apply the concept of habitual residence as explained by the CJEU in *Proceedings brought by A* (Case C-523 / 07) [2010] Fam 42 and *Mercredi v Chaffe* (Case C-497 / 10 PPU) [2012] Fam 22. Again emphasising that habitual residence is a question of fact and not a legal concept, and once more having referred at [20] to "the test adopted by both the CJEU and by this court", the Supreme Court again stated the task of the court when determining the question of habitual residence as being to examine the numerous factors specific to the individual case in order to determine whether the requisite *degree* of integration is made out:

> "[26] The mother was coming home. This was where she had lived and worked before her short-lived marriage to the father. This was where she intended to stay. This was where she had a child by another relationship, KWA, now aged two, who lives with her and K. So neither she nor K will have perceived the return here as in any way temporary. From K's point of view, this was where he had lived for some 20 months before his return to the United States in March 2010. This is where he became integrated into a social and family environment during the eleven and a half months in which he lived here before the US Court of Appeals' judgment of 31 July 2012. Against all those powerful factors in favour of the child's integration or acclimatisation, there is only his father's fervent desire, of which K may very well have been aware, that he should return to live in the United States."

77. The Supreme Court again considered the concept of habitual residence in *Re LC (Abduction: Habitual Residence: Inherent Jurisdiction)* [2014] AC 1038. Lord Wilson stated in the opening paragraph of his judgment that "it is clear that the test for determining whether a child was habitually resident in a place is whether there was some degree of integration by her (or him) in a social and family environment there." In that context, at [34] Lord Wilson stated with respect to the approach to determination habitual residence that, "At all events what our courts are now required to do is to search for some integration on the part of the child in a social and family environment in the suggested state of habitual residence." In *Re LC* Baroness Hale articulated the question of fact with respect to habitual residence as being "has the residence of a particular person in a particular place acquired the *necessary degree* of stability to become habitual?" (emphasis added). With respect to integration, Baroness Hale once again emphasised the need for the court to examine the *degree* of integration achieved by the child, observing at [60]:

> "[60] In the case of these three children, as of others, the question is the quality of their residence, in which all sorts of factors may be relevant. Some of these are objective: how long were they there, what were their living conditions while there, were they at school or at work, and so on? But subjective factors are also relevant: what was the reason for their being there, and what were their perceptions about being there? I agree with Lord Wilson JSC (para 37) that "wishes", "views", "intentions" and "decisions" are not the right words, whether we are considering the habitual residence of a child or indeed an adult. It is better to think in terms of the reasons why a person is in a particular place and his or her perception of the situation while there—their state of mind. All of these factors feed into the essential question, which is whether the child has achieved a sufficient degree of integration into a social and family environment in the country in question for his or her residence there to be termed "habitual".

78. The subject of habitual residence was further considered by the Supreme Court in *Re R (Children)* [2016] AC 76, a case concerning Art 3 of the 1980 Hague Convention. The Supreme Court reiterated that, for the purposes of applying the 1980 Hague Convention and Council Regulation (EC) 2201/2003, habitual residence was to be determined in accordance with the guidance given by the court in *A v A* and *Re L (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC

1038, which guidance was consistent with the guidance given by the CJEU in *Proceedings brought by A, Mercredi v Chaffe* and C v M (Case C-376/14PPU) [2015] Fam 116. The court observed that the essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce. In this context, the Supreme Court again highlighted the need to examine the *degree* of integration:

> "[17] As Baroness Hale DPSC observed at para 54 of *A v A*, habitual residence is therefore a question of fact. It requires an evaluation of all relevant circumstances. It focuses on the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It is necessary to assess the degree of integration of the child into a social and family environment in the country in question."

79. Thus in *Re R (Children)* the Supreme Court again confirmed that the task of the court when determining the question of habitual residence is to examine the numerous factors specific to the individual case in order to assess the *degree* of integration by the child in a social and family environment was made out on the evidence. In *Re R (Children)* Lord Reed further made clear, as had Baroness Hale in *Re LC (Abduction: Habitual Residence: Inherent Jurisdiction)*, that a relevant factor when analysing the nature and quality of the residence is its "stability".

80. Finally with respect to this line of authority, the Supreme Court considered the concept of habitual residence for a fifth time in *Re B (A Child) (Reunite International Child Abduction Centre Intervening)* in a case concerning the question of whether a British Citizen child who had been removed from the United Kingdom to Pakistan by the only person who had parental responsibility for her had *lost* her habitual residence in England and Wales. Having considered the decisions of the CJEU in *Proceedings brough by A* and *Mercredi v Chaffe*, and the earlier decision of the Supreme Court in *A v A*, Lord Wilson stated as follows:

> "[38] In *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] AC 1, this court held that the criterion articulated in the two European authorities ("some degree of integration by the child in a social and family environment"), together with the non-exhaustive identification of considerations there held to be relevant to it, governed the concept of habitual residence in the law of England and Wales: para 54(iii)(v) of Baroness Hale of Richmond DPSC's judgment, with which all the members of the court (including Lord Hughes JSC, at para 81) agreed. Baroness Hale DPSC said at para 54(v) that the European approach was preferable to the earlier English approach because it was "focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors".
>
> [39] It is worthwhile to note that the new criterion requires not the child's full integration in the environment of the new state but only a degree of it. It is clear that in certain circumstances the requisite degree of integration can occur quickly. For example article 9 of Regulation B2R, the detail of which is irrelevant, expressly envisages a child's acquisition of a fresh habitual residence within three months of his move. In the *J* case, cited above, Lord Brandon suggested that the passage of an "appreciable" period of the time

> was required before a fresh habitual residence could be acquired. In *Marinos v Marinos* [2007] 2 FLR 1018, para 31, Munby J doubted whether Lord Brandon's suggestion was consonant with the modern European law; and it must now be regarded as too absolute. In *A v A*, cited above, at para 44, Baroness Hale DPSC declined to accept that it was impossible to become habitually resident in a single day."

81. Thus, once again, in *Re B (A Child) (Reunite International Child Abduction Centre Intervening)* the Supreme Court confirmed that the task of the court charged with determining the question of habitual residence is to examine all the circumstances specific to the individual case in order to assess the *degree* of integration by the child in a social and family environment.

82. The Court of Appeal has subsequently reiterated the approach set out in the foregoing decisions of the Supreme Court. In *Re J (A Child)(Finland) (Habitual Residence)*, having surveyed the Supreme Court authorities, Black LJ (as she then was) held that:

> "[27] The message from these cases is that the European formulation of the test, to be found in *Proceedings brought by A* Case C-523/07, [2010] Fam 42, is the correct one and accordingly "the concept of habitual residence …. must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment". The position can be found set out, for example, in the passage in Baroness Hale's judgment in *A v A* (supra) commencing at [45], where she dealt with *Proceedings brought by A* and also with the additional observations made in *Mercredi v Chaffe* (Case C-497/10PPU) [2012] Fam 22) about the relevance of the child's age and the need for "stabilité". What is also very clear is that the identification of a child's habitual residence is a question of fact and that "glosses" or "sub-rules" about it should be avoided."

83. In *Re M (Habitual Residence: 1980 Hague Child Abduction Convention)*, Moylan LJ again undertook a review of the Supreme Court decisions set out above and, concluding that the task of the court is to conduct an analysis of the child's situation in, and connections with, the state or states in which he or she is said to be habitually resident for the purpose of determining in which state he or she has the requisite degree of integration to mean that their residence there is habitual, observed follows:

> "[47] Accordingly, as summarised by Lord Wilson JSC in *In re LC*, at para 1, "it is clear that the test for determining whether a child was habitually resident in a place is whether there was some degree of integration by her (or him) in a social and family environment there.
>
> [48] What is meant by "some degree" of integration? As Lord Wilson JSC said in *In re B* [2016] AC 606, at para 39, there does not have to be "full integration in the environment of the new state … only a degree of it". He also said: "It is clear that in certain circumstances the requisite degree of integration can occur quickly". In *In re LC*, Lady Hale DPSC, at para 60, referred to the "essential question" as being "whether the child has achieved a sufficient degree of integration into a social and family environment in the country in question for his or her residence there to be termed 'habitual'".

> [49] As referred to above, another relevant factor when analysing the nature and quality of the residence is its "stability". This can be seen from *In re R* [2016] AC 76 in which Lord Reed JSC referred to both the degree of integration and the stability of the residence…"

84. In this case, when the matter came before the Court of Appeal pursuant to the father's appeal, Moylan LJ observed as follows at [42] having referred to the authorities set out above with respect to the concept of "some degree of integration by the child in a social and family environment":

> "It is clear, however, not only from *Proceedings brought by A* itself but also from many other authorities, that this is a shorthand summary of the approach which the court should take and that "some degree of integration" is not itself determinative of the question of habitual residence. Habitual residence is an issue of fact which requires consideration of all relevant factors. There is an open-ended, not a closed, list of potentially relevant factors."

And as follows at [46]:

> "I would add that, self-evidently, a test of whether a child had "some degree of integration" in any one country cannot be sufficient when a child might be said to have some degree of integration in more than one State. This is why, as referred to in my judgment in *Re G-E (Children) (Hague Convention 1980: Repudiatory Retention and Habitual Residence)* [2019] 2 FLR 17 ("Re G-E"), at [59], the "comparative nature of the exercise" requires the court to consider the factors which connect the child to each State where they are alleged to be habitually resident. This is reflected in Mr Tyler's written submissions when he referred to the relevance of a child's "degree of connection" with the State in which he/she resided before they arrived in the new State."

85. Placed in the context of the long line of prior decisions of the Supreme Court and the Court of Appeal, I do not read the judgment of Moylan LJ as in any way changing the fundamental position set out in those prior authorities.

86. Each of the decisions summarised above makes clear the importance of the court examining the *degree* of integration of the child into a social and family environment when determining habitual residence. The judgment of the Court of Appeal in this case simply recognises that although, in circumstances where full integration is not required, some degree of integration can establish habitual residence, it must still be demonstrated to the satisfaction of the court that the degree of integration contended for in the given case is *sufficient* to reach that conclusion. In short, "some degree of integration" must still be demonstrated to be sufficient integration if it is to establish habitual residence. Determining whether that is the position requires a global analysis of all of the relevant circumstances specific to the individual case.

87. Where then does this plethora of authority on the concept of habitual residence leave the busy judge who is required to determine the preliminary issue of jurisdiction, without that determination "becoming an unworkable obstacle course, through which the judge must pick his or her way by a prescribed route or risk being said to have

made an unsustainable finding?" Reading the foregoing authorities together, it is tolerably clear that the task of determining habitual residence falls to be discharged by the court asking itself whether, having regard to all the relevant circumstances and as a matter of fact, the subject child has achieved a degree of integration in a social and family environment in the country in question sufficient for the child to be habitually resident there. That is the test I have adopted in this case.

88. The authorities further make clear that in deciding in a given case whether the degree of integration is sufficient to establish habitual residence, i.e. whether the "some" is enough, certain matters may inform the court's global analysis of the child's situation in, and connections with, the state in which he or she is said to be habitually resident for the purpose of determining whether a sufficient degree of integration exists. These non-exhaustive considerations, to paraphrase Lord Wilson in *Re B (A Child) (Reunite International Child Abduction Centre Intervening)*, may include the following:

i) The factual inquiry is centred throughout on the circumstances of the child's life that are most likely to illuminate his or her habitual residence. It is the child's habitual residence which is in question and the child's integration which is under consideration.

ii) The meaning of habitual residence is shaped in the light of the best interests of the child, in particular on the criterion of proximity. Proximity in this context means the practical connection between the child and the country concerned.

iii) It is not necessary for a child to be fully integrated in a social and family environment before becoming habitually resident.

iv) The requisite degree of integration can, in certain circumstances, develop quite quickly. It is possible to acquire a new habitual residence in a single day. There is no requirement that the child should have been resident in the country in question for a particular period of time.

v) It is the stability of a child's residence as opposed to its permanence which is relevant. This is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there.

vi) Relevant matters can include the duration, regularity and conditions for the stay in the country in question; the reasons for the parents move to and the stay in the jurisdiction in question; the child's nationality; the place and conditions of attendance at school; the child's linguistic knowledge; the family and social relationships the child has; whether possessions were brought; whether there is a right of abode; and whether there are durable ties with the country of residence or intended residence.

vii) Where there are competing jurisdictions advanced as the child's habitual residence, the comparative nature of the exercise requires the court to consider the factors which connect the child to each State where they are alleged to be habitually resident.

viii) Where there are competing jurisdictions advanced as the child's habitual residence, the circumstances of the child's life in the country he or she has left as well as the circumstances of his or her life in the new country will be relevant. What is important is that the court demonstrates sufficiently that it has in mind the factors in the old and new lives of the child, and the family, which might have a bearing on the subject child's habitual residence.

ix) The deeper the child's integration in the old state, probably the less fast his or her achievement of the requisite degree of integration in the new state. Likewise, the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his or her achievement of that requisite degree.

x) In circumstances where all of the central members of the child's life in the old state to have moved with him or her, probably the faster his or her achievement of habitual residence. Conversely, where any of the central family members have remained behind and thus represent for the child a continuing link with the old state, probably the less fast his or her achievement of habitual residence.

xi) In circumstances where the social and family environment of an infant or young child is shared with those on whom he or she is dependent, it is necessary to assess the integration of that person or persons (usually the parent or parents) in the social and family environment of the country concerned. In respect of a pre-school child, the circumstances to be considered will include the geographic and family origins of the parents who effected the move.

xii) A child will usually, but not necessarily, have the same habitual residence as the parent(s) who care for her. The younger the child the more likely that proposition but this is not to eclipse the fact that the investigation is child focused.

xiii) Parental intention is relevant to the assessment, but not determinative. There is no requirement that there be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely. Parental intent is only one factor, along with all other relevant factors, that must be taken into account when determining the issue of habitual residence. It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent.

89. Finally with respect to jurisdiction, giving judgment in this case in the Court of Appeal, and having considered the jurisdictional framework applicable in this case, Moylan LJ stated as follows at [68] regarding what will be the consequence of the court's decision on habitual residence in this case:

> "In summary, the courts of England and Wales would have jurisdiction if A was habitually resident here at the date of the father's application, even if the father is wrong as to the relevant date for the purposes of article 5 and even if A became habitually resident in Zambia by the date of the final hearing. This is because, pursuant to the provisions of the FLA 1986, the date for determining this court's jurisdiction would be based on A's

> habitual residence at the date of the application. Further, I would just mention that the courts of England and Wales would have (on the mother's case) and retain (on the father's case) jurisdiction if A remained habitually resident here at the date of the final hearing."

90. In their Skeleton Argument, Mr Devereux and Professor George submit that whilst pursuant to s. 3(1)(a) the court has jurisdiction under the Family Law Act 1986 if, on the relevant date, the child is habitually resident in England and Wales, there is "some ambiguity" in the definition of relevant date provided by s.7(c) of the 1986 Act. Mr Devereux and Professor George submit that the definition of relevant date provided by s.7(c) of the Act, namely "the date of the application (or first application, if two or more are determined together)", plainly refers to the date entered on the application form and not the date of issue. The point is said to be of some relevance in this case as, whilst the father's application bears the date 23 June 2022 and was lodged with the court office on that date, due to an administrative oversight in the court office the application was not issued until 6 July 2022. In circumstances where I am satisfied that that delay of some 13 days does not affect the court's conclusions in this case, it is not necessary for me to determine that legal issue.

91. Finally, in light of the conclusion I have reached in respect of habitual residence, it is not necessary for me to set out the law concerning the *parens patriae* jurisdiction of the High Court.

Forum

92. Where, as in this case, there is no operative international Convention governing the question of forum (for example, Arts 8 and 9 of the 1996 Hague Convention) the issue of *forum conveniens* falls to be determined in this case by reference to the principles set out in the case of *Spiliada Maritime Corporation v Consulex* [1997] AC 460. These principles are as follows:

    i) It is upon the party seeking a stay of the English proceedings to establish that it is appropriate.

    ii) A stay will only be granted where the court is satisfied that there is some other forum available where the case may be more suitably tried for the interests of all parties and the ends of justice. Thus the party seeking a stay must show not only that England is not the natural and appropriate forum but that there is another available forum that is clearly and distinctly more appropriate.

    iii) The court must first consider what is the 'natural forum', namely that place with which the case has the most real and substantial connection. Connecting factors will include not only matters of convenience and expense but also factors such as the relevant law governing the proceedings and the places where the parties reside.

    iv) If the court concludes having regard to the foregoing matters that another forum is more suitable than England it should normally grant a stay unless the other party can show that there are circumstances by reason of which justice requires that a stay should nevertheless be refused. In determining this, the

> court will consider all the circumstances of the case, including those which go beyond those taken into account when considering connecting factors.

93. In determining the appropriate forum in cases concerning children using the principles in *Spiliada Maritime Corporation v Consulex*, the child's best interests would not appear to be paramount, but rather an important consideration (whilst in *H v H (Minors)(Forum Conveniens)(Nos 1 and 2)* [1993] 1 FLR 958 at 972 Waite J (as he then was) held that the child's interests were paramount, subsequent decisions have treated those interests as an important consideration (see *Re S (Residence Order: Forum Conveniens)* [1995] 1 FLR 314 at 325, *Re v (Forum Conveniens)* [2005] 1 FLR 718 and *Re K* [2015] EWCA Civ 352).

94. The starting point when determining whether the party seeking the stay has established that England is not the appropriate forum for a case concerning a child is that the court with the pre-eminent claim to jurisdiction is the place where the child habitually resides (although habitual residence will not be a conclusive factor). In *Re M (Jurisdiction: Forum Conveniens)* [1995] 2 FLR 224 at 225G Waite LJ observed as follows:

> "There is no limit, in legal theory, to the jurisdiction of the court in England to act in the interests of any child who happens to be within the jurisdiction for whatever purpose and for however short a time. In practice, however, if the child is not habitually resident in this country and there are legal procedures in the country of habitual residence available to achieve a fair hearing of competing parental claims regarding the child's upbringing, the English court will decline jurisdiction, except for the purpose of making whatever orders are necessary to ensure a speedy and peaceful return of the child to the country of habitual residence. The practice thus is to follow the spirit of the Convention, even though its formal terms are inapplicable."

Welfare

95. With respect to the question of welfare, if this court has jurisdiction in respect of A, and if the court concludes that this jurisdiction is the appropriate forum for the determination of A's welfare, the primary welfare issue to be determined at this stage is whether A should be returned to the jurisdiction of England and Wales. With respect to the question of whether it is in A's best interests to be returned to this jurisdiction, the following legal principles apply.

96. The question of return turns on welfare. A's best interests are the court's paramount consideration. In *Re J (Child Returned Abroad: Convention Rights)* [2006] 1 AC 80 the House of Lords made clear that:

> "[22] There is no warrant, either in statute or authority, for the principles of The Hague Convention to be extended to countries which are not parties to it. Section 1(1) of the 1989 Act, like section 1 of the Guardianship of Infants Act before it, is of general application. This is so even in a case where a friendly foreign state has made orders about the child's future."

And in this context:

> "[30] Nevertheless, it was urged upon us by Mr Setright QC, for the father, that there should be 'a strong presumption' that it is 'highly likely' to be in the best interests of a child subject to unauthorised removal or retention to be returned to his country of habitual residence so that any issues which remain can be decided in the courts there. He argued that this would not mean the application of the Hague Convention principles by analogy, but the results in most cases would be the same.
>
> [31] That approach is open to a number of objections. It would come so close to applying the Hague Convention principles by analogy that it would be indistinguishable from it in practice. It relies upon the Hague Convention concepts of 'habitual residence', 'unauthorised removal', and 'retention'; it then gives no indication of the sort of circumstances in which this 'strong presumption' might be rebutted; but at times Mr Setright appeared to be arguing for the same sort of serious risk to the child which might qualify as a defence under article 13(b) of the Convention. All of these concepts have their difficulties, even in Convention cases…There is no warrant for introducing similar technicalities into the 'swift, realistic and unsentimental assessment of the best interests of the child' in non-Convention cases. Nor is such a presumption capable of taking into account the huge variety of circumstances in which these cases can arise, many of them very far removed from the public perception of kidnapping or abduction.
>
> [32] The most one can say, in my view, is that the judge may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that proposition will vary enormously from case to case. What may be best for him in the long run may be different from what will be best for him in the short run. It should not be assumed, in this or any other case, that allowing a child to remain here while his future is decided here inevitably means that he will remain here for ever."

97. In *In re J (A Child) (Custody Rights: Jurisdiction)* [2006] 1 AC 80 Baroness Hale further observed that:

> "It is plain, therefore, that there is always a choice to be made. Summary return should not be the automatic reaction to any and every unauthorised taking or keeping a child from his home country. On the other hand, summary return may very well be in the best interests of the individual child."

98. In *Re NY (A Child)* [2019] UKSC 49 Lord Wilson considered that when evaluating the question of welfare in an application under the inherent jurisdiction the court is likely to find it appropriate to consider the first six items in the section 1(3) Children Act 'welfare checklist':

> "[47] Where an application for the same order can be made in two different proceedings and falls to be determined by reference to the same overarching principle of the child's welfare, it would be wrong for the substantive

> inquiry to be conducted in a significantly different way in each of the proceedings.
>
> [48] Of course, when in each of the proceedings it is considering whether to make a summary order, the court will initially examine whether the child's welfare requires it to conduct the extensive inquiry into certain matters which it would ordinarily conduct. Again, however, it would be wrong for that initial decision to be reached in a significantly different way in each of them.
>
> [49] The mother refers to the list of seven specific aspects of a child's welfare, known as the welfare check-list, to which a court is required by section 1(3) of the 1989 Act to have particular regard. She points out, however, that, by subsections (3) and (4), the check-list expressly applies only to the making of certain orders under the 1989 Act, including a specific issue order, as is confirmed by the seventh specific aspect, namely the range of powers under that Act . The first six specified aspects of a child's welfare are therefore not expressly applicable to the making of an order under the inherent jurisdiction. But their utility in any analysis of a child's welfare has been recognised for nearly 30 years. In its determination of an application under the inherent jurisdiction governed by consideration of a child's welfare, the court is likely to find it appropriate to consider the first six aspects of welfare specified in section 1(3) (see *In re S (A Child) (Abduction: Hearing the Child)* [2014] EWCA Civ 1557, [2015] Fam 263, at para 22 (iv), Ryder LJ); and, if it is considering whether to make a summary order, it will initially examine whether, in order sufficiently to identify what the child's welfare requires, it should conduct an inquiry into any or all of those aspects and, if so, how extensive that inquiry should be."

99. In *A (Children)(Summary Return: Non-Convention State)* [2023] 1 FLR 1229, the Court of Appeal reiterated that *In re J (A Child) (Custody Rights: Jurisdiction)* and *Re NY (A Child)* articulate the principles to be applied when deciding whether it is in a child's best interests to be returned from a non-Convention State. In *A (Children)(Summary Return: Non-Convention State)* Moylan LJ drew the following distinction between proceedings for a return order under the 1980 Hague Convention and proceedings for a return order under the inherent jurisdiction:

> "[3] The expression which is often used, and was the order sought by the father in his application, is a summary return order. In the context of the present case, that is, in fact, shorthand for a return order made after a summary welfare determination. This is relevant because a summary return order more accurately defines an order made under the provisions of the 1980 Convention. It is also important because the exercise in which the court is engaged when the court is determining an application for a return order under the inherent jurisdiction or the Children Act 1989 ("the CA 1989 ") is not the same as when the court is determining an application for the return of a child under the 1980 Convention. However, in this judgment, I will continue to use the expressions "summary return" and "summary return order" but I do so in the terms explained above."

100. Within this context, and having made clear that a judge has a discretion when deciding the extent of any welfare inquiry, Moylan LJ held as follows with respect to the nature and extent of the summary welfare assessment involved in an application for a return order under the inherent jurisdiction:

> "[71] In my view, there is no need for further guidance because *Re J* and *Re NY* contain the relevant, and sufficient, guidance to the court for the purposes of determining an application for the return of a child to a non-Convention State. It is a welfare determination in respect of which an array of factors will be relevant and which the court must balance when determining what order to make. As Lord Wilson said in Re NY , part of that exercise will include the court determining, in respect of all relevant matters, but in particular in respect of the matters set out in section 1(3) of the CA 1989 and any allegations of domestic abuse, whether, in order sufficiently to identify what the child's welfare requires, the court should conduct an inquiry into any or all of those matters and, if so, how extensive that inquiry should be."

101. Finally, and as I have noted, the further information provided by the FCDO on 17 November 2023 suggests that the extradition of the father to Zambia may be sought. However, such a situation does not necessarily prevent the proper determination of the application for a return order. For example, in *Re P (A Child)(Abduction: Inherent Jurisdiction)* [2022] 1 FLR 737 at [45] the Court of Appeal declined to criticise the court for proceeding to determine the application for return order in the absence of knowledge of the outcome of pending extradition proceedings, in circumstances where that case had already been subject to considerable delay.

DISCUSSION

102. I am satisfied, having regard to the evidence and submissions in this case that, as at the date of the father's application, A was habitually resident in the jurisdiction of England and Wales. In the circumstances, this court has jurisdiction in respect of A for the reasons explained by the Court of Appeal. As I made clear at the outset, in the circumstances of this case the questions of forum and return have no wholly satisfactory solutions. However, on balance, I am further satisfied that England and Wales is the more appropriate forum for the determination of issues concerning A's welfare and that it is in A's best interests to order her return to the jurisdiction of England and Wales whilst the court determines the welfare dispute between the parties. My reasons for so deciding are as follows.

Jurisdiction

103. The mother concedes that as at the date A left England on 8 March 2022, she was habitually resident in this jurisdiction. In the circumstances, and having regard to the exposition of the law set out above, the question for the court is whether, having regard to all the relevant circumstances and as a matter of fact, A had achieved by 23 June 2022 a degree of integration in a social and family environment in Zambia sufficient for her to be habitually resident there. When the matter was before the Court of Appeal, Moylan LJ observed at [73] as follows with respect to the question of habitual residence in this case:

> "Having regard to the circumstances of this case and bearing in mind the matters referred to by Lord Wilson in *Re B*, it seems to me that, on paper, the case that [A] was habitually resident in England and Wales at the date of the application is a strong one. [A] had been retained by the mother in Zambia at or about the end of March 2022, with no pre-planning at all and with all her paternal family and her primary home throughout her life remaining in England. The mother's intentions as to where she planned to live were, at least, open to question. However, I consider Mr Devereux was right to accept that the issue of habitual residence should be reheard. The parties had given oral evidence on that issue at the hearing before the judge and it would difficult to exclude the prospect of a judge at a rehearing deciding to hear short, focused, evidence again."

104. In the circumstances, I have reached my own decision on the question of habitual residence on the basis of the evidence before Arbuthnot J, the court having the benefit of transcripts of the oral evidence given by the parties at the hearing before Arbuthnot J, and the additional oral evidence and submissions that I have heard. The parties, helpfully, agreed a schedule of findings made by Arbuthnot J, which findings were not the subject of the appeal. In respect of the Schedule, four findings were the subject of dispute between the parties as to their status at this hearing in circumstances where Mr Devereux and Professor George submitted that those findings were based on what the Court of Appeal found was the erroneous approach of Arbuthnot J to the test for habitual residence. In any event, and for the avoidance of doubt, in circumstances where this matter was remitted for re-hearing of the issue of habitual residence I make clear that I have reached my own conclusions on the facts that inform that question.

105. In deciding whether, as a matter of fact, A can be said to have achieved by 23 June 2022 a sufficient degree of stability and integration into a social and family environment in Zambia to be habitually resident there, the inquiry of this court must be centred throughout on the elements of A's life that are most likely to illuminate her habitual residence. It is A's habitual residence that is in question and A's degree of integration that is under consideration. In circumstances where the court is faced on the question of habitual residence with competing jurisdictions, I am satisfied that the following matters lead to the conclusion that A remained habitually resident in England and Wales as at the date of the father's application.

106. A's habitual residence will be shaped in light of her practical connections. A is a British citizen. At the time she went to Zambia on 8 March 2022, she had lived her whole life in this jurisdiction. As at that date A's family home was in this jurisdiction and it was in this jurisdiction that she was where she was registered for medical care. Both her mother and her father had substantial connections with this jurisdiction. The father is a British citizen and has always lived in this jurisdiction. Whilst the mother sought to portray otherwise, I am satisfied that the mother also had very substantial connections with this jurisdiction, having lived here for some 20 years, first with her mother, who is a British citizen, and then as an adult. Whilst Ms Allman attempted to present the mother as a vulnerable young woman who lived a peripatetic existence in a foreign country both before and after she met the father, I am satisfied that the evidence does not support that characterisation.

107. At the time A went to Zambia on 8 March 2022, the mother and father jointly owned a property that the mother conceded had been renovated, largely by her, for the purposes of creating a family home and in which all of A's belongings, and a substantial proportion of the mother's belongings were located. As at 8 March 2022 all of A's paternal family, and her maternal grandmother, resided in this jurisdiction. Prior to the departure for Zambia, on the mother's own evidence, the father had been significantly involved in the care of A, being "hands on" when the mother was ill, assisted by the maternal grandmother. I am satisfied that he was also involved with A's care prior to that period.

108. In the foregoing circumstances, whilst I acknowledge that the *mother* had spent significant time in Zambia prior to March 2022, from A's perspective I am satisfied that she was firmly rooted in this jurisdiction at the time she was taken to Zambia. Her experience to that point was of being in the family home in England, of being parented by both parents in this jurisdiction and of having the company of her maternal grandmother and, on occasion, of her extended paternal family in this jurisdiction.

109. By contrast, at the point of departure, A had no experience of Zambia beyond one short visit when very young and she was not familiar with that jurisdiction. She had not had any experience of Zambia as a home and, beyond one visit to a GP, no practical connections to that jurisdiction as at March 2022. Once again, whilst I accept that the mother had much more extensive connections with the jurisdiction of Zambia, given A's very young age those connections would not have been understood in any meaningful sense by *A* prior to the departure to Zambia. A was not of an age where, for example, she was able to conceptualise what the mother's, property, business links or friendships in Zambia meant for her own relationship to that jurisdiction. Whilst I also accept that the mother had property in Zambia, it was almost entirely unknown to A and had never been her home. There is no evidence that it was equipped prior to her arrival to accommodate A's arrival. In those circumstances, I am not able to accept the submission that A already benefited from a home when she arrived, save in the most practical sense, when compared to position in England.

110. With respect to the intention of the parents upon their departure on 8 March 2022, I am satisfied that all of the evidence before the court points to the plan of the mother when the family departed for Zambia being a short trip, lasting two or three weeks. The family travelled on return tickets booked by the mother; this included the maternal grandmother, who was involved in caring for A in England and also travelled on a return ticket. The mother informed the father of her proposed return date and the maternal grandmother had a return date of 31 March 2022. Prior to departure the mother told no one that she was moving, or intended to move, permanently to Zambia with A. All of the mother's and A's belongings in England remained in this jurisdiction. No attempt was made by the mother to extricate herself or A from their practical arrangements in England. There is no evidence before the court that, prior to the family's departure, the mother made arrangements in Zambia to indicate she intended to remain there permanently with A. The text messages between the parents denote a clear expectation on the part of the father that the mother would return to the jurisdiction with A. I am satisfied that on departing from England, the mother intended to return to the jurisdiction with A.

111. I am satisfied that at no point prior to departure did the father agree to the mother relocating permanently to Zambia with A, nor did he submit to that course subsequent to the parties' arrival in Zambia. Again, the text messages between the parents denote a continiuing expectation on the part of the father that he expected the mother to return with A. Whilst the evidence does demonstrate that the father submitted to extensions to the mother's stay in Zambia with A, in the context of the fact that the duration of the mother's previous trips to Zambia had been flexible, and where she had previously returned A, I am satisfied that the father's conduct does not evidence an intention to submit to A remaining in Zambia. In the context of the mother's prior conduct, the father cannot be criticised for taking time to realise that, contrary to what I am satisfied was her intention at the date of departure, the mother did not intend to return. Likewise, the fact that the father was required to discuss contact with A is not evidence an intention to submit to A remaining in Zambia.

112. Within the foregoing context, and in contrast to the work done to create a home for A in England, the evidence in this case demonstrates that there was no pre-planning by the mother for A's arrangements in Zambia prior to the departure on 8 March 2022. I acknowledge that the *mother* had established arrangements in Zambia borne of her regular trips to that jurisdiction. However, in the context of what I am satisfied was the mother's intention to return with A to the jurisdiction of England and Wales within three weeks, the mother made no prior arrangements for A's medical care or education in Zambia or the transport of her belongings to that jurisdiction. The mother likewise engaged in no discussions with the father prior to departure about his future contact with A.

113. On the mother's own evidence, and indeed to use the mother's own term, I am further satisfied that once she and A were in Zambia they continued to be in "a state of flux". The mother's evidence before Arbuthnot J, and confirmed to this court, demonstrates that even when it became apparent that the mother did not intend to return with A to this jurisdiction, the mother did not have a settled intention to remain in the jurisdiction of Zambia with A. Ms Allman rightly reminds the court that, in determining habitual residence, there is no requirement that there be an intention to reside in the country in question permanently or indefinitely. However, there is a difference between intending to be in a place and then spending time away from that place, and not being certain as to in which place you intend to be. Within this context, I am satisfied that in the months leading up to father's application, there was a lack of clarity as to what the future held for the mother and A in terms of *which* jurisdiction they would settle in and, therefore, whether their presence in Zambia would be short or long term.

114. I am further satisfied that following the return of the father to England, the mother failed to promote contact between A and her father, notwithstanding the efforts made by the father to maintain contact with A. As I have already referred to, during her oral evidence the mother appeared to have given almost no thought to the impact this course of action would have had on A, who went from living with her father to having no contact with him in the space of a little over two weeks. The mother presented as having almost no insight into A's emotional needs in this context. Given A's age at the time, even had the mother thought to explain to A the position, it would have been difficult to assist A to understand the sudden and, from her perspective, almost complete absence of her father from her life. I am satisfied on the evidence before

the court that A was having no meaningful contact with her father for nine weeks following a single online contact on 8 April 2022, the mother having prevented all contact following the father's return to England.

115. In my judgment, the foregoing matters provide the prism through which the stability of A's life in Zambia between her arrival on 8 March 2022 and the date of the father's application on 23 June 2022 falls to be examined.

116. I accept that, in circumstances where the social and family environment of young child is shared with those on whom she is dependent, it is necessary to assess the integration of the mother in the social and family environment of Zambia, including her geographic and family origins as the parent who effected A's move. Within this context, it is plain that the mother was well integrated into her social and family environment in Zambia. She had strong links to that jurisdiction, a property in the jurisdiction and an, albeit non-trading, business. She also had extended family in the jurisdiction, in which her own mother was then present. Within this context, I accept that the mother's integration in Zambia would have assisted A in integrating in a social and family environment. The evidence demonstrates that in the care of her mother A was spending time with her extended maternal family, making friends and experiencing life in Zambia.

117. Against this however, for the reasons I have already described, the starting point for A was she was firmly rooted in this jurisdiction at the time she was taken to Zambia, with no substantial prior links herself to that jurisdiction. Further, and in that context, I am not satisfied that the position of A in Zambia between her arrival on 8 March 2022 and the date of the father's application on 23 June 2022 was characterised by stability.

118. Within the context of the findings I have made above, A remaining in Zambia was contrary to the mother's original intention and to the father's wishes, her position in Zambia was the subject of no prior planning by the mother, on the mother's own case the future was in a state of "flux" with respect to which jurisdiction they would settle in, and therefore whether their presence in Zambia would be short or long term, and A had suddenly and unilaterally been deprived of contact with her father, who remained in the jurisdiction that was A's habitual residence prior to the departure to Zambia. I am satisfied that all these matters would have acted to significantly undermine A's stability in Zambia and would have impacted on the speed at which, from the position of being firmly rooted in the jurisdiction of England and Wales, she became integrated into a social and family environment in Zambia.

119. Having regard to the matters set out above, whilst I accept that by 23 June 2022 A would have achieved some degree of integration in a social and family environment in Zambia, in all the circumstances I am satisfied that that degree of integration was not sufficient to result in A being habitually resident in that jurisdiction on that date. Albeit not expressly, the mother appeared to go some way in recognising this by her email to the father in August 2022 setting out her proposals for her and A moving forward. Whilst the mother now contends that A was quickly and completely integrated in a family and social environment following her arrival in Zambia, in August 2022 the mother was prepared to move A back to England on a mere 14 days' notice.

120. In light of the conclusion I have reached in respect of habitual residence, it is not necessary for me to address the parties submissions concerning the *parens patriae* jurisdiction of the High Court. Having regard to my conclusion in respect of habitual residence, I am satisfied that this court has jurisdiction in respect of A for the reasons set out in the judgment of the Court of Appeal.

Forum

121. As her case was originally presented, the mother did not seek to argue that, if the court concluded that it had jurisdiction with respect to A based on her habitual residence at the relevant date, the court should a stay these proceedings on the basis that Zambia is the more convenient forum. During the course of oral submissions on the point, Ms Allman made clear that the mother has "conflicted feelings" on the issue of forum and would have "more confidence" in the process in this jurisdiction. Ultimately, however, Ms Allman argued that the court should find that Zambia is the more appropriate forum and grant a stay. The burden lies on the mother to demonstrate that Zambia is clearly and distinctly the more convenient forum for the determination of question of A's welfare, being the jurisdiction where the question can be more suitably tried for the interests of all parties and the ends of justice. I am not satisfied that the mother has discharged that burden.

122. As a starting point, I am satisfied that the jurisdiction of England and Wales remains the 'natural forum' for the determination, being the place with which this case has the most real and substantial connection. A is a British citizen and prior to 8 March 2022 she had lived her whole life in this jurisdiction. As I have found, it was not intended that A would remain in the jurisdiction of Zambia following the short trip planned in March 2022. That position only changed in the circumstances I have set out above.

123. The principle that the court with the pre-eminent claim to jurisdiction is the place where the child habitually resides necessarily attracts less weight in this case given the impact of the severe delay that has beset these proceedings. However, whilst unsatisfactory, I am satisfied that the fact this court retains jurisdiction in respect of A nonetheless acts to reinforce the conclusion that the jurisdiction of England and Wales is the natural forum in this case. The parent seeking relief with respect to the question of A's welfare brought proceedings in this jurisdiction only a month after he concluded that the mother would not be returning A. Those proceedings have continued in this jurisdiction since that date, and have resulted in extensive evidence being assembled in this jurisdiction.

124. By contrast, there are currently no proceedings on foot in Zambia on the question of A's welfare. In the circumstances, the only court currently engaged with matters relating to A's welfare is the court in England and Wales. Further, the mother confirmed in evidence that she intends to issue *further* proceedings in this jurisdiction under Schedule 1 of the Children Act 1989, for financial relief in respect of A, and the Trust of Land and Appointment of Trustees Act 1996, for relief in relation to the family home. I am satisfied that this further reinforces the conclusion that the jurisdiction of England and Wales is the natural forum.

125. Whilst A's best interests are not a paramount consideration in the context of *forum conveniens*, they are relevant. Within this context, I accept and acknowledge that a factor in considering forum is that A has, as the result of regrettable levels of delay in

these proceedings, now been in the jurisdiction of Zambia for nearly two years. I am not however, satisfied that this changes the position with respect to natural forum when the foregoing matters are taken into account.

126. I am not satisfied that the likelihood that this court will be required to hold a finding of fact hearing in respect of an event alleged to have occurred in Zambia leads to the conclusion that is clearly and distinctly the more convenient forum for the determination of question of A's welfare. Whilst the allegation arose in Zambia, the alleged event was unwitnessed. A is too young to give her own account. In the circumstances, in addition to the father's evidence, the primary evidence with respect to the allegation will comprise the medical report, which is already in mother's possession and which the father has indicated he does not dispute the authenticity of, the swab results (in the form of the letter from the Zambian Ministry of Health National Food Laboratory dated 20 September 2022), which again are already in the possession of the court, and any relevant police disclosure, including the DNA test results, any medical photography and the interview(s) of the father. I accept that that latter evidence *may* be more challenging to secure, although requests can be made of the Zambian authorities and this court can reasonably anticipate that the Zambian authorities will co-operate in assisting with provision of documentary evidence. This court in any event has a record of the father's evidence in respect of the allegation given to the Zambian court in the civil protection order proceedings. Whilst I accept that the father could give evidence on these issues by video-link were they to be the subject of determination in family proceedings brought in Zambia, if the issue was dealt with by this court the father could give evidence in person and on an equal footing with the mother.

127. When considering the question of forum, it is also important to remember that any fact finding process would constitute only the first stage of the welfare determination, the court thereafter being required to consider A's best interests having regard to assessments carried out in light of any finding made by the court. With respect to those assessments, I am satisfied that any comprehensive welfare assessment of A's best interests, including any assessment of contact, would be more easily conducted in a jurisdiction which both parents can access in order to be fully involved in such an assessment.

128. I am likewise not satisfied that the additional information provided by the FCDO on 17 November 2023 renders Zambia clearly and distinctly the more convenient forum for the determination of question of A's welfare. First, it is not entirely clear from the information provided by the FCDO what stage any extradition request has reached. The letter of 17 November 2021 speaks of "an extradition request for the father's arrest" having been submitted via INTERPOL. In the circumstances, no timescales are available to the court with respect to the commencement of any extradition application. Second, whilst a matter for the court considering any extradition application and not a matter on which this court makes any findings, having regard to the evidence this court heard regarding the conduct of the police investigation in Zambia, it is to be anticipated that the extradition proceedings are likely to be contested, either on the basis of that information or on other grounds. In the circumstances, it is unlikely that this court will know the outcome of any extradition proceedings for a number of months, even assuming the request made by Zambia is acted on immediately. Further, any criminal proceedings that may proceed in Zambia

consequent on a successful extradition of the father will not be considering the welfare of A, but will be concerned with dealing with the offence for which the father has been charged.

129. Having regard to the matters set out above, I am not satisfied that the mother has demonstrated that the jurisdiction of Zambia is clearly and distinctly the more convenient forum for the determination of question of A's welfare. In the circumstances, I refuse to grant a stay.

Welfare

130. Finally, and on balance, I consider that it is in A's best interests to order the mother to return A to the jurisdiction of England and Wales whilst this court determines the welfare dispute between the parties. As I have noted, during the course of her evidence the mother confirmed that she will comply with an order for return were the court to conclude that such an order is in A's best interests.

131. As reiterated in *Re A and B (Children) (Summary Return: Non-Convention State)* [2022] EWCA Civ 1664, the court has a discretion when deciding the extent of the welfare inquiry required at this stage. In examining the question of whether a return order is in A's best interests, it is important to recall that the step the court is considering is a return to this jurisdiction for the dispute concerning her welfare to be decided. An order requiring the mother to return A to this jurisdiction does not inevitably means she will remain here permanently. That is a question that will fall for determination in due course. At this stage, this court is determining whether A's welfare requires her to be returned to this jurisdiction whilst the court with jurisdiction with respect to A determines the welfare dispute between the parties.

132. Within this context, the survey of the factors relevant to the court's welfare decision will necessarily be narrower than that involved in a final determination of whether A should remain permanently to this jurisdiction. In the circumstances, whilst the father points to the apparently precarious position of the mother in respect of her accommodation, with the mother and A residing in a property on a month to month lease, a lack of consistent income, with the mother's business providing no income and her being reliant on family and the father for funds, the limitations imposed on the mother consequent on her diagnoses and to what he contends are difficulties with the provision of schooling and health care services and with disparities in gender equality in Zambia, those are matters that will fall to be considered in greater detail when determining the final outcome of any continuing welfare dispute between the parents as to where A should live.

133. In the circumstances of this case, the weight to be given to the starting point that it is likely to be better for A to return to her home country for disputes about her future to be decided here is again somewhat reduced by the level of delay that has occurred in this case. As a result of that delay, A has now been in Zambia for nearly two years. She is enrolled in education in that jurisdiction, has contact with her extended maternal family in that jurisdiction and has made friends. In those circumstances, the impact on A of the change of circumstances which an order compelling her return to the jurisdiction of England and Wales whilst her future welfare is determined will not be insignificant and will result in a degree of disruption, at least in the short term. However, against the effect on A of a change of circumstances, and again whilst

unsatisfactory, I am satisfied that there are factors that weigh in favour of return to enable the resolution of the welfare dispute in respect of A.

134. The impact on A of a change of circumstances whilst her future welfare is determined will, I am satisfied, be mitigated by a number of factors. A is a British citizen. A remains registered with a GP in this jurisdiction. Subject to the father's undertaking to vacate the property, A would be returning to the family home, in which her belongings remain and would be able to reside in her family home whilst the court determines the welfare dispute between the parties. In the circumstances, I am not able to accept Ms Allman's submission that A would be returning to an environment that is unfamiliar to her. Subject to suitable safeguards, the father is willing to fund flights for A to visit her extended maternal family in Zambia. The maternal grandmother, with whom A has a close relationship, spends extended periods in England and is at the present time in England residing with her English boyfriend. A would also be in a position to have contact with her extended paternal family.

135. With respect to any harm A has suffered, I am satisfied that she will have suffered a degree of emotional harm from having been retained from her home country in an unplanned manner and thereafter denied contact with her father for an extended period. The retention of A outside the jurisdiction of England and Wales by the mother has had a serious impact on her relationship with her father and her wider paternal family and hence on her emotional welfare, an impact that has been substantially aggravated by the mother's approach to contact. Within this context, there is an urgent need to determine the welfare disputes between the parties to ensure, to the extent that it is safe to do so, A's relationship with her father is restored and promoted. There are no family proceedings ongoing in Zambia in which that determination could be made.

136. In this case, that step will require the determination of the allegation of sexual abuse made by the mother against the father. I am not able, however, to accept Ms Allman's submission that an order requiring the return of A to the jurisdiction of England and Wales would be premature in circumstances where the court has reached no conclusion on whether the father presents a risk of sexual harm to A.

137. The determination of the allegation of sexual harm made by the mother in this case is only first stage of the process of determining the welfare dispute between the parties. For the reasons set out above when considering forum, I am satisfied that this court is the more appropriate forum in which to make that determination. Thereafter, welfare assessments will be required to assist the court in determining what arrangements are in A's best interests moving forward, having regard to any findings made with respect to harm. I am satisfied that an order requiring the mother to return A to the jurisdiction of England and Wales whilst the court determines the welfare dispute between the parties is necessary to ensure that A's welfare needs can be properly assessed and met.

138. For the reasons set out above, I am satisfied that after the father returned to England in March 2022, the mother deliberately obstructed contact between him and A. On the evidence before the court, I am further satisfied that the mother has continued to obstruct and delay contact during the course of these proceedings. Whilst it would appear that, latterly, the mother has permitted some supervised contact in South Africa, having regard to the evidence before the court, whilst A remains outside the

jurisdiction I am not satisfied that the mother can be relied on to continue to promote the regular supervised contact that will be required to complete the welfare assessments necessary to determine the welfare dispute in respect of A.

139. In determining that dispute, it will be vital that the court has a reliable assessment of A's relationship with and interactions with her father. As I have noted, during her oral evidence the mother displayed almost no insight into the emotional impact on A of her approach to contact. During that evidence, she variously stated that "I don't know what the impact on A has been of not being able to see her father" and "I have not thought about how it would affect her". Given the mother's obstructive approach to contact to date, and the impact on welfare assessments should she once again decide to take that approach, I am satisfied that the most effective way of ensuring that the court has such assessments available to it, and of meeting A's emotional need for a relationship with her father in the interim, is to order A's return to the jurisdiction. Contact with her father for the purpose of assessment and promoting A's relationship with him in the interim, subject to suitable safeguarding measures being put in place pending the determination of the allegation of sexual abuse, will be more readily policed by the court if she is returned to this jurisdiction. Given the complexities of this case, and the mother's past obstructive conduct, I am not able to accept Ms Alman's submission that assessments required by Cafcass or other agencies could successfully be undertaken by mother visiting England with A.

140. In all the circumstances, and for the reasons set out above, I am satisfied that that it is in A's best interests to order the mother to return A to the jurisdiction of England and Wales whilst this court determines the welfare dispute between the parties.

141. I acknowledge that this decision will impact on the mother. However, as I have already noted, during her oral evidence the mother made clear she would obey an order to return A to this jurisdiction. As I have also noted, in August 2022 the mother was prepared to return A to the jurisdiction on 14 days' notice, notwithstanding the difficulties she articulated in that email in respect of her and A. In addition, the father has made clear that he will ensure that the mother and A are able to return to the family home. Both the mother and A's belongings remain in that property and the mother has a car in this jurisdiction. The evidence before the court suggests that the mother has maintained her links with healthcare providers in this jurisdiction. The maternal grandmother, whom the mother relies on for support, is also presently in this jurisdiction.

CONCLUSION

142. In conclusion, and for the reasons set out above, I find that A was habitually resident in the jurisdiction of England and Wales as at the date of the father's application on 23 June 2022 and that, accordingly, this court has jurisdiction in respect of A. I refuse to order a stay in circumstances where I am satisfied that the jurisdiction of England and Wales is the more convenient forum for determining the welfare issues.

143. I order the mother to return A to the jurisdiction of England and Wales no later than midnight on 22 February 2024 or such earlier date as agreed between the parties. I will invite the parties to agree further case management directions in circumstances where it is to be anticipated that a fact finding hearing will be required prior to the court's final decision on the question of A's welfare.