Neutral Citation Number: [2020] EWCA Civ 922

Case No: B4/2020/0471

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY DIVISON
OF THE HIGH COURT
HHJ MORADIFAR SITTING AS A
DEPUTY HIGH COURT JUDGE
[2020] EWHC 451 (FAM)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2020

Before:
LORD JUSTICE HENDERSON
LORD JUSTICE MOYLAN
and
LORD JUSTICE BAKER

- -

Between:

RE: M (A Child)

- -
- -

Mr T Gupta QC, Miss C Papazian and Mr R Marnham (instructed by **Freemans Solicitors**) for the **Appellant**
Miss Ruth Kirby and Mr M Edwards (instructed by **Dawson Cornwell Solicitors**) for the **Respondent**

Hearing date: 28th April 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am 17th July 2020.

Lord Justice Moylan:

1. This appeal concerns the exercise by the court of its inherent jurisdiction in respect of a child who is a British national, historically called the *parens patriae* jurisdiction. The principal question is whether His Honour Judge Moradifar, sitting as a Deputy High Court Judge, was right to order that a child aged 13, who has been living in Algeria for just over 12 years, should be brought to England so that, as set out in a recital (7) to the order dated 27th February 2020, "an assessment can be made in a place of safety as to her best interests and living arrangements".

2. A was born in England but was taken to Algeria by her mother in March 2008. The mother has remained living in England. She visited Algeria on a few occasions after March 2008 but has not been there at all since November 2009. A has not been to England since March 2008 and has been living with her father and/or his family in Algeria.

3. The father appeals from the order that A be brought to England and from the continuation, until A's return to this jurisdiction, of a passport order made on 4th July 2019. The judge expressly made no "determination about the duration of A's visit to the UK" but gave directions so that a decision could be made about arrangements for her care in England at a hearing which was listed to take place prior to A's arrival in England. These included directing a local authority to prepare a report pursuant to s.37 of the Children Act 1989 ("the 1989 Act") and requiring each of the parents to set out their respective proposals for A's care. The passport order provided for the father's passports to continue to be held by the court until A's "return to this jurisdiction in accordance with this order". The judge refused to make a Forced Marriage Protection Order ("FMPO") and there is no appeal from this part of his decision.

4. The father is represented by Mr Gupta QC (who did not appear below) and Ms Papazian; the mother is represented by Ms Kirby and Mr Edwards (who did not appear below).

5. It is not disputed that the inherent jurisdiction was potentially available in this case because A is a British national. The father's overarching contentions are that the judge was wrong to exercise the jurisdiction in the circumstances of this case and was wrong to make the order which he did. A number of grounds are advanced in support of these arguments including that the judge failed to apply the law correctly because the circumstances of this case do not justify the exercise of the inherent jurisdiction; that the judge's order was an improper use of the inherent jurisdiction both because it effectively conflicted with the provisions of the Family Law Act 1986 and more generally; that the judge's findings were not supported by the evidence; that the order was not justified; that the judge was wrong to order that A be removed from her home and brought to England when he had, what he considered to be, "little evidence" of her wishes and feelings and with the prospect of her being placed in the care of the Local Authority.

6. I will adopt the same initials used for the children by the judge, namely in order of their age, X, Y, Z and A.

Background

7. The judgment below is reported as *Re A (A Child) (Inherent Jurisdiction: Parens Patriae, FMPO and Passport Orders)* [2020] EWHC 451 (Fam). The background circumstances are, briefly, as follows.

8. The mother is a British national. The father is a British and an Algerian national. The parties married in England in 1990 and made their home here. They divorced in 1997 but subsequently reconciled. They have four children of whom A is the youngest.

9. Shortly before care proceedings were commenced, the mother took the two youngest children to Algeria in March 2008. A was then less than 12 months old. As set out in the judgment below, at [24], the mother accepted in her oral evidence, having said in her statement that it had been for a holiday, that she "and the father made a joint decision to take A and Z to Algeria in 2008. This was to avoid any applications by the local authority in respect of these children." The mother returned after about seven weeks, leaving the children in the care of the paternal grandparents. The father then also went to Algeria in May 2008, in breach of an order prohibiting him from leaving the jurisdiction, and remained there, it appears, until August 2018. He has remarried in Algeria and has three children by his present wife.

10. Care proceedings were commenced in respect of the three youngest children in April 2008. The proceedings were transferred to the High Court. The two youngest children were made wards of court and they were ordered to be returned to England. The care proceedings in respect of Z and A were not pursued and the wardship orders were discharged on 26th January 2009.

11. It appears from a judgment given in the care proceedings by Her Honour Judge Cox in June 2009 that the local authority had "considerable involvement with [the] family over a number of years". There had been "periodic domestic abuse and extreme household rules and controls"; the mother's "were seemingly informal and flexible and [the] father's impressed as harsh and rigid". The children had been "exposed to matrimonial tension and difficulties". Among the agreed threshold findings (made at a hearing which the father did not attend and at which he was not represented) were that Y had suffered "physical and verbal abuse by the father" and had been assaulted by him on two specific occasions. It was also agreed that there had been "physical altercations between the mother" and Y.

12. The care proceedings concluded in January 2010 with a care order being made in respect of Y with the care plan providing that she would remain in residential care. HHJ Cox decided that the harm which the child had suffered had had "a lasting impact" on her development and that the mother was not able to meet the child's needs. Additionally, in the course of her judgment, HHJ Cox set out that it had "proved impossible for the moment to secure the return [of the two youngest children] to this jurisdiction, although [the mother] is still engaged in strenuous attempts to do so and has instructed a specialist firm of international lawyers to assist her in this very difficult task".

13. The mother visited Algeria for about three days in May 2008; for about three weeks in March 2009; and for about 10 weeks between August and November 2009. The last

visit, as described by HHJ Cox, was because "she is still pursuing … her wish to reunite her family and to bring [the two youngest children] back from Algeria".

14. As set out in the judgment below, at [20]:

> "The mother has not seen A and, until recently, Z since November 2009. Her contact has been limited to some infrequent contact via text and social media apps. The father asserts that the mother has had the means to contact the children and to visit them but has chosen not to. The mother complains that she has been prevented by the father from having a meaningful relationship with her children who have been retained in Algeria without her agreement."

The judge then sets out the more recent history:

> "[21] In 2018 the parents began discussions about A and Z visiting the mother in the UK and agreed that both should obtain British passports. In January 2018, the father sent the mother an invitation to assist her with gaining a visa to enter Algeria. The father's ambition had been and continued to be to move his family to the UK. However, he was faced with difficulties with his wife's immigration issues. After obtaining their British passports, the father had a change of heart about A travelling to see her mother but allowed Z to come to the UK. Z came to the UK in August 2018. Regrettably, Z's reunification with his mother has been less than successful. His behaviour has been challenging and this has at points culminated in physical assaults upon his mother with the last being on the 22 November 2019. The father came to the UK within days of Z's arrival. Save for living with his mother initially and later a very short period living with his father in February or March 2019, Z has been voluntarily accommodated by the local authority."

Proceedings and Judgment

15. On 25th June 2019 the mother commenced the current proceedings. Her application sought simply a wardship order and stated that A was being wrongfully retained in Algeria. The mother's statement in support was more specific in that she said that she was very worried about A's safety and well-being and wanted her "returned to my care".

16. At a without notice hearing on 4th July 2019, the court made, among other orders, a passport order, namely an order requiring the father to give his passport(s) to the Tipstaff. This order was activated on 28th September 2019 when the father came to England from Algeria. He was subsequently arrested for failing to comply with the order following which it was discovered that he had failed to hand over his Algerian passport.

17. Since that date further orders have been made prohibiting the father from leaving the jurisdiction and providing for his passports to be retained by the Tipstaff. A Forced Marriage Protection Order was made on 3rd December 2019.

18. By an order dated 14th October 2019, the Foreign and Commonwealth Office was requested to arrange for a consular official to visit A at her home in Algeria. The FCO replied on 2nd December 2019 stating that it would not be possible for consular staff to visit A but that it would be possible for her to be seen by staff at the Embassy. This led to the court on 3rd December 2019 requesting that a "welfare check" be carried out at the Embassy. By the same order, Cafcass was directed to endeavour to speak directly with A.

19. Expert evidence was obtained on Algerian law. The judge made only a passing reference to this evidence in his judgment. He did not refer to it in his analysis, save, briefly, when he dealt with the application for an FMPO, and he referred to it in his conclusions only, at [50], in the context of there being no evidence of "any risk" of conflicting decisions. I propose to deal with this evidence in more detail because of its relevance to the question of whether the court should exercise its inherent jurisdiction in this case.

20. The expert provided a written report and further written answers to additional questions on behalf of each of the parties. He did not give oral evidence. He dealt in some detail with "protective measures" available in Algeria in respect of a child who is alleged to be the victim "of violence or inappropriate physical chastisement"; with forced marriage; and with orders which the mother could seek to obtain in Algeria in respect of the care of A. The expert summarised a number of relevant provisions in the Algerian Constitution, the Family Law Code and the Penal Procedural Code.

21. In respect of protective measures, the expert set out the steps which could be taken in Algeria to protect a child. The police could be asked to investigate "any violence or bad treatment". Proceedings could be commenced in the local tribunal including for urgent interim measures of protection. In addition, there are "many" agencies available to undertake an investigation into a child's situation. Some are funded by the state and some are "more independent and managed by volunteers such as medical staff, lawyers and social workers". He identified the "most prominent" which include an NGO called NADA as being available "to assist parents, children or women in difficulties". NADA stands for the Algerian Network for the Defence of Children and was referred to by the FCO in an email to the mother in 2018 as "the competent child safeguarding body in Algeria" and an organisation which the FCO had "worked closely with on other cases".

22. The expert pointed to the fact that the mother had "not actively pursued any complaint"; she had not "initiated any court action in Algeria" nor had the police or any "support or non-governmental agency such as NADA … been contacted". This did not, however, mean these steps could not now be taken.

23. The mother could, therefore, ask the police to investigate. If they failed to do so, the mother could go to the local tribunal and start a legal action "with a view to obtaining an injunction against [those] who allegedly committed any violence or bad treatment against" A. This would either require the mother to employ a lawyer "or an NGO can take the matter to the police and local court". The available steps included an "urgent

action" in the local tribunal. In response to a question on how an urgent investigation can be started, the expert replied that: "Once the police and local court are made aware of any bad treatment of a child [the] *juge des mineurs* would start the investigation" as set out in the relevant Code.

24. There is no legal aid available in Algeria, but the expert set out at various places in his evidence how the mother could be assisted to bring proceedings. He first said that: "In this context, with the help of an NGO … or the local assistance sociale (Social Workers) … a court action could be initiated at any time". He later added, when asked about legal aid and the cost of proceedings, that "there are many NGOs such as NADA [which] would represent women victims of domestic violence or children at risk and the NGOs would predominantly use pro-bono" lawyers. For criminal matters, there are "many lawyers [who] operate a pro bono scheme". In his conclusions he reiterated that "in view of the alleged violence and abuse" the mother could obtain assistance from "local Child and Family support groups … to obtain urgent interim measures of protection of" A.

25. In addition to dealing with protective measures, the expert also dealt with the equivalent of welfare proceedings. The mother could apply for, what was described as, the equivalent of residence and for permission to remove A from Algeria. The outcome would be based on the court's assessment of A's best interests but the expert pointed out a number of difficulties that the mother would face in particular in respect of any application to remove A from Algeria, meaning that the prospects of this succeeding were remote.

26. The expert was also asked about the likely cost of proceedings. Inevitably, he said that this would depend on the nature of the proceedings (which could include validating the parties' English divorce in Algeria) and their length. The full cost was "likely to run into £4/5,000" plus a similar amount for an interpreter. However, he also said that the "starting fee" would be around £3/400 and, as referred to above, that there are support groups who could assist and that once the court was made aware of "any bad treatment", the judge would start an investigation.

27. The expert also addressed in detail the law relating to forced marriage. In addition, no-one under the age of 19 can be lawfully married (the court can exceptionally authorise marriage between the ages of 16 and 19) and marriage can only be contracted at the local state Marriage Registry.

28. Cafcass filed a report dated 23rd January 2020. This set out the difficulties which had been encountered in contacting A for the purposes of speaking to her. Contact had been made with A (via a Viber call) on 20th January but this was "only partially successful as at different times there were problems with A and the interpreter hearing each other". In addition, during "our brief call I repeatedly heard voices in the background possibly of her younger paternal siblings, which left me questioning what level of privacy A had for the call". The Cafcass officer sought to explain her role but A "said she was no longer able to hear the interpreter again". The Cafcass Officer then tried to explain that she would place another call and ended the call. There were some further email exchanges with the parties' solicitors but, in the absence of a response, no further attempt was in fact made.

29. At the hearing below, the judge heard oral evidence from the mother and the father.

30. The mother's evidence was significantly based on what Z had told her both before he came to England in August 2018 and subsequently. Z alleged that he and A were "regularly assaulted and experienced emotional cruelty", at [22]. He also "alleged that his father and stepmother are planning to force A to marry". The mother relied on photographs and on a recording from July 2019 of a video conversation between the father and his wife in Algeria. The judge sets out a summary of the "relevant parts" of the telephone conversation:

> "[36] … In summary, the relevant parts of the transcript record the father to ask his wife to hit one of the younger children with a cable in front of him so that he can see, invite his wife to ask A to 'hit' the children, state that he will ask his brother to hit the children, his children will "pee their pants" if he looks at them and finally suggest that he would heat a serving spoon on the hob and "burn their backside with it". The father denied referring to a cable and stated that he would use a 'flip flop' to chastise the children. He also denied that he had ever carried out the threat of burning the children with a hot spoon. He stated that sometimes he would threaten the children by not buying 'them sweets'. He was pressed as to why he said during the conversation that the children would "pee their pants" if he looked at them. The father explained that, as the head of the family, he sets the rules that must be followed. He denied that such a reaction suggests that his children fear him. He explained this to be not a 'high degree' of fear but respect for their father. When questioned further about the mother's concerns that saw her go to the Algerian Embassy on two occasions, he dismissed those as "nonsense" and it seemed to him to be a "set up"."

31. After the conclusion of the hearing, but before judgment, the FCO provided a short report setting out details of the welfare check which had been conducted when A had been seen by consular staff at the Embassy on 16th February 2020. As referred to above, the FCO had previously declined to undertake a visit to A's home, which had been agreed by both the mother and the father and requested by the court. I make clear that I do not in any way criticise the FCO for declining to visit the home but simply to explain the background which led to A being taken to the Embassy so that a "safety and welfare check" could be undertaken there.

32. The report from the FCO recorded that A had been brought to the Embassy by her aunt and uncle. She was first seen with them and then seen alone. She was asked "about her life in Algeria". She gave details of where she went to school and that she had passed a recent exam and had ambitions to attend high school and university. She "described her day to day life" as "normal" and "talked warmly of family members who visit her at home, and reported enjoying trips to the countryside with her family". A said that "she was not worried about anything at home".

33. A was "asked explicitly about marriage". She said that "her family encourage her in her studies and that no-one in her family had talked to her about marriage".

34. The "general impressions of the consular staff were that A looked well and she seemed confident in her answers despite being nervous about the meeting at first". The report concluded, as set out in the judgment at [41]:

> "The FCO's Social Work Adviser specialised in child safeguarding agreed with the consular staff who spoke with A that the visit did not raise concerns about A's health or welfare."

A was told that she could contact consular staff if she needed help with anything.

35. The report also recorded A as saying that she had "regular contact with her mother, father and brother in the UK" via an app or by telephone. When she speaks to them she said that her brother translates as her English is limited.

36. The judge concluded, at [40], that, for a number of reasons, he had to approach Z's "allegations against his father with caution and to carefully consider other evidence that may corroborate or disprove his allegations". The judge then, at [41], referred very briefly to the content of the FCO report but without, either there or anywhere else in the judgment, any further analysis. This lack of analysis is also reflected in his observation, at [43], that the father's conduct in 2019 had "led to a lack of independent information about A's welfare".

37. The judge set out his assessment of the mother and of the father. His ultimate conclusions were as follows:

> "[45] The father was very expressive and candid about his role in the family. I found his lack of concern for Z and the contents of his text messages to the mother revealing. He was dismissive of the contents of those messages. He sought to unrealistically explain his son's difficulties without displaying any curiosity about his welfare. I found his evidence about the recorded conversation honest but most concerning. He was given many opportunities to soften his views or to distance himself from the contents of that conversation. He resolutely refused to do so. The father displayed a most concerning lack of awareness of the impact of his threats on his children. He did not recognise anything wrong in encouraging A to physically chastise her younger siblings. Most concerning was his profound lack of any insight into the impact of the level of his children's fears of their father that would cause them to urinate when he looks at them. His explanation that this was out of respect and not fear did nothing to lessen my concerns about the environment of violence and fear that the children have become accustomed to living in. In this context, the father's evidence corroborated Z's allegations of ill-treatment. Having considered the totality of the evidence before me, I find that A has lived and continues to live in a household where fear and violence has become an acceptable and integral part of her family life."

38. The judge recognised, at [46], that to "move [A] to the UK, even on a temporary basis, might be unsettling for her and cause her harm". He also said that he had "little evidence of her wishes and feelings on this issue". He then set out, at [47], his assessment that the "practical implications of requiring A to come to England are complex and present with difficulties". These included "serious concern about each of the parents' ability to adequately care for A" and that the "only realistic option would be for her accommodation by the local authority". The latter "would bring with it an added layer of concern and potential harm that must be carefully weighed in the balance of welfare considerations".

39. The judge's ultimate conclusion in respect of the exercise of the inherent jurisdiction was as follows:

> "[50] For reasons that I have set out above A has suffered significant harm in the care of her father where she has lived and continues to live in a household where fear and violence has become an acceptable and integral part of her family life. Consequently, A's rights pursuant to Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) have been breached. A is a British national and there can be no doubt that the court's Inherent Jurisdiction is engaged. A's welfare is my paramount consideration and having considered all of the welfare considerations, I have concluded that A does require the court's protection. In my judgment there are no applicable jurisdictional schemes that would conflict with my decision. Furthermore, there is no evidence before me that would suggest that there is any risk of a conflicting decision being taken in Algeria. The evidence of [the expert] does not raise this as an issue. Finally, there is no suggestion that orders of this court may be unenforceable in Algeria. Accordingly, I will make A a ward of the court and exercise the *parens patriae* jurisdiction of the court by ordering her return to England forthwith. I am not making any determinations about the duration of A's visit to the UK. Such a determination will be made at subsequent hearings when further appropriate evidence will be available to the court."

40. The judge decided, at [48], that an FMPO was not justified by the evidence. The "only evidence consists of an account of a conversation that Z overheard between the father and his wife". He referred to the "mother's acceptance that there is no evidence in the paternal family of anyone marrying outside of domestic Algerian law", which prohibits forced marriages. The judge decided that the evidence was not "sufficiently reliable" to justify the continuation of the order. Although not impacting on his ultimate decision, the judge appears to have considered that he was applying the inherent jurisdiction rather than the Family Law Act 1986.

41. As for the passport order, at [49], given that the father had breached the previous passport order and his "cavalier approach to this issue", the judge was "profoundly concerned that there is a real risk that the father will leave the jurisdiction at the first

opportunity". He concluded that "the continuation of the Passport Orders is necessary".

42. At the hearing on 27th February 2020, when he handed down his judgment, the judge made clear that the purpose of the order was, as set out in recital (7), so that "an assessment can be made in a place of safety as to [A's] best interests and living arrangements". He was not determining "the duration of A's visit to the UK" which would be determined after she came. However, he also, as referred to above, listed a hearing at which he would determine the arrangements for A's care prior to her arrival in England and, for which purpose, he directed the local authority to prepare a report pursuant to s.37 and each of the parents to set out their respective proposals for A's care in England.

Law

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

44. The context of the present case is the exercise of the jurisdiction when the child, the subject of the proceedings, is habitually resident outside the United Kingdom and in a jurisdiction with which there are no reciprocal jurisdictional agreements in force. The manner in which it has been exercised is the order that A be brought to England "so that an assessment can be made in a place of safety as to her best interests and living arrangements". It is clear from this recital, and indeed the provisions in the order dealing with A's care, that the court was embarking on a welfare enquiry, which would include making orders dealing with arrangements for her care.

45. In this context, the Family Law Act 1986 ("the 1986 Act") contains important limitations on the *exercise* of the inherent jurisdiction with respect to children. The judge was not referred to the 1986 Act, in particular the limitations imposed on the orders the court is permitted to make when exercising the inherent jurisdiction. We were told during the hearing that this was because counsel below were agreed that, based on *A v A*, the jurisdiction could potentially be exercised in this case to order that A be made a ward and be brought to England. I deal with the relevance of the 1986 Act further below but I would immediately note that, whilst *A v A* makes clear that these orders can, in principle, be made in such a way that they do not conflict with the 1986 Act the question of whether they might conflict either directly or indirectly is more complex.

46. The 1986 Act sets out when a court in England and Wales has jurisdiction to make the orders listed in s.1(1). These include, by s.1(1)(a), an order under s.8 of the 1989 Act (save for an order varying or discharging such an order) and, by s.1(1)(d):

> "an order made by a court in England and Wales in the exercise of the inherent jurisdiction of the High Court with respect to children –

(i) so far as it gives care of a child to any person or provides for contact with, or the education of, a child; but

(ii) excluding an order varying or revoking such an order."

47. Section 2 of the 1986 Act contains general jurisdiction provisions. An order under s.1(1)(a) can only be made as follows:

> "(1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless –
>
> (a) it has jurisdiction under the Council Regulation or the Hague Convention, or
>
> (b) neither the Council Regulation nor the Hague Convention applies but –
>
> (i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2A of this Act is satisfied, or
>
> (ii) the condition in section 3 of this Act is satisfied."

Section 2(3) provides when an order can be made under s.1(1)(d):

> "A court in England and Wales shall not make a section 1(1)(d) order unless
>
> (a) it has jurisdiction under the Council Regulation or the Hague Convention, or
>
> (b) neither the Council Regulation nor the Hague Convention applies but –
>
> (i) the condition in section 3 of this Act is satisfied, or
>
> (ii) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection."

48. Section 3 of the 1986 Act provides:

> "(1) The condition referred to in section 2(1)(b)(ii) of this Act is that on the relevant date the child concerned –
>
> (a) is habitually resident in England and Wales, or

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

As Lady Hale pointed out in *A v A*, at [19], the “omission of a reference to section 2(3)(b)(i) from section 3(1) appears to be an oversight [but it] does not alter the sense of the provisions”.

49. I also set out the provisions of s.8 of the 1989 Act:

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

50. The other relevant statutory provisions are the Family Law Act 1996 (“the 1996 Act”) and the Female Genital Mutilation Act 2003 (“the 2003 Act”).

51. The 1996 Act was amended by the Forced Marriage (Civil Protection) Act 2007 to give the court the express power to make an FMPO; Part 4A. There are no territorial limitations to the exercise of this power. Indeed, it is expressly provided by s.63B(2) that:

> “The terms of such orders may, in particular, relate to –
>
> (a) conduct outside England and Wales as well as (or instead of) conduct within England and Wales;
>
> (b) respondents who are, or may become, involved in other respects as well as (or instead of) respondents who force or attempt to force, or may force or attempt to force, a person to enter into a marriage;

(c) other persons who are, or may become, involved in other respects as well as respondents of any kind."

52. The 2003 Act was amended by the Serious Crimes Act 2015 to give the court the express power to make a female genital mutilation protection order: s.5A and Schedule 2. As with the power to make a FMPO, there are no territorial limitations to the exercise of this power. Schedule 2, paragraph 1(4) replicates the provisions in s.63B(2) of the 1996 Act.

53. Accordingly, in the present case the court in England and Wales could not use the inherent jurisdiction to make an order giving care of A to any person or which provided for contact. It is apparent that, save for the power to make s.8 orders in connection with matrimonial proceedings, the scheme of the 1986 Act is to give jurisdiction to make one of the substantive orders listed in s.1 only when the child is either habitually resident or is present in England and Wales. As set out in *In re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 606, at [27], these provisions reflect the fact that a "child's habitual residence in a state is the internationally recognised threshold to the vesting in the courts of that state of jurisdiction to determine issues in relation to him (or her)".

54. I now turn to consider the authorities starting with *A v A*.

55. In that case, the mother and three children had been forced by the father to remain in Pakistan while there on a visit from their home in England. The mother gave birth to a fourth child while in Pakistan. On her return to England, without the children who continued to be retained in Pakistan, the mother applied for orders in respect of all four children. At first instance, the court determined that all of the children were habitually resident in England giving the court here substantive jurisdiction. The father's appeal in respect of the three elder children was dismissed by the Court of Appeal but allowed in respect of the youngest child. The mother appealed to the Supreme Court which decided that the court had jurisdiction in respect of the youngest child based on his being a British national.

56. One of the issues which the Supreme Court considered was whether the order made by Peter Jackson J (as he then was), making the children wards of court and ordering that they be returned forthwith to England and Wales by the father, was either a s.1(1)(a) order or a s.1(1)(d) order.

57. Lady Hale dealt with this issue at [25]-[28]. She started by saying that neither the submissions made on behalf of the mother nor those made on behalf of the father were "completely right". Mr Setright QC had argued on behalf of the mother that the order made by Peter Jackson J was a specific issue order under s.8 and, therefore, within s.1(1)(a) of the 1986 Act. Mr Turner QC had argued on behalf of the father that, because the order had been made under the inherent jurisdiction, it could not be an order under the 1989 Act.

58. What did Lady Hale mean when she said that neither of these submissions was completely right?

59. She, first, made clear that an order that a child be brought to England and Wales could be an order made under the 1989 Act but that it was not in that case:

> "[26] The court has power to make any section 8 order of its own motion in any "family proceedings" in which a question arises with respect to the welfare of any child: see section 10(1)(b). Proceedings under the inherent jurisdiction of the High Court are family proceedings for this purpose: see section 8(3)(a). So, assuming for the moment that an order to return or bring a child to this jurisdiction falls within the definition of a specific issue order, the judge might have made such an order even though this was not what the mother applied for. But that is not what he did. There are many orders relating to children which may be made either under the Children Act 1989 or under the inherent jurisdiction of the High Court: an order authorising a blood transfusion for a Jehovah's Witness child is a good example. There is no mention of the Children Act 1989 in the order made by Peter Jackson J, which specifically refers to the inherent jurisdiction and moreover also makes the children wards of court, which is not an order available under the Children Act 1989"

60. As for the father's submissions, she said, at [27], that the order did not fall with s.1(1(d) not because it was made under the inherent jurisdiction but because of the form of the order. It was not within this provision because it did not give care of the child to any person or otherwise include a provision prohibited by that section.

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

62. Lady Hale also dealt with the court's inherent jurisdiction in respect of children who are British nationals and when it should be exercised, at [59]-[65]. She quoted with apparent approval, at [62], from *Al Habtoor v Fotheringham* [2001] 1 FLR 951 (Thorpe LJ "advised that the court should be 'extremely circumspect'"); *In re B (Forced Marriage: Wardship Jurisdiction)* [2008] 2 FLR 1624 (Hogg J exercised the jurisdiction because she considered the circumstances "sufficiently dire and exceptional"); and *In re N (Abduction: Appeal)* [2013] 1 FLR 457 (McFarlane LJ, as he then was, commented that the jurisdiction "exists in cases which are at the very extreme end of the spectrum"). She then expressly approved, at [65], what Thorpe LJ had said in *Al Habtoor v Fotheringham* about the need to use "extreme circumspection in deciding to exercise the jurisdiction" adding, "But all must depend on the circumstances of the particular case".

63. She also set out a number of potentially relevant factors in that case one of which, at [65(iii)], was that "arguments as to the appropriate forum in which to decide Haroon's future will be relevant as to whether it would be right for the High Court to exercise its inherent jurisdiction based on nationality in this case". "Among those arguments" was, at [65(iv)], "the practicability of the mother litigating the children's future in Pakistan".

64. I next turn to *In re B*. The case concerned a young child whose parents were in a same sex relationship. The family lived in England. The biological mother, without

warning, took the child to Pakistan on 3rd February 2014 where they remained living. The substantive issue was whether, when an application was made on 13th February 2014 by the parent who remained here, the court in England and Wales had jurisdiction either under the 1989 Act, because the child was habitually resident here, or because the court could exercise its inherent jurisdiction based on the child's British nationality.

65. Hogg J determined that the child had lost her habitual residence in England at the date of the application. She also declined to exercise the inherent jurisdiction because, as set out in the Court of Appeal's judgment at [12], "the facts of the present case did not justify such a course, it being: '[at] heart a contact application which does not come within the 'extreme circumstances' or 'dire circumstances' as referred to in the jurisprudence'".

66. The Court of Appeal dismissed the mother's appeal upholding both aspects of the judge's decision. The Supreme Court, by a majority, allowed the appeal determining that the child was habitually resident here when the application was issued; in addition, they made some, obiter, observations about the inherent jurisdiction. The minority would have dismissed the appeal on both the issue of habitual residence and on the exercise of the court's inherent jurisdiction.

67. I propose, first, to deal at some length with the judgment of the Court of Appeal (Sir James Munby P, Black LJ and Underhill LJ), which was handed down by Black LJ (as she then was). This is because it draws together and extensively analyses the history and nature of the court's inherent jurisdiction in respect of a British national child. For ease of reference, I refer to it as Black LJ's judgment rather than the Court of Appeal's.

68. Black LJ noted, at [35], "two features of the case law [which] are both prominent and pertinent to the issues we have to decide". The first was "the repeated stress on the need for 'extreme circumspection' … in deciding to exercise jurisdiction where the child is outside the jurisdiction". Black LJ quoted what Lady Hale had said in *A v A*, at [62], and noted, at [36], that "the principle in play here goes back far beyond" the authorities referred to by Lady Hale. She then quoted from a number of cases decided between 1885 and 1965 which used expressions such as "extraordinary circumstances", Cotton LJ in *In re Willoughby (An Infant)* (1885) 30 Ch D 324, at 331-332; "the rarest possible thing", Lord Merriman P in *Harris v Harris* [1949] 2 All ER 318, at 322; "only in most exceptional circumstances", Lord Goddard CJ in *R v Sandbach Justices, Ex p Smith* [1951] KB 62, at 67; and *In re P(GE) (An Infant)* [1965] Ch 568, "where the circumstances clearly warrant it" (Lord Denning MR, at 582), "sparingly" (Pearson LJ, at 587), and "exceptional" (Russell LJ, at 595).

69. At [37], Black LJ noted that the "other striking feature of the case law is the extreme rarity of reported cases in which the jurisdiction has in fact been exercised in such cases", referring to cases decided between 1854 and 1957 and, at [40], to cases up to 2015. The last of these was Sir James Munby P's decision in *Re M (Wardship: Jurisdiction and Powers)* [2016] 1 FLR 1055 in which he referred, at [32], to the need for "extreme circumspection" and observed that: "the use of the jurisdiction in cases where the risk to a child is of harm of the type that would engage Arts 2 or 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

1950 (European Convention) – risk to life or risk of degrading or inhuman treatment – is surely unproblematic."

70. Black LJ further identified "two important developments" being, at [38], the 1986 Act and, at [39], developments in the international arena as referred to in *A v A* including jurisdiction being based on habitual residence. When dealing with the former, Black LJ quoted a passage from Ward J's (as he then was) judgment in *F v S (Wardship Jurisdiction)* [1991] 2 FLR 349 at 356 when dealing with an application for an order that a child be returned to England. He said:

> "If proceedings in wardship were instituted, but, unlike the plaintiff in this case, no application was made for care or control or for access, and where, by definition, no custody order was being sought, it could be argued that the habitual residence basis of jurisdiction did not apply. That would leave the court in wardship free to order the minor's return to the jurisdiction; once returned to the jurisdiction, the plaintiff could then apply for a custody order. Arguably, in that event, jurisdiction could arise on the ground provided by s. 2(2)(b), namely that the ward is present in England or Wales on the relevant date – the date of the new application – and the court considers that the immediate exercise of its powers is necessary for his protection. By this procedural device, the court might then make the custody order. But should that be permitted? Whilst this ancient prerogative jurisdiction survives, I shall scrupulously and rigorously enforce it where I can. Nevertheless, despite this reluctance to curtail my jurisdiction, I consider that to exercise these powers would be wrong, and that I cannot justify what could be a devious entry to the court by the back door where Parliament has so firmly shut the front door to custody orders being made in these circumstances."

Black LJ considered, at [38], that; "One corollary of this is that, whatever may have been the position before the Family Law Act 1986, the focus nowadays must be on the *protective* rather than the *custodial* aspect of the inherent jurisdiction".

71. The judgment then, at [41]-[45], dealt with a submission that *A v A* had reduced the threshold for the exercise of the jurisdiction and had "freed" the court from the "inhibiting effect" of *Al Habtoor v Fotheringham*. This submission was rejected. An analysis of *A v A* led to the following conclusion, at [42]: "We do not read Baroness Hale DPSC as intending to overthrow more than 150 years of settled jurisprudence". This was for a number of reasons including that: "She said nothing by way of disapproval of any of the phraseology she had quoted in para 62."

72. The court's conclusions as to the inherent jurisdiction were as follows:

> "[45] In our judgment, the use of the inherent jurisdiction in cases where the child is outside the jurisdiction remains subject to the long established and consistent jurisprudence. Various words have been used down the years to describe the kind of circumstances in which it may be appropriate to make an order:

> "only under extraordinary circumstances", "the rarest possible thing", "very unusual", "really exceptional", "dire and exceptional", "at the very extreme end of the spectrum". The jurisdiction, it has been said, must be exercised "sparingly", with "great caution" (the phrase used by Lord Hughes JSC in *A v A (Children: Habitual Residence)* [2014] AC 1, para 70(v)) and with "extreme circumspection." We quote these words not because they or any of them are definitive—they are not—but because, taken together, they indicate very clearly just how limited the occasions will be when there can properly be recourse to the jurisdiction.
>
> [46] Moreover, and as we have already explained, those occasions will in modern times be even more limited than previously, given, first, the effect of the Family Law Act 1986 and, secondly, the other recent developments noted by Thorpe LJ and Baroness Hale DPSC. The importance of the 1986 Act in limiting recourse to the inherent jurisdiction is plain. In our judgment, the analysis of Ward J in *F v S (Wardship: Jurisdiction)* [1991] 2 FLR 349, and his warning against using a return order as an artificial device to found jurisdiction, are as valid now as then, and remain unaffected by anything said in *A v A (Children: Habitual Residence)*."

73. Black LJ also agreed, at [47], with Hogg J's description of the case as being: "At heart … a contact application". This led to the conclusion that: "On the face of it, therefore, notwithstanding the application for a return order, the applicant's attempt to invoke the inherent jurisdiction founders on section 1(1)(d)(i) of the 1986 Act and involves an impermissible attempt, using Ward J's expressive phrase [1991] 2 FLR 349, 356, to make 'a devious entry to the court by the back door'".

74. The judgment also addressed a submission that the applicant would effectively be denied access to justice as she would be unable to litigate in Pakistan. It was accepted, at [52], that the applicant would "have no realistic opportunity to advance her claim in the Pakistani courts". However, at [53], this was "not by itself enough to justify the intervention of the English court". In addition, the circumstances of the case did "not approach the very high threshold necessary to justify the exercise of the jurisdiction"; the "situation falls short of the exceptional gravity where it might indeed be necessary to consider the exercise of the inherent jurisdiction".

75. The Supreme Court was divided on the question of whether the child remained habitually resident in England and Wales when the application was issued. The majority (Lady Hale, Lord Wilson and Lord Toulson) decided that she had not lost her habitual residence here at that date. In addition, their judgments addressed the inherent jurisdiction in observations, set out below, which were acknowledged to be obiter given their decision on the issue of habitual residence. Those in the minority (Lord Clarke and Lord Sumption) dissented on the issue of habitual residence and would also have upheld the decision that the court should not exercise its inherent jurisdiction.

76. On the latter issue, Lord Wilson described, at [52], the order which had been made in *A v A* as "a bare order for [the child's] return to England". He next, at [53], agreed with Lady Hale and Lord Toulson in rejecting the suggestion that the "nationality-based jurisdiction falls for exercise only in cases 'at the extreme end of the spectrum'". He also agreed with the "three main reasons" they gave "for the court's usual inhibition about exercising it". He then identified what he regarded as "the most problematic question" which he described as follows:

> "To my mind the most problematic question arises out of the likelihood that, once B was present again in England pursuant to an order for her return, the appellant would have issued an application for orders relating to care of her or contact with her. The question would be whether in such circumstances an order for her return would improperly have subverted Parliament's intention in enacting the prohibitions comprised in sections 1(1)(d), 2(3) and 3(1) of the 1986 Act. Or, in such circumstances, should the interests of the child prevail and indeed would Parliament have so intended?"

77. In their joint judgment, Lady Hale and Lord Toulson dealt only with the inherent jurisdiction. I set out what they said in full:

> "[58] Lord Wilson JSC's conclusion on the issue of habitual residence makes it unnecessary to reach a decision on the hypothetical question whether it would have been right for the court to exercise its jurisdiction founded on B's nationality if she had no habitual residence at the time when these proceedings began. It is not in doubt that the restrictions on the use of the inherent or parens patriae jurisdiction of the High Court in the Family Law Act 1986 do not exclude its use so as to order the return of a British child to this country: this court so held in *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] AC 1. The Court of Appeal, ante, p 614, devoted a large proportion of their judgment to this aspect of the case. Their approach is summed up in para 45:
>
> > 'Various words have been used down the years to describe the kind of circumstances in which it may be appropriate to make an order: 'only under extraordinary circumstances', 'the rarest possible thing', 'very unusual', 'really exceptional', 'dire and exceptional' 'at the very extreme end of the spectrum'. The jurisdiction, it has been said must be exercised 'sparingly', with 'great caution' … and with 'extreme circumspection'. We quote these words not because they or any of them are definitive—they are not—but because, taken together, they indicate very clearly just how limited the occasions will be when there can properly be recourse to the jurisdiction.'

[59] Lord Wilson JSC has listed a number of important issues to which that question would have given rise and which must wait for another day. It is, however, one thing to approach the use of the jurisdiction with great caution or circumspection. It is another thing to conclude that the circumstances justifying its use must always be "dire and exceptional" or "at the very extreme end of the spectrum". There are three main reasons for caution when deciding whether to exercise the jurisdiction: first, that to do so may conflict with the jurisdictional scheme applicable between the countries in question; second, that it may result in conflicting decisions in those two countries; and third, that it may result in unenforceable orders. It is, to say the least, arguable that none of those objections has much force in this case: there is no applicable Treaty between the UK and Pakistan; it is highly unlikely that the courts in Pakistan would entertain an application from the appellant; and it is possible that there are steps which an English court could take to persuade the respondent to obey the order.

[60] The basis of the jurisdiction, as was pointed out by Pearson LJ in *In re P (GE) (An Infant)* [1965] Ch 568, 587, is that "an infant of British nationality, whether he is in or outside this country, owes a duty of allegiance to the Sovereign and so is entitled to protection". The real question is whether the circumstances are such that this British child requires that protection. For our part we do not consider that the inherent jurisdiction is to be confined by a classification which limits its exercise to "cases which are at the extreme end of the spectrum", per McFarlane LJ in *In re N (Abduction: Appeal)* [2013] 1 FLR 457, para 29. The judgment was ex tempore and it was not necessary to lay down a rule of general application, if indeed that was intended. It may be that McFarlane LJ did not so intend, because he did not attempt to define what he meant or to explain why an inherent jurisdiction to protect a child's welfare should be confined to extreme cases. The judge observed that "niceties as to quite where the existing extremity of the jurisdiction under the inherent jurisdiction may be do not come into the equation in this case": para 31.

[61] There is strong reason to approach the exercise of the jurisdiction with great caution, because the very nature of the subject involves international problems for which there is an international legal framework (or frameworks) to which this country has subscribed. Exercising a nationality-based inherent jurisdiction may run counter to the concept of comity, using that expression in the sense described by US Supreme Court Justice Breyer in his book *The Court and the World* (2015), pp 91–92:

> "the court must increasingly consider foreign and domestic law together, as if they constituted parts of a broadly interconnected legal web. In this sense, the old legal concept of 'comity' has assumed an expansive meaning. 'Comity' once referred simply to the need to ensure that domestic and foreign laws did not impose contradictory duties upon the same individual; it used to prevent the laws of different nations from stepping on one another's toes. Today it means something more. In applying it, our court has increasingly sought interpretations of domestic law that would allow it to work in harmony with related foreign laws, so that together they can more effectively achieve common objectives."
>
> [62] If a child has a habitual residence, questions of jurisdiction are governed by the framework of international and domestic law described by Lord Wilson JSC in paras 27–29. Conversely, Lord Wilson JSC has identified the problems which would arise in this case if B had no habitual residence. The very object of the international framework is to protect the best interests of the child, as the CJEU stressed in the *Mercredi* case [2012] Fam 22. Considerations of comity cannot be divorced from that objective. If the court were to consider that the exercise of its inherent jurisdiction were necessary to avoid B's welfare being beyond all judicial oversight (to adopt Lord Wilson JSC's expression in para 26), we do not see that its exercise would conflict with the principle of comity or should be trammelled by some a priori classification of cases according to their extremity."

78. As referred to above, Lord Sumption and Lord Clarke would have upheld the decision that the court should not exercise the inherent jurisdiction. Lord Sumption agreed, at [81], "that its exercise would call for 'extreme circumspection'"; and that the "case law, which fully bears out that proviso, is summarised in the judgment of the Court of Appeal". He considered, at [82], that the authorities showed that such orders had been made in two classes of cases for what could "broadly be described as protective" purposes. The first was abduction cases, outside the statutory scheme, and the second "comprises cases where the child is in need of protection from some personal danger … [such as] forced marriage or female genital mutilation".

79. He made three points. The first, at [84], was that the jurisdiction is discretionary and "should not be overturned in the absence of some error of principle or misunderstanding of the facts, unless the judge has reached a conclusion that no judge could reasonably have reached". He further agreed with the Court of Appeal's conclusion, at [53], that the case fell short of the "exceptional gravity where it might indeed be necessary to consider the exercise of the inherent jurisdiction".

80. The second point, at [85], was that "the inherent jurisdiction should not be exercised in a manner which cuts across the statutory scheme". If, as Lady Hale and Lord Toulson suggested, "the use of the inherent jurisdiction is not reserved for exceptional cases, the potential for it to cut across the statutory scheme is very considerable".

Lord Sumption then explained, at [85], his conclusion that an order for the child's return from Pakistan would not be "a proper exercise of the court's powers":

> "The real object of exercising it would be to bring the child within the jurisdiction of the English courts (i) so that the court could exercise the wider statutory powers which it is prevented by statute from exercising while she is in Pakistan, and (ii) so that they could do so on different and perhaps better principles than those which would apply in a Court of family jurisdiction in Pakistan. Thirdly, this last point is reinforced by the consideration that the appellant's application in the English courts is for contact and shared residence. This is not relief which the statute permits to be ordered under the inherent jurisdiction, in a case where there is no jurisdiction under the Council Regulation or the 1996 Hague Convention. I do not accept that the inherent jurisdiction can be used to circumvent principled limitations which Parliament has placed upon the jurisdiction of the court. For these reasons, in addition to those given by the judge and the Court of Appeal, I do not think that an order for the child's return could be a proper exercise of the court's powers."

81. The third point was that, "if there were grounds for believing the child to be in danger, or some other extreme facts justifying the exercise of the inherent jurisdiction, it would no doubt be possible in the exercise of the court's inherent jurisdiction to direct an independent assessment of the situation of the child in Pakistan. Unless the facts were already clear, that would be the least that a court should do before it could be satisfied that she should be compulsorily returned to this country".

82. In conclusion, at [87], Lord Sumption did not consider that there was "a peril from which the courts should 'rescue' the child" in that case.

83. Lord Clarke agreed with Lord Sumption, at [96], that the appeal from the decision on the exercise of the inherent jurisdiction should be dismissed. He also agreed with Lady Hale and Lord Toulson's comments about the need for "great caution and circumspection for the reasons they give", but added that he agreed with Lord Sumption that "on the facts of this case it should not use the inherent jurisdiction to order B to be returned to the jurisdiction in order to enable it to exercise its statutory jurisdiction in circumstances in which it would not otherwise have that jurisdiction".

84. Since the decision in *In re B*, there have been a number of cases at first instance dealing with the exercise of the court's inherent jurisdiction. I propose to refer only to two. The first is *Al-Jeffery v Al-Jeffery (Vulnerable Adult: British Citizen)* [2018] 4 WLR 136 ("*Al-Jeffery*"). In that case Holman J decided, at [55], that a British woman, aged 21, was in a "peril" from which she required to be "rescued" because of the circumstances in which she was living in Saudi Arabia.

85. He dealt with both *A v A* and *In re B*. From the former he took, at [46], "that the jurisdiction based on nationality alone should only be exercised with extreme circumspection or great caution and where the circumstances clearly warrant it". From the latter he took, at [48], that Lady Hale and Lord Toulson, at [60], "do

helpfully indicate a test when they said 'the real question is whether the circumstances are such that this British child requires that protection'. That has an echo in the words of Lord Sumption at para 87 where he referred to "a peril from which the courts should 'rescue' the child".

86. The second case is MacDonald J's decision in *Re K and D (Wardship Without Notice Return Order)* [2017] 2 FLR 901. He also analysed the authorities including *A v A* and *In re B* before concluding, at [33], that "whilst the existence of the inherent jurisdiction based on nationality is in no doubt, the test for exercising the jurisdiction does not yet appear to be conclusively settled".

87. I now turn to my conclusions as to the legal position in respect of the exercise of the inherent jurisdiction based on nationality in circumstances such as those in the present case.

88. As Lady Hale said in *A v A*, at [63], "there is no doubt that the jurisdiction exists in so far as it has not been taken away by the provisions of the 1986 Act". It is clear, therefore, that, apart from the very significant limitations prescribed by that Act, the courts in England and Wales have jurisdiction to make any other orders in respect of a child who is a British national even though they are neither habitually resident nor present in England.

89. The important question is, therefore: what is the "test" or guide which the courts should use when deciding whether it is appropriate to exercise this jurisdiction? It is self-evident that this will ultimately depend on the circumstances of the case and on the nature of the order being sought. However, this does not answer the broader issue of what the legal position now is, following the obiter comments made by the majority of the Supreme Court in *In re B*. Where do they leave what Black LJ described in that case, at [45], as the effect of "the long established and consistent jurisprudence"?

90. One legal conundrum, which was not explored during the course of the hearing, is how obiter comments in the Supreme Court (or the House of Lords) impact on what might otherwise be taken to be earlier binding precedents from the Court of Appeal. This is, perhaps, not as significant in the present case as it might be in others as the issue concerns the circumstances in which an undoubted jurisdiction should be exercised and the precedents provide guidance rather than a prescriptive delineation or determination.

91. I would also refer to Lord Wilberforce's observation in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, at p.212 G, about obiter observations in *Rondel v Worsley* [1969] 1 AC 191, namely that "not all obiter dicta have the same weight, or lack of weight, in later cases". One of the reasons for giving greater weight to them in that case was that "they were considered and deliberate observations after discussion of the same matters had taken place in the Court of Appeal and in the light of judgments in the Court of Appeal". In his speech, Lord Salmon set out, at 229 A/C, how the House of Lords in that case had "faced a dilemma" in that:

> "the Law Lords did not agree with the majority of the Court of Appeal which had decided, obiter, that a barrister enjoyed a blanket immunity against any claim in negligence in respect of

> all paper work. It was indubitably plain to this House that the obiter dictum of the majority of the Court of Appeal, although not binding, would carry great weight. Indeed it was extremely doubtful that any judge of first instance or any division of the Court of Appeal would depart from that obiter dictum unless this House disagreed with it. Accordingly, this House had no real choice but to deal with it."

92. I recognise, of course, that the obiter observations of the majority in *Re B* deserve great respect. They are also "considered and deliberate observations" on an issue which had been fully considered by the Court of Appeal and on which the Supreme Court, per Lord Wilson at [53], "received extensive submissions". On the other hand, we do not know what those submissions were, other than the very brief synopsis of the applicant's and the mother's submissions as set out in the law report. In addition, reference was made, at [59], to "important issues to which the question [of whether it would have been right for the court to exercise the inherent jurisdiction] would have given rise and which must wait for another day". The specific question identified, at [53], by Lord Wilson was whether the order being sought "would improperly have subverted Parliament's intention in enacting the prohibitions" set out in the 1986 Act or whether "in such circumstances, should the interests of the child prevail and indeed would Parliament have so intended?"

93. There are two aspects of Lady Hale and Lord Toulson's judgment which I must specifically address. First, they set out, at [59], "three main reasons for caution when deciding whether to exercise the jurisdiction", also described as "objections". To repeat, they are: "first, that to do so may conflict with the jurisdictional scheme applicable between the countries in question; second, that it may result in conflicting decisions in those two countries; and third, that it may result in unenforceable orders". Do these potential objections to the exercise of the jurisdiction provide an alternative guide to when the jurisdiction should be exercised?

94. In my view, they were not being put forward as providing a test or guide for the court to use when deciding whether to exercise the jurisdiction. They are general reasons explaining why the court should take a cautious approach although, no doubt, they will provide a specific reason or reasons why the jurisdiction should not be exercised in an individual case. The difficulty in using them as a guide to the exercise of the jurisdiction is that they would, in practice, provide a very low threshold which would not support the need for "great caution or circumspection", *In re B* at [59].

95. In respect of the first reason, there are numerous countries with which the UK has no applicable reciprocal jurisdictional scheme. For example, whilst it has achieved significant support around the world, the main international convention, the 1996 Hague Child Protection Convention, applies in only 52 countries (including the UK). As for the second reason, there are likely to be many situations when conflicting decisions are, in fact, unlikely because, for example, the parent in the other state will not seek to invoke that court's jurisdiction. In addition, I can see evidential difficulties if the court is to be expected to make a specific determination as to whether the exercise of the jurisdiction "may result in conflicting decisions".

96. As to the third reason, it will often be difficult for a court to determine whether an order will or may be unenforceable. Even though there was expert evidence in the

present case, it did not address this issue in respect of Algeria. However, the judge concluded, at [54], that there was "no suggestion that orders of this court may be unenforceable in Algeria". It is not clear to me how orders would be enforceable in Algeria, given the absence of any reciprocal jurisdictional scheme, but this demonstrates the approach a court might understandably take to this question in the absence of expert evidence, which is likely in many private law cases. In addition, it is not clear what weight the court should give to this question when, as suggested in *Re B* at [59], there may be steps which the "court could take to persuade the respondent to obey the order". This, again, is not a high threshold. There are often steps which a court *could* take.

97. The second aspect is that referred to by Holman J in *Al-Jeffery* when, as set out above, he took the "real question" identified by Lady Hale and Lord Toulson, at [60], which had "an echo" in what Lord Sumption said, at [87], as indicating a test. Namely, are "the circumstances … such that this British child requires … protection" through the courts in this country exercising the inherent jurisdiction?

98. I agree with Holman J that this could be seen as suggesting a test and does so more readily than the three reasons to which I have referred above. If it does, what is the nature of the test and how does it fit with the need for great circumspection?

99. It might, when taken with other observations rejecting expressions such as "at the very extreme end of the spectrum" and "extreme cases" and the reference, at [60], to it being a jurisdiction "to protect a child's welfare", be setting quite a low, welfare, threshold. This would, however, seem immediately to conflict with the need for great circumspection and, if applied generally, would also seem likely to lead the court in practice to address welfare issues connected with care and contact when the court is prohibited from making orders directly dealing with either of these matters.

100. On the other hand, the word "requires" can in some contexts import a high threshold. While, I acknowledge, a different context, an example is when the court is deciding whether to dispense with parental consent under s.52(1)(b) of the Adoption and Children Act 2002. This entitles a court to dispense with the consent of any parent to the child being placed for adoption or to the making of an adoption order in respect of the child if the court is satisfied that "the welfare of the child requires the consent to be dispensed with".

101. In that context, Wall LJ (as he then was), giving the judgment of the court in *Re P (Placement Orders: Parental Consent)* [2008] 2 FLR 625, at [125], said that the word "requires" has "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable".

102. This meaning also reflects the use of the word "necessary" by Lady Hale and Lord Toulson in *In re B*, at [62], when they said that: "If the court were to consider that the exercise of its inherent jurisdiction were *necessary* to avoid B's welfare being beyond all judicial oversight … we do not see that its exercise would conflict with the principle of comity or should be trammelled by some a priori classification of cases according to their extremity" (my emphasis). This mirrors, although also in a different context, the approach taken by the Supreme Court in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 to the word *necessary* when analysing the impact of the European Convention on Human Rights (and when, I note

in passing, Lord Wilson, at [34], referred with apparent approval to *Re P*). In that case Lady Hale used the expression, at [198], "nothing else will do", which Lord Neuberger, at [76], took to mean *necessary*.

103. What are my conclusions?

104. I understand why, given the wide potential circumstances, concern was expressed in *In re B* that the exercise of the jurisdiction should not necessarily be confined to the "extreme end" or to circumstances which are "dire and exceptional". But I do not consider that this means that there is no test or guide other than that the use of the jurisdiction must be approached with "great caution and circumspection". The difficulty with this as a test was demonstrated by the difficulty counsel in this case had in describing how it might operate in practice.

105. In my view, following the obiter observations in *In re B*, whilst the exercise of the inherent jurisdiction when the child is habitually resident outside the United Kingdom is not confined to the "dire and exceptional" or the "very extreme end of the spectrum", there must be circumstances which are sufficiently compelling to *require* or make it *necessary* that the court should exercise its protective jurisdiction. If the circumstances are sufficiently compelling then the exercise of the jurisdiction can be justified as being required or necessary, using those words as having, broadly, the meanings referred to above.

106. In my view the need for such a substantive threshold is also supported by the consequences if there was a lower threshold and the jurisdiction could be exercised more broadly; say, for example, whenever the court considered that this would be in a child's interests. It would, again, be difficult to see how this would be consistent with the need to "approach the use of the jurisdiction with great caution or circumspection", at [59]. It is not just a matter of procedural caution; the need to use great caution must have some substantive content. In this context, I have already explained why I consider that the three reasons set out in *In re B* would not provide a substantive test and, in practice, would not result in great circumspection being exercised.

107. The final factor, which in my view supports the existence of a substantive threshold, is that the 1986 Act prohibits the inherent jurisdiction being used to give care of a child to any person or provide for contact. It is also relevant that it limits the circumstances in which the court can make a s.8 order. Given the wide range of orders covered by these provisions, a low threshold to the exercise of the inherent jurisdiction would increase the prospect of the court making orders which would, in effect, "cut across the statutory scheme" as suggested by Lord Sumption in *In re B*, at [85]. This can, of course, apply whenever the jurisdiction is exercised but, in my view, it provides an additional reason for limiting the exercise of the jurisdiction to compelling circumstances. As Henderson LJ observed during the hearing, the statutory limitations support the conclusion that the inherent jurisdiction, while not being wholly excluded, has been confined to a supporting, residual role.

108. In summary, therefore, the court demonstrates that it has been circumspect (to repeat, as a substantive and not merely a procedural question) by exercising the jurisdiction only when the circumstances are sufficiently compelling. Otherwise, and I am now

further repeating myself, I do not see, in practice, how the need for great circumspection would operate.

109. As set out below, it is not necessary to address, in this already too long judgment, the law relating to the imposition of a passport order.

Submissions

110. The parties' respective written and oral submissions were as follows.

111. The father submitted that the judge had not exercised great circumspection when deciding to order A to be brought to England. There was not the "strong evidence" which might justify the exercise of the inherent jurisdiction. Rather, there was unchallenged evidence from the expert that there were courts and other "domestic institutions" in Algeria which were available to protect A, none of which had been pursued. A was not, therefore, "beyond all judicial oversight" or otherwise unprotected and did not need the protection of the English court. The judge had not explained why it was necessary to use the inherent jurisdiction to require A to be brought to England rather than for the remedies in Algeria to be used.

112. It was also submitted that the judge's assessment of the evidence was flawed in that he failed to have any or any proper regard to the welfare check undertaken by the FCO. The judge failed to explain why he made the findings which he did which were contrary to A's own account to the FCO. Mr Gupta also submitted that the judge's findings were, in any event, not justified on the evidence.

113. The judge was further said to have been wrong to order that A be removed from her home to be brought to England. It was submitted that this was a welfare decision which, for a number of reasons, was not justified by the judge's very limited welfare assessment. In support of his submission that this was insufficient, Mr Gupta referred to a number of authorities including *Re NY (A Child)* [2019] UKSC 49. It was submitted that the judge did not have the evidence to enable him properly to determine that it was in A's best interests for her to be brought to England. This included the fact that, as recognised by the judge, the "only realistic option" would be for her to be accommodated by the Local Authority which brought an "added layer of concern and potential harm". It was submitted that the judge did not have the "information that would enable [him] to look at the comparative welfare advantages" of A remining in Algeria or coming to England. As a result, the judgment did not contain a sufficient best interests' analysis which would also have required him to take A's wishes and feelings into account.

114. During the course of the hearing, in response initially to questions from the court, Mr Gupta submitted that the judge's order conflicted with s.2(3) of the 1986 Act because it was dealing with A's care or "living arrangements" under the inherent jurisdiction. He also submitted, alternatively, that the order improperly subverted the statutory regime because it would be "disingenuous" to use the inherent jurisdiction to procure A's presence in England for the purpose of obtaining substantive jurisdiction. A was being brought here for the purposes of care or welfare proceedings which was not an appropriate use of the inherent jurisdiction.

115. Mr Gupta submitted finally that the judge should have concluded that the FCO assessment was sufficient and that the proceedings should be dismissed.

116. Briefly, in respect of the passport order, it was submitted on behalf of the father that this was a "coercive" order contrary to *Re B (A Child) (removal from jurisdiction: removal of family's passports as coercive measure)* [2014] EWCA Civ 843, [2015] Fam 209.

117. Ms Kirby submitted that the judge had made a "fact-based, discretionary" decision with which this court should be very slow to interfere. She relied on the frequently quoted passage from Lewison LJ's judgment in *FAGE UK Ltd and Another v Chobani UK Ltd and Another* [2014] EWCA Civ 5 and on *Re F* [2016] EWCA Civ 546 and submitted that there was no basis on which this court could interfere with the judge's findings, which were open to him on the evidence, and/or with the exercise of his discretion which was based on those findings and which could not be said to be wrong.

118. Ms Kirby also submitted that the context of the judge's decision was important. She, frankly, acknowledged that his order had been designed to give this court jurisdiction to undertake a welfare enquiry by requiring A to be brought to England. However, she submitted that this was a limited exercise of the inherent jurisdiction because the judge had only been deciding whether the jurisdiction should be exercised so as to enable the court in England to carry out a full welfare enquiry (and establish A's wishes and feelings).

119. The judge's decision was, she submitted, based on his determination that A lived in a "household where fear and violence has become an acceptable and integral part of her family life" and that it was not possible to assess her general welfare needs in Algeria. This was, Ms Kirby submitted, a sound basis for the exercise of the court's inherent jurisdiction. The judge had further exercised "extreme circumspection" by addressing, at [50], the criteria set out in *In re B*, at [59], and had concluded that none of them applied.

120. As for the situation in Algeria, Ms Kirby submitted that, in practice, it would be impossible for the mother to fund welfare proceedings in Algeria or obtain an order for custody or permission to relocate. She further submitted that the "only jurisdiction that could protect A" was this court under the inherent jurisdiction. Ms Kirby acknowledged that the judgment below did not deal with the expert evidence but submitted that this was because it had not been addressed in the parties' submissions. She submitted that it was clear that A required protection and that this was only available to her through the English court. She repeated that the only way in which a proper welfare assessment could be carried out was by A being brought to England.

121. As referred to above, the judge had not been addressed on the effect of the 1986 Act but Ms Kirby submitted that the judge's order did not conflict with the provisions of that Act because it was a "return order" (as had been made in *A v A*). She further submitted that the purposes of the order, namely to give this court welfare jurisdiction and to establish A's wishes and feelings, also did not conflict with the 1986 Act.

122. Ms Kirby submitted that the judge had been entitled to give little weight to the report from the FCO. She accepted that the judge had not explained why he gave little or no

weight to it but she submitted that he did not need to do so when it was clear that he had read it and must have decided that it was unreliable. She put forward a number of reasons which, she submitted, would support the report being given little weight including that A had initially been seen with her aunt and uncle and that she had said that she had regular contact with both the mother and the father in the UK when this was not correct.

123. As for the judge's welfare assessment, Ms Kirby submitted that attempts had been made to obtain evidence of A's wishes and feelings through Cafcass but that these had been frustrated or not properly enabled by the father. She also submitted, as referred to above, that the scope of the judge's return order was limited in that it was for the purposes of enabling a welfare assessment to be carried out *after* A arrived in England because the judge had rightly recognised that he could not undertake such an enquiry while A was in Algeria.

124. In respect of the passport order, Ms Kirby submitted that the circumstances of this case fell within the court's power under the inherent jurisdiction to prevent a party from leaving the jurisdiction. The order had been made not as a "coercive measure to secure the return of A" but for the explicit purpose of stopping the father from leaving the jurisdiction.

Determination

125. In my view, the judge was wrong to exercise the inherent jurisdiction in the circumstances of this case and was wrong to make an order requiring A to be brought to England. I set out below the factors which have led me to this conclusion. They are factors which the judge either did not take into account or did not sufficiently take into account and which lead me to conclude both that the circumstances of this case are not such as to require this court to act to protect A and, specifically, that it was wrong to order that A be brought to England.

126. First, the judge did not analyse why it was necessary for *this* court (i.e. the English court) to exercise its jurisdiction beyond addressing the three reasons referred to in *In re B*, at [59]. It is, of course, understandable why the judge did this but, for the reasons set out above, I do not consider that this was a sufficient basis for deciding whether the circumstances were such that this court was required to act to protect A. If the judge had undertaken a broader analysis, including the availability and efficacy of the protective measures in Algeria, he would have concluded that this court was not required to act to protect A.

127. The judge did not, at any stage, address the evidence given by the expert on Algerian law as to the options and agencies available in Algeria to investigate and act to protect children who are alleged to be the victim of abusive behaviour. As set out above, the expert identified a number of agencies which were available to act to protect A. These included the police, social workers, NGOs and the courts. The police could be asked to investigate and/or one of the "many" agencies which provide assistance to women and children in difficulties could be asked to do so. In addition, legal proceedings could be initiated in the local tribunal, in particular an urgent action for measures of protection.

128. As for court proceedings, Ms Kirby submitted that the mother did not have the financial resources to litigate in Algeria. I would accept this submission in respect of the likely cost of substantive welfare proceedings if they had to be funded by the mother from beginning to end. However, the expert also said that court proceedings could be initiated with the help of an NGO or social workers and that that there are "many NGOs … [which] would represent … children at risk" and which predominantly use pro bono lawyers. Additionally, he said that "an NGO can take the matter to the police and local court" which would lead to a judge starting an investigation.

129. Ms Kirby submitted that there were other factors which indicated that there was no effective protection available in Algeria. These were: that no action had been taken following the mother and Z attending the Algerian Consulate in London to convey their concerns about A; that Z had sent a text message when he was still living in Algeria in which he had said he had been to the Police to complain about his treatment and nothing had happened; and that there had been correspondence between the mother and the FCO setting out that NADA had been unable to assist in respect of Z because they had been busy and also because they did not know which school he was attending.

130. It is clear, as I have said, that the judge did not take into account the measures available in Algeria to protect A. Further, in my view, the points made by Ms Kirby do not meet the substance of the case as advanced on behalf of the father, namely that the English court was not required to act to protect A because there were other more relevant remedies available in her home state, none of which had been pursued or explored. There was no suggestion in the expert evidence that they were other than effective remedies. Indeed, as referred to above, he made clear that there are "many" agencies available to undertake an investigation and to act to protect A. It is also right to note that NADA was identified by the FCO as a relevant safeguarding body which they had worked closely with on other cases.

131. Secondly, it is apparent that the judge did not consider the evidence provided by the FCO either when making his findings or when deciding whether or how he should exercise the inherent jurisdiction. As set out above, the "FCO's Social Work Adviser specialised in child safeguarding" did not consider that there was anything arising from A's "visit" which raised concerns about her health or welfare. Ms Kirby put forward a number of reasons why, in her submission, the judge had been entitled to attach little weight to this report. The difficulty I have with this submission is that, in my view, it is clear from the judgment that the judge did not take this evidence into account either when making his substantive finding nor in any assessment of whether this court should exercise its jurisdiction.

132. This may well reflect the fact that this evidence was received after the conclusion of the hearing, but it was important evidence which needed to be addressed by the judge including when making any findings about A's circumstances. When finding that A lived in a household in which "fear and violence has become an acceptable and integral part of her family life" and when concluding that, as a result, A's Article 3 rights had been breached, the judge needed expressly to address this evidence which was contrary to his finding and conclusion.

133. The whole purpose of the request that the FCO see A to "check" her safety and welfare was to obtain evidence from an objective and professional source. The absence of any analysis of the effect of this evidence, in other words the failure to take material evidence into account, undermines the judge's finding and conclusion. I recognise that, if this was the sole basis for interfering with the judge's decision, it might have been appropriate to order a rehearing but, when combined with the other factors in this case, it supports the conclusion that the exercise of this court's inherent jurisdiction was not justified.

134. Thirdly, the judge did not consider the provisions of the 1986 Act and how they impacted on his decision whether the inherent jurisdiction should be exercised. This undoubtedly reflects the way in which the case was argued below but it is, clearly, an issue which we must address.

135. The context of the present case, to repeat, is that the court is determining whether to exercise the jurisdiction when the child, the subject of the proceedings, has been habitually resident outside the United Kingdom for most of her life and in a jurisdiction with which there are no reciprocal jurisdictional agreements in force. The specific form in which the jurisdiction has been exercised is the order that A be brought to England "so that an assessment can be made in a place of safety as to her best interests and living arrangements".

136. It is clear from this recital, and indeed the provisions in the order dealing with A's care, that the court was embarking on a welfare enquiry, which would include making orders dealing with arrangements for her care. Whilst no order had yet been made providing for A's care when she was in England, it is inevitable that the judge would have had to make such an order prior to her arrival. This was why the judge required the Local Authority urgently to address the question of A's accommodation, "including whether either of A's parents are able to care for A" and, if not, what "other accommodation is available"; and why the parents were also required to set out their proposals for A's care so that a decision could be made at the next hearing. An order providing for her care needed to be made *before* A arrived here because the necessary arrangements needed to be in place. Such an order would either have conflicted with the provisions of the 1986 Act or, if it gave care to a Local Authority, would have conflicted with s.100 of the 1989 Act.

137. However, even if no such order was made, taking the terms of the judge's order of 27th February 2020, the clear purpose of the order was to enable the English court to undertake a welfare enquiry for the purposes of deciding who should care for A *and*, as acknowledged by Ms Kirby, to seek to vest this court with jurisdiction to undertake this exercise by procuring A's presence in England. In my view, this would be using the inherent jurisdiction directly for the purpose of avoiding the effect of the 1986 Act and would, in the circumstances of this case, improperly have subverted Parliament's intention (to adopt Lord Wilson's words whilst recognising that this was *not* his conclusion). I deliberately say, in the circumstances of this case, because I can see that there may well not be a bright line between an order which conflicts with the limitations imposed by the 1986 Act and one which does not. In my view, it would be doing so in this case because the judge's order was expressly for the purpose of enabling this court to decide who should care for A and whether here or in Algeria.

138. I have no doubt that if the judge's attention had been drawn to the provisions of the 1986 Act he would have decided that he was being asked to make an order which either directly or in substance conflicted with those provisions. As I have described, the purpose of the proceedings and of the order he made was to deal with the issue of who should care for A. I would add that the instinct of every family judge would be to act to safeguard a child's welfare and, in pursuit of that aim, to seek to ensure that any available jurisdiction is exercisable to achieve that outcome. However, Parliament has expressly limited the types of orders which can be made under the inherent jurisdiction and the order made in this case cuts across those statutory limitations.

139. Finally, the judge, in addition, recognised that he was not able to make a full welfare assessment which would be required before any substantive welfare decision could be made. I question, therefore, whether, as submitted by Mr Gupta, the judge was properly able to decide that it was in A's best interests for her to be brought to England and, as was likely, be placed in the care of a Local Authority. How were, for example, the "complex" implications and the "potential harm" caused by A being brought to England going to be "carefully weighed in the balance", as described by the judge, at [47], prior to A's arrival in England and, consequently, how could the court make a proper welfare assessment that justified A being brought to England? This factor also supports the conclusion that agencies in Algeria are better placed to make any decision as to A's welfare needs as well as undermining the judge's conclusion that it was in A's welfare interests to be brought to England.

140. In summary, in my view, if the judge had taken the above factors into account, he would have decided that this was not a case in which, despite inevitable concerns which would remain as to A's situation in Algeria, it was appropriate for the English court to exercise its inherent jurisdiction. In summary, this is because the substantive threshold required to justify the exercise of the inherent nationality jurisdiction was not crossed in this case in that the circumstances did not *require this* court to act to protect A. In addition, I consider that the judge's order was wrong because, in effect, it conflicted with the limitations on the court's powers imposed by the 1986 Act and because the judge was not able properly to determine that his order was one which accorded with A's welfare needs.

141. In conclusion, I consider that the appeal must be allowed and the judge's order set aside. In addition, despite, as I have said, inevitable concerns as to A's circumstances, this is not a case in which it would be appropriate for the English court to exercise its inherent jurisdiction and, accordingly, the proceedings must also be dismissed.

142. It is not, therefore, necessary to address whether it was appropriate for the judge to make a passport order because this must necessarily be discharged with the dismissal of the proceedings.

Lord Justice Baker:

143. I agree.

Lord Justice Henderson:

144. I also agree.