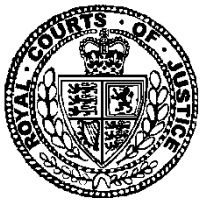

[2020] EWHC 1041 (Fam)

No. FD19P00298

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

7 February 2020

IN THE MATTER OF THE SENIOR COURTS ACT 1981

Before:

HIS HONOUR JUDGE MARK ROGERS

(Sitting as a Judge of the High Court)

(**In Private)**

B E T W E E N :

R — Applicant

- and -

B — Respondent

MR B. JUBB (instructed by Dawson Cornwell Solicitors) appeared on behalf of the Applicant

DR O. MOMOH (instructed by Dack Pearson Solicitors) appeared on behalf of the Respondent

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J U D G M E N T

(A p p r o v e d)

JUDGE MARK ROGERS:

1 I begin this judgment by thanking very much the scholarship and efforts of both Miss Onyoja Momoh, who represents the father, and Mr Brian Jubb, who represents the mother. My impression is that they both accepted briefs in this case quite late in the day and the degree of detailed and structured help that I have received is commendable and I express my gratitude.

2 The parties are R, to whom I will refer, probably extensively, by the phrase "the mother", and B, whom I will refer to as "the father". The three children, the subject of these proceedings, are all under eight years of age and their precise details of birth and circumstances are set out in the papers and need not be on the face of the judgment.

3 The application, which is to be found at B1 in the trial bundle, is unfortunately from as long ago as 6 June of last year. It is quite an unusual application. The extensive procedural history of this case, which is in many ways rather unfortunate, is to be found in B and needs not a full recital by me. A great number of orders have been made by various Judges of the Division and Deputies, both substantive and by way of case management. The application is brought under the inherent jurisdiction of the High Court of England and Wales. An application has also been made for the children to be wards of court. I gather, although I have not seen a specific order to this effect, from the skeleton, that my Lord, MacDonald J, was asked to confirm the wardship at an early stage but declined to do so, and so I take it that that application stands adjourned. I will hear counsel upon it when I come to make orders in due course.

4 The relief claimed by the mother is, as I say, in the inherent jurisdiction and/or wardship for return orders in relation to the children from the Kingdom of Saudi Arabia into the jurisdiction

of the Court of England and Wales, together with a number of ancillary orders. There has been rather slow progress. The hearing, which is to some extent a hybrid, has been multi-faceted. It has involved, rather unusually, a detailed factual inquiry into not only the general background but various particular events which occurred largely as long ago as 2016. There are specific facts in dispute and it is necessary to decide all or some of those facts in order to feed into the factual question of habitual residence and the consequential discretionary matters of forum and choice of orders. It is not an entirely legal matter or an exercise carried out in a vacuum; the factual context or the factual matrix, as it has been described, is absolutely essential in a case of this sort.

5 There has been compiled a schedule of allegations, a so-called Scott schedule, containing four general headings, although numbers 1 and 4, effectively, can be taken together with the detailed sub-allegations within each category and helpfully cross-referenced with the majority of the factual material drawn from the witness statements of the various individuals involved. This has been a full four-day hearing; in fact, running into the fifth day for judgment. I have heard from the mother and the father themselves and, in addition, from four witnesses: Mr W, the mother's uncle; Mr X, a family friend of theirs; Mr Y, the father's friend; and Mr Z, a further friend of the father. I have also read the documents in the trial bundle, including statements of individuals not, in fact, called to give oral testimony but nevertheless taken into account by me.

6 The factual dispute is wide ranging and although it falls within the four or three categories in the schedule there are many other points raised along the way. The central factual issue ends up being a consideration of the question of abandonment, or, to use perhaps a term of art, the stranding of the mother and the children as it is alleged, because the heart of this case, the question why are the mother and the children now in Saudi Arabia, is hotly contentious and is relevant to what follows.

7 The mother's case, at its simplest, is that she wants to care for all of the children in the United Kingdom but she says she cannot return because restrictions placed upon her either as a result of legal matters or *de facto* mean that she is there and cannot leave. She lacks relevant documentation, she does not have the ability to meet financial penalties which would be imposed, and she cannot pay the costs of travel. She says that she is in Saudi Arabia against her will and has only resorted to Saudi courts for relief of a temporary or protective nature. She says that there is no level in a real sense of social integration for herself and the children. They are, in effect, she says, hidden behind closed doors in her uncle's house with no access to money, healthcare, education or social amenities. She says that the father has largely engineered this and has frustrated efforts to make changes to this. She says that she would return as soon as possible and practicable and allow the Courts of England and Wales to resolve any outstanding issues in the Family Court and its welfare jurisdiction.

8 In contrast the father says that the mother has now settled in Saudi Arabia and, whatever the original circumstances, is content with that choice. He says that the family holiday, which obviously was at the outset from the United Kingdom to Saudi Arabia, has developed into a form of permanent residence. He says he would, if he could, join them. He is restricted by virtue of passport orders in this court and by financial restraints, but he would take every step that he could to resolve that. He says any continuing family dispute should be settled by the Saudi court either in what he contends are continuing proceedings or any further proceedings. He denies frustrating the mother's efforts by abandoning her or stranding her and the children as alleged; in fact, he says his actions when viewed fairly and objectively contraindicate those allegations.

9 The background to the case, very briefly, is that the parties are Indian Muslims, although were resident in Saudi Arabia. At some stage, the evidence is not clear, they plainly had legitimate

residential permits to remain in Saudi Arabia. The husband contends that he is a businessman. I say, "contends" because the evidence, in fact, does not satisfy me in anything more than a superficial way as to precisely what his means of financial development or business acumen really is. I remain very doubtful as to precisely what his activities are and how he earns a living; nevertheless, they, as a family, moved to the United Kingdom.

10 It is in dispute, but unnecessary for me to resolve, as to whether the original move was with the support of, or in defiance of, their wider families. What is plain, as the agreed chronology at A1 and following shows, is that from 2011 they, as a couple, were in the United Kingdom and undoubtedly, at that stage, were habitually resident here. The three children of the family were born in London in various hospitals. The three children, therefore, are British and have entitlement to British passports. The contentious matters in this case really arise from about the spring of 2016. I find, without hesitation, that it was the intention for there to be a family visit to Saudi Arabia. The fact that 90-day visas were obtained supports that. The mother had not seen her family face-to-face for some while and understandably missed seeing them in that way. Upon their arrival quite naturally they moved between the two sides of the family living for a few days in one household and a few days in another.

11 Whether there were tensions between the adult parties in this case is difficult to say with clarity. I suspect, however, without formally finding, that they were probably developing. What I do find, and is abundantly clear, is whatever the precise state of play in the marriage, and whatever discord there was between the married couple, those were amplified and actively exacerbated by the contrasting views of the wider families. This has been described as a "family feud". That is dramatic language but is broadly accurate. It was not strictly a feud so much as a clash of social mores; some of it was cultural, some of it was religious with very different interpretations of Islamic tenets. It is no part of my task to form a value judgment on such matters, or crudely characterise either side as in the right or in the wrong. What,

however, is clear is that there were very different interpretations of the dynamics of a married couple's relationship and, in particular, the authority of the husband.

12 The father's family, and he himself increasingly probably polarised by the dispute, advocated a firm line on a wife's obedience. The example which caused friction was her decision to spend time during that holiday on a visit with her family. In the event, each side sought to blame the other and excuse or minimise his or her own role. It will be no surprise to anyone that I do not exculpate either individual or family completely; some blame lies with each, but to make an arbitrary attribution of blame on a percentage basis would be superficial and unhelpful.

13 That is the background to the specific matters explained in the evidence in relation to July 2016. The sadness in this case, and some might say, “the irony of it”, is that all of these matters date back some three and a half years and, to my mind, demonstrate, in one sense, the utter futility of this dispute which has torn through this family.

14 Before turning, in detail, to the matters in the schedule of allegations I need simply to remind myself of the approach. When this court is finding a fact, the burden lies upon the person asserting that fact, in this case substantially the mother. The standard of proof is the simple balance of probabilities. In looking at the evidence I have to consider its whole broad canvass. I have to bear in mind that a denial is a form of evidence and so should not likely be dispensed with. It is difficult sometimes to mount a contrary case if all that is being said is that these allegations are simply not true, and I bear that in mind.

15 I also understand the pressures in a forensic situation of mounting or defending a case and there can be exaggerations or even lies on occasions. The fact that an individual lies is, of course, a relevant piece of evidence but it is not determinative. I must consider the context of

any exaggeration or lying and bear in mind that people, who nevertheless have a good case, may lie on occasions believing it being to their advantage.

16 A further particular point in the assessment of the oral evidence, and, in particular, the truthfulness, credibility and reliability of witnesses, depends upon the nature of the evidence and how it is given. This was a case, which is relatively familiar in this Division, where evidence was given by video link and involved the services of an interpreter. I cannot give enough praise for Mrs Sheik, the interpreter. She had at times an almost impossible job. Although the sound and vision on the live link were reasonable, there was nevertheless, as is often the case, quite a substantial delay in the words being communicated. On occasions, quite inexplicably, the link was interrupted when another video link intervened, so bizarrely there was more than one person on the screen, and that was disruptive.

17 The procedure was not entirely satisfactory. I took a proportionate view and did not insist upon the process slowing down to what would have been a completely snail's pace, and I have no doubt that some words and nuances were at times missed, notwithstanding the best efforts of the interpreter. One of the difficulties was the inability of the witnesses at times to address the key question being posed. That arose because understandably, and this particularly, of course, was in the context of the cross-examination of the mother, counsel began a question in a familiar way with a premise or a contextual background or a page reference, that was then translated and there was a pause. Immediately, from time to time, the witness began to respond to the premise or the context rather than waiting for the question. That, of course, interrupted counsel's flow, the question could not be put and either there was silence or both were talking at once and there was no real flow to the process. This made the normal technique of cross-examination very difficult.

18 I mention that in some detail because it is important that I bear in mind that it is not as easy to evaluate the credibility or reliability of a witness via a link, particularly when evidence is being given in that way in another language. Secondly, counsel's task in cross-examination is difficult enough without it being impeded by the language and technical problems that I have described and, therefore, cross-examination can be blunted as a technique. In that way, therefore, it is important that I treat the mother's evidence with some caution in that regard, but I do express my gratitude to Miss Momoh for her persistence, at times in difficult circumstances, to make sense of the occasional chaos which was generated.

19 Having said all that, and notwithstanding the shortcomings, I have had to consider whether it led to an unfair process for either. I am satisfied, in the end, that it plainly did not and that with patience and determination the evidence has emerged in a proper way. I bear in mind the same points in relation to the mother's witnesses, who similarly gave their evidence via a video link in Urdu. If anything, the two men were rather more long-winded and less focused and so the problems were compounded. The father and his witnesses all attended in person before me and gave their evidence in English. That was obviously easier for me as the tribunal of fact, and translation in real-time was possible so that there were no impediments in that regard.

20 In relation to my impression of the witnesses before turning to the specific findings, the mother, it seemed to me, was clear; she had a good recollection of relevant events; she was measured; she was not obviously prone to exaggeration; she was able to respond clearly to the points that were made against her interest. Interestingly, and just by way of example, at C74 in the bundle is a lengthy letter written on her behalf by her father to the authorities. It contains, undoubtedly, exaggerated claims. The mother, in my judgment, very much to her credit, said in stark terms without prevarication, “Those are his words, not mine”. That, it seemed to me, was a fair and reasonable concession and did not seek to overstate her case. At

times in giving her evidence she was plainly in emotional distress and that was evidenced not only literally by tears but by her body language.

21 The impression of the father was of a quiet respectable man, clear in his account. He was, I regret to say at times, however, evasive and unable to give appropriate levels of detail. In relation to his own circumstances, he was, to some extent, secretive. As was demonstrated in cross-examination, he was extremely uncooperative with the mother's solicitor in revealing such a detail as should not have been a problem, namely his address and his circumstances. Above all his account had with it, to my mind, an unrealistic air in terms of the events. He had a lot to say about the past, but when asked really about his plans and expectations for the future he was, to my mind, vague. The evidence in relation to the Saudi Arabian proceedings, by way of an example, was confusing and unconvincing. I stress that these preliminary impressions do not determine my findings but are part of the overall picture.

22 Looking then at the schedule, for reasons which attracted themselves to both counsel, it is probably sensible to start with the specific allegations of direct abuse and coercive and controlling behaviour. In the schedule under item 2 the detailed narrative passages, both in the statement of the mother's solicitor who launched the proceedings, Miss Jahangir, and also the mother's own statement of 5 October 2019 at paragraph 6, set out the background. In addition, the mother gave oral testimony about these matters and it was, in my judgment, very striking, indeed. It was the point of the highest emotion and, in my judgment, notwithstanding the language difficulty since I do not speak Urdu, nevertheless her feelings shone through. She said that she had, at times, facial paralysis and that he had slapped her; that she went to the GP for other unrelated matters but he sought to ensure that she did not reveal them to the general practitioner. She said:

> "He pushed me; he strangled me; he sat on my chest; beat me to the point where I fainted and was lying on the floor"

Then, and this is when the ring of truth comes through, she says:

> "The next day he apologised and asked me not to tell the GP because it would cause problems."

23 She added that he had hit her with a computer cable on her feet, and again such a striking and unusual detail, in my judgment, is telling. He slapped her. Then again with insight, although the physical scars have long since healed, she says that she is mentally scarred because of the abuse. At times she said that she was so distressed that she was unable to move or to eat. That was, in my judgment, powerful and compelling testimony.

24 There is very limited evidence but some that she told those around her of what she was suffering, but effectively she kept it to herself. Mr Jubb accepts that there is no independent evidence of a familiar sort either from a trusted independent eyewitness or from a medical practitioner, or from any other person in authority. Understandably, Miss Momoh relies heavily on the absence of other material and she points specifically to the fact that if the mother's account is correct there would have been visible bruising, which apparently was not spotted or reported**,** and that in the context of the mother having time with medical practitioners.

25 She says there was no police or other authority intervention and, indeed, no family intervention; even though mediation was occurring this was not the subject matter of the mediation. She says that there is no other reference to such abuse in documents which might well have been the sort of things where it would have been seen. She points, in particular, to

the fact that the mother did not raise it as an allegation in the conversation that featured so prominently in the evidence and is to be found at C60 in its transcribed form. She says also that there is other ample evidence to show the mother's ability to act as an independent person with ability to dictate her own events, and so she could easily have brought these matters to light. She also rightly says, and I have already accepted, that it is important to bear in mind that the father denies all these matters. That denial must carry weight.

26 In response Mr Jubb points to the cultural elements of the case and the propensity, he would submit, to keep such matters private and secret, the willingness of the husband to apologise and his imploring her not to go to the GP. In addition, as well as any cultural aspect relating to their religion or cultural values, he says that this is typical of a disempowered victim of abuse.

27 In my judgment, Miss Momoh's points are well made and must be balanced and given full weight, but in the total analysis that I have to undertake, and notwithstanding all of those points, I have no hesitation at all in accepting the mother's evidence as being a credible account with the ring of truth. The contraindicators are there, I accept, but they are explicable in the context of this particular mother's life. Sadly, victims of abuse do get missed and often, as I find here, continue in their existence in plain sight without the true facts coming to life.

28 In consequence, therefore, in relation to item 2 on the schedule, the matters set out there in detail, which I will not go through, are made out. The one exception is in relation to the allegation that he exposed her to financial abuse. That may be so, but there is no clear evidence, to my mind. I am satisfied that he has not provided financial support since separation, but that is simply a factual finding. I am not satisfied on the evidence that it is a weapon of abuse and therefore the specific term “financial” must be deleted from my finding.

29 In relation to the third item, which is described as “controlling”, Mr Jubb asked the court to make specific findings in relation to the schedule but also to hold that there is, on the totality of the evidence, clear material upon which the court can find that there was an imbalance in the power relationship of an extreme sort. I heard a lot of the events in late July 2016 leading up to the father's departure. Whatever the precise detail, says Mr Jubb, they feed into the overall impression and, in the end, court's finding if I am satisfied, on the balance of probabilities, that he was a controlling man.

30 The first incident was at the swimming pool. The details, frankly, do not matter, and although I heard a lot of the detail. I do not propose to set it out in this judgment. It is sufficient to say that the father forbad the children from swimming at this family party. He, however, was not there and so his word had to be carried out by others. He says that he was not being dogmatic or domineering but was worried, first of all, about the cleanliness of the pool and, secondly, about the safety, the lack of a provision of lifeguards, and so on. In relation to the cleanliness, he may or may not have had a point but the fact is that there were many other people swimming and that would not, in my judgment, have necessarily been an essential or determinative. In relation to safety, his points are less well made. There were many people there and he may have been right that there was no lifeguard, but there were any number of adults on hand for this happy family event**.**

31 What his injunction failed to take account of, of course, was the propensity of a young child to try and have his way. H wanted to go in. Who would be surprised at the reaction of such a child? That put the mother and her family in a very difficult position. Her oral evidence to me was that “[Father] said, ‘Don't let the children go into the pool’” and that was the position at first and she tried to enforce it, but H wanted to go into the pool:

> "I tried to explain that he might get sick but I didn't want people to know that the father was being strict."

In the end her mother intervened and took H in to avoid him being very upset. It may be said that they gave into the boy.

32 The father's anger which followed was not about cleanliness or safety, or any other matter of minute detail, but was because his word had been countermanded and he had been disobeyed, and when the mother said she did not want people to know that he was strict that is the key. He simply was cross that he had not been followed, and I accept the mother's account.

33 All of these problems and these minor tensions led to the various attempts at counselling and mediation which were described, and it appears that both the parents and, perhaps more significantly, the wider families were involved. Again it is unnecessary to deconstruct the precise detail of exactly when this occurred and what the advice of the sheikh was on any particular occasion. The overall impression I have, and I am satisfied, is that the father was prepared to enter into mediation but that compromise would mean substantively, if not entirely, accepting his terms.

34 There was, subsequently, yet another unpleasant piece of discord: the altercation in the car principally involving the mother's uncle and the father himself. Once again the details do not precisely matter. Who did what, where the car was, whether it was pulled over, who first raised a hand, are all matters of detail, but the overall scene reflects badly upon both men. They collectively showed a stubborn disregard for the feelings of those around them. Whilst it may have been a hotly disputed debate upon Islamic orthodoxy, it was neither the time nor the place so neither man is without blame. The mother again spoke true common sense in saying both men were out of control.

35 Matters were further deteriorating, no doubt, in part, because of that incident, both sides taking the affront at having been accused of wrongdoing. The mother was visited by what appears to have been a delegation of women and the matter yet again soon deteriorated and spun out of control. I accept that, to some extent, both the mother and the father were being driven and carried along by what was going on in the wider families who were taking a large role; probably, with the benefit of hindsight, a counterproductive role. But underlying all this was father's view and his side of the family's view that it would be appropriate to restrict the mother's freedom of movement and, in particular, the time she was spending with her family.

36 In her submissions Miss Momoh says that the wider picture, if the court is to look at the matter fairly, shows a completely different approach to family life; that this was normal family life and this was not a controlling husband. She points to a series of photographs where any objective observer would regard them as showing a happy family, a relatively liberal and unrestricted family; the wife showing no head covering and wearing western clothes and undertaking normal activities.

37 Very late in the day this morning, after the submissions but with my permission, I was shown two video clips, the first of which, again she submits, shows perfectly well-balanced and happy children interacting in a happy and family setting. Miss Momoh also says that the father's apparent demands, if that is what they are seen to be, were, at the very least, an exaggeration of his own view and, she would submit, were far and away more stringent and extreme than anything he would advocate and probably demonstrated that the point had been hijacked by the wider family. She further points out that there is ample evidence to show that the mother is able to act independently. Again, all of those points require very careful balancing in the overall exercise.

38 I accept the photographs (although seemingly the entirety or majority of those that I have been shown date from 2013) do show examples of happy family life, but, as is correctly pointed out, it is not uncommon for an abusive, controlling individual to project a picture of harmony on the outside world. Mr Jubb says as well as the specific matters of direct evidence, the overall picture created by the father was of a dominant, domineering man and some of his vocabulary betrays such a characteristic. When the husband or the father speaks of offering a wife a kind gesture or indicating "Why would I seek to punish her?", Mr Jubb submits that that shows that in his mind all of the power in the family resides with him and he is therefore to set the terms.

39 In relation to the vocabulary, the proviso, of course, is that it is a point that only goes as far as is reasonable, bearing in mind that the father's first language is not English, although I do remark that he gave his evidence clearly and in an entirely proficient way.

40 What happened next in this series of very unhappy events was the visit to the police station. It appears relatively spontaneous as a result of a passing police patrol car, but, however it came about, the whole family ended up in the police station airing their private dispute in public and receiving, no doubt, advice to calm down and to take matters sensibly. Again, it does not particularly matter where the blame exactly lies but what is clear is that this family problem was now at the point where it was out of control.

41 The fallout, however, is significant. The mother and one child were for a few days, in my judgment, and I find, isolated. I am satisfied that the father used the retention of the belongings as a short-term weapon. Equally, and this is a point of balance which Miss Momoh relies upon importantly, the other children were soon returned to the mother's care and she says that is a strong contraindication of a controlling and coercive partner against

his wife. She submits that the return of those children would have been inexplicable in other circumstances if that was right.

42 At the end of all this, after a few days, the father left that jurisdiction to return to London. The key question then arises: where were the passports, the relevant passport with the mother's crucial visa, and the travel documentation? I am quite satisfied that the family documentation, in principle, was in the father's control. That in itself was probably entirely conventional and not sinister. I am also satisfied that, if not all, the majority of those documents were taken to the police station. The evidence then becomes curious. The father says that only his passport was released to him. He apparently did not enquire in detail as to what happened to the others. He assumes that they were given back or kept in safekeeping or passed to other individuals; he simply cannot say. He assumed that the mother and the children had their passports.

43 If that were so, namely that the documents were in the mother's possession, then it would have occurred to him, in my judgment, that this whole dispute, this protracted problem and this litigation, would have been pointless. Why would she assert, as she has done, that she has no relevant important documentation if it was with her? I am quite sure that the mother did not have those documents. She believed, firstly, in a general way, that the documents were with the paternal family. She may not have drilled down into the analysis of exactly where and in what circumstances. It is therefore entirely consistent that she, after a while, took legal action to try and retrieve them; fruitless, as it turned out, as the grandfather denied possession.

44 The father, as was pointed out surprisingly late in the day, began to assert as a possibility (not certain but as a possibility) that the passports might still be lodged with the police or other Saudi authorities. That, it seems to me, is a highly improbable proposition, in any event, but even so it could easily have been established by anyone. But it would have been the trump card for the father and the onus upon him making the inquiry, it seems to me, is obvious. He

has been accused, he says, wrongly throughout of stealing or, at best, withholding the possession of those documents. He could easily have disproved that by producing evidence that they were being held in safekeeping in Saudi.

45 This depends, to a large extent, on inference because there simply is no absolute evidence of where any document, apart from the father's own passport, is at the present time, but by inference and a process of elimination I am quite satisfied that the passports, and other relevant visa and travel documentation, were at the time of his departure with the father and I have no reason to suppose are not either in his possession or certainly under his control. But it goes beyond that I and make a positive finding: I reject his denial. He had every incentive, I find, to retain the documents. His goal in that regard was to create difficulty for her and therefore to isolate her; it made sense. If he had her passport then she would be stuck. If he had the children's passports, although the plans themselves had not yet been formed, there would, in his view, no doubt come a time when he could facilitate their travel to the United Kingdom without the mother, particularly if by then she had had to leave Saudi most probably to go to India.

46 His swift departure is also, in my judgment, significant. He said that there were a range of reasons, partly practical, partly financial and partly to avoid himself being stuck in Saudi, but overwhelmingly I find his departure was a response to the family breakdown and his desire to isolate and weaken his wife and children's position. It is, I am sorry to say, demonstrative of a selfish outlook. He may have had his own practical and financial reasons, but he appears to have paid little regard to the consequences for the others. It was, in the heightened emotional circumstances of that time, also a punishment for her attempts to rebuild her quality time with her own family.

47 Both on the specific items raised, and in relation to the particular matters in item 3, I therefore make positive findings on the balance of probability. I find also in the most general sense that he sought to take advantage of an imbalance of power in the relationship and to impose his will.

48 I have effectively covered the material that flows into items 1 and 4 in the schedule. I have found, and repeat, that I accept that the father's motivation was to undermine the mother's position and the consequence, whether deliberate or *de facto*, was to strand her in Saudi in an effective legal and practical limbo. I therefore make that specific central finding.

49 The only proviso and it is really again a matter of small detail relates to item 1 where it is suggested that he removed the documents, the travel and passport documents, which I find, but also her mobile phone and jewellery. The evidence on that was insufficient, in my judgment, to make a positive finding. I heard little or nothing about that and so those two subitems of the mobile phone and jewellery must be deleted.

50 In making those general findings I have taken account of the oral and written testimony of all the witnesses, including those not called, and the documents filed by other important players in this drama. I also take account of the demeanour and manner of giving the evidence and of the wider surrounding circumstances of the case. I have also taken into account the specific points made by counsel as to the key documents in this case. There was quite extensive reference to contemporaneous and/or other subsequent documents, and I need not refer to them all, but in deference to the helpful submissions made it is important simply to put those in context.

51 Perhaps the most examined document was the transcript of the conversation between the parents translated from Urdu into English and to be found at C60 relating, as the document

shows, to a discussion in October of last year. I am sure that the translation is accurate, but it does, to some extent, make comprehension difficult, the conversations at times stilted or difficult quite to comprehend, but the overall position is clear. It is quite a lengthy transcript and I simply dip into two or three items. At C62 there is a discussion about obtaining the Saudi visa and it reads as follows:

> "MALE [that is, of course, the father]: No visa possible, there isn't any visa; I have tried. Can't come now, and now even your visa is about to expire.
>
> FEMALE: So, how can I come over there?
>
> MALE: So, your Saudi visa is about to end, you will have to go to India.
>
> FEMALE: As you wish, wherever you say, I will go there. However, how could I go? I have three children with me without Mahram (a lawful male adult companion), then you say not to go anywhere without Mahram. How would I go?
>
> MALE: You should have thought at that time.
>
> FEMALE: That time, …all this happened all of sudden that at that time…
>
> MALE: Right now, at present I can't bring you to the UK. Neither can I come there, nor I will be able to. Your visa is going to end, therefore, your visa is going to end on the 9th, so you have to go to India before the 9th. For now, you are going to India, still you have to get Indian visa for children as well. So, in India, wherever you are going to stay, with your mum or whoever, make arrangements and be prepared before the 9th.
>
> FEMALE: I will think about this and let you know.
>
> MALE: So, what's the second option you have?
>
> FEMALE: Second option. I don't have any…"

Then at C63 a passage again by the male speaker:

"You also know everything, so you should not talk like this. The second thing is that how much money is owed to S…..? So, for now I can't leave here to come over. You go to India. Go to India… after three months or so, as soon as I get time I will try to come to the UK or Saudi, or wherever I am relocated you come over there."

Then at the bottom of that page:

"FEMALE: … one day's permission I had asked for, as a wife. You could not do that for me? You could not fulfil my little wish? I stood by you for so long, four and a half years, five years I stayed with you there.

MALE: I stood with you for four years.

FEMALE: Yes, you did. Don't say that, ok. I also was there. Now after so many years I came here, so I made a request to leave me just for one day - problem will be solved, yes, many people requested.

MALE: ... I am going to the UK, but all your family…

FEMALE: So, right when the situation was going on, listen to me, when that sort of circumstances were going on, during all this, everyone came and asked you to leave her for one day and let her meet the parents for once let her see them, and I had also told you the same."

Finally, very much towards the end of the passage at 67, the conversation is about to end and the male asks: "…where is [F]?"

"FEMALE: [F]? Everyone sitting in other room watching cartoons. All of them forgotten you. No one misses you."

52 On behalf of the father, the submission is made that that is a mother who is not estranged from her husband who even then, after the event, is contemplating some form of new life together. There appears certainly to be discussion of the future. She makes the important point that there is no mention of the passport difficulty.

53 The reality is, of course, that the mother knew what was being said was being recorded; the father did not, so it is submitted that he is likely to have been more unguarded, but, of course, the mother is the one setting the agenda. It is undoubtedly an important piece of evidence and what Miss Momoh says carries weight, but what strikes me as well as the equivocal nature of what the mother is saying is the clear determination, even after that passage of time, of the father suggesting that the solution is that the mother should go to India. But she makes the point with clarity, and Mr Jubb reinforces that, by saying "Why on earth would she go to India without her children? It was an unrealistic prospect for her". The father seems impervious to that. He fears that there is no other solution. I have to bear in mind carefully the points made about that, but I am satisfied that they do not change my overall view of events.

54 The next document of significance, to which a lot of reference was made, is at C74, to which I have already referred. It is from the mother's father. It is an unhelpful letter in many ways and can easily be criticised. It obviously carries with it exaggeration and graphic accounts. It demonstrates, in my view, the intensity of the family discord. Does it, however, weaken the mother's case? In my judgment, it does not, because she fairly disassociates herself from that. She could easily have adopted it and jumped on the bandwagon to make the picture seem even worse, but fairly she did not do that.

55 A further document of note is at C71 and it is an important document in Mr Jubb's submission. It is apparently a document headed or directed to the "Head of the Fourth Department of the Personal Affairs Court in Jeddah" and is a submission made in relation to the proposition of

a reconciliation on terms between the parties. As counsel rightly points out, it is very important and it is in terms clear that this was written by the solicitor equivalent on the instructions of the client who was the father's father, not the father himself. However, and a good deal of analysis was undertaken of the terms. It is not, I am quite satisfied, merely a document written unilaterally without the father's input. I am satisfied that even if strictly the client was his own father he was undoubtedly involved in the input of information, and I am satisfied the document was sent with his approval.

56 It is, I have no doubt, a strong indicator of the husband's own views. It is not entirely formulaic or based upon a template. There are elements of that I accept and that must be borne in mind, but there are specific details which could only refer to the particular dynamic of this relationship and refer, for example, to the husband, in terms, as a business consultant, (that plainly would not be formulaic) and in paragraph 6 to the circumstances of the visas, which again could not be formulaic.

57 There are also items which go to the specific points in dispute, namely the degree of Islamic veiling and of the question of wearing of make up or other items of modesty or adornment. They are, to my mind, important factors. This is, as I put it in the course of the evidence, and I adhere to this view, stringent terms that were being put forward in order to save this relationship. They were not obviously the sort of matters which would give confidence to a mediator that there could be a meeting of minds in this regard. In short, this letter reinforces my view and I reject the distancing that the father sought to place between his view and its contents.

58 Similarly the documents that were provided subsequent to the delivery of the bundle and are found at VB1 to 6, and, in particular, documents 5 and following including 5A, which was the additional letter handed in of 2 November 2016, are also, in my judgment, important and

indicative of the overall picture, as I have described it, and the father's explanations in that regard are not convincing. I am very sorry to say that the surrounding documentation shows a father who was keen to keep up the pressure.

59 Finally, in terms of the other documents, are the translations of the material from the Saudi court. The concluding part of E in the bundle are the original case notes and rulings of the Court at First Instance, the Personal Status Court, the Fourth Personal Status Department. It is unnecessary to read in detail. Again, the translation, I am sure, is good but it is quite a dense document and difficult to unpack, but at E83 the original finding of the court, it seems to me, can be gleaned. Having set out some general propositions that apply in so-called custody cases the court says this:

> "[Children] will be with her mother and this is the saying that we do not choose anything else, and since the consideration of custody by looking at it is in the interest, and since the common children under the age of seven and because they are in the custody of their mother have an interest for them, because she is the most pitiful and most merciful, and because what the jurists decided in the event of one of the two children traveling a long time. So as to dwell, then the nursery will be the core, and they are justified, including the fear of losing cuddles, loss of lineage, and this is safe at the present time…"

In other words, the proposition from which the Saudi welfare court began was, as they saw it, the inherent advantages of young children being with the mother. That is then concluded in the ruling, by the specific matter, in this way:

> "…there was no contradiction to me regarding the ruling of the department for its claim of custody of her children, namely… [and the children's names are given] that the country of incubation must be the Governate of Jeddah. Thus, the notes of the

appeal were addressed, and I ordered that all the papers of the treatment be submitted to the Court of Appeal [for further decision]."

60 I have not been given expert evidence, but I infer from that that any first instance decision may be reviewed without request by the Court of Appeal. That seems to have happened because there is a further judgment and translation which is very much more up to date. The freestanding document from the Ministry of Justice, again headed in the "Personal Affairs Court" with the dates of December of last year, show that the matter was reconsidered. On the first page, I have not numbered them individually, the court's judgment reads:

> "Having reviewed what the claim contains about the Respondent, the authorised representative said: What the Claimant said about marriage and children is correct yet with regards to their ages, the hearing at which their ages were verified is old and consequently their ages are … [and then their ages are given]… my client [that is the father] does not approve of what the Claimant mentioned in her application for custody as he resides in Britain and the Claimant used to reside with him for more than fifteen years. Hence, my client requests custody over his children. This was how he answered and upon asking the Claimant about the location where the marriage contract was conduct ed she said: In the province of Jeddah. When putting this to the Respondent, she [the advisor] has replied: correct, then the Respondent, authorised representative decided: the children did not finish their education, she did not care about their health and my client is insistent on custody."

That is an important passage, although a little difficult to unravel, but what is plainly being said is that he, the father, "was insistent on custody" and was making adverse comment (a welfare basis) of the mother's care.

61 After then a lengthy passage in which the principles relating to custody cases in that jurisdiction are discussed, the court then descends to the detail on the fourth page:

> "As the Respondent's authorised representative has acknowledged that his client lives alone, this is not in the best of interest of the child over whom a parent has custody. Hence, the father shall not resume custody as he is busy with his life matters."

Then in the final judgment attachment for the last two dates in the series, the judge states:

> "Accordingly, I have not observed anything but what the district had decided that is to grant the Claimant [that is the mother] custody over her children…"

Then that is confirmed. The case having been submitted to the Court of Appeal was sent back and the final judgment, I am told, from 2 January of this year in short reads:

> "The hearing has begun after the case has returned from the Court of Appeal and it is found that the decision issued by the Third District of Personal Affairs at the Court of Appeal, has been enclosed with it … [number and date given], the required text of which states the judgement is upheld…."

62 As I understand it, although I may be wrong as to the detail, the overall thrust is that the matter began at first instance, was either once or twice sent up to the Court of Appeal for review and back and the ultimate decision of the court was upheld, namely, that the mother should have custody.

63 The father complains that he was not able to attend in person and that any legal representation he had was formal, limited to asking for an adjournment or taking a note of the proceedings.

That is not my reading of the judgment and of the passages to which I have expressly referred. The representative appears to have been taking a proper advocate's role in that. But even so, it is, in my judgment, plain that the court addressed the questions in accordance with its own rubrics and tenets in a welfare-based manner. There is no evidence before me of an appeal to the Supreme Court. The father overstated that and quite unwittingly, I am sure, counsel's skeleton suggested that there was an extant appeal. There was not; there is not; there may be but there is no evidence that that is so.

64 What has happened, as has emerged, is that the father has left it with his sister. Whether she is entitled to prosecute such an appeal on his behalf I simply do not know; I have no evidence of Saudi procedure. But there is no evidence from the sister; there is no piece of documentation, although throughout this hearing, which has lasted a week, he has had the opportunity to produce it. There is also no evidence, either expert or academic, as to the nature of Saudi procedural law. It is not clear to me whether he has the absolute right to go to the Supreme Court, whether it is a conditional or provisional right, or whether he requires permission. There is no evidence that simple non-attendance would be a valid ground of appeal, whether, as one might expect, in the final Court of Appeal in a jurisdiction that it was limited to matters of public importance or pure law. But, whether or not that is so, the fact remains that although he has intimated he would like to appeal, there is no evidence that he has done so; there is no evidence that he has the ability to do so or the means to fund it.

65 Why then has he been so determined? As I have said, his case was put and a welfare determination was issued. It is suggested and in the end, having thought carefully about this, I am satisfied that his appeal, or his attempt to appeal, is a spoiling tactic. I do not, in the end, believe unreservedly his apparent concessions in relation to the mother's role. He said that in fact all he is seeking to achieve is a degree of shared care and control whether here or in Saudi Arabia. That, it seems to me, is inconsistent with the case he put before the court and given

his suggestion, to put it at its lowest, that the mother would have to leave Saudi for India, how that would be a practical proposition in any event. It is, I am afraid, looking at all of that material, further indication of an attempt at controlling events, albeit from afar.

66 What then flows from all of those factual matters? I have received detailed submissions, a skeleton argument from each counsel before me, and, indeed, Mr Jubb has adopted the submissions of counsel earlier instructed at the time of the prehearing review. Although they are learned and extensive documents on the law, in the end, as I understand it, there is nothing between counsel on the law as such, merely its application to the facts of this case. The first question, which always arises, or almost always arises, is the question of habitual residence because if habitual residence is determined that very often founds jurisdiction in the same place and is often decisive. It is, of course, a very familiar concept, particularly in cases of this sort in the Division. There are a number of very well-known leading authorities in the House of Lords and Supreme Court with many examples at first instance to demonstrate the application.

67 In this particular case the authorities, to which I have been referred, relate not just to habitual residence but to the application of the principles into factual situations of the sort I am dealing with. The first and well-known case is *A v A [2013]* UKSC 60. It is a very well-known case and I need not set out the factual background. It was a case where the Supreme Court held that an order making a child a ward of court to secure the child's return to England and Wales was an order related to parental responsibility within the Regulation. In the course of the judgments of the Supreme Court Justices the importance, or central place of habitual residence, fell to be considered. The second holding reads, in part, as follows:

> "Since Part 1 of the Family Law Act 1986 is not applicable, the common law rules of inherent jurisdiction would continue to apply, including the inherent jurisdiction

> exercised by the courts on behalf of the Crown to protect its subjects, that it followed that it would be open to a judge to order the return of the youngest child on the basis of his nationality regardless of his habitual residence, albeit that such jurisdiction was to be exercised with extreme circumspection."

And that accordingly the matter in that case was remitted.

68 That, of course, gives the court a broad and useful jurisdiction of a breadth, which, of course, the inherent jurisdiction provides. It does not mean that habitual residence does not require consideration. Baroness Hale in her judgment at paragraph 54 reminds us, although it is very familiar these days, that "habitual residence is a question of fact and not a legal concept such as domicile", and then later:

> "The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned."

In other words, habitual residence is factual, it is importantly situational, and the question of social and family integration of the children, particularly where they are young, of the parents or the parent with custody, has to be considered.

69 Inevitably and properly Miss Momoh relies upon the important central ingredients of physical presence, which, of course, is made out: the length of time, which is substantial, and the connection with the environment. Mother, of course, from an early age in her life lived in Saudi before moving to the United Kingdom. They are, of course, as she submits, powerful

indicators and might in many cases be the starting point to suggest Saudi Arabia is the place of habitual residence.

70 The reason it was essential that I determined the factual matters in this case was that the factual context is an important ingredient. I am satisfied, as will be plain from my findings, that the mother's continued presence in Saudi Arabia is against her will and has been caused by the circumstances I have described and brought about, in part, if not in whole, by the father. Her freedom of movement as an overstayer is now limited. She is not, I find, "literally a prisoner in her own home", as perhaps her father had sought to suggest, but on her own evidence, which I accept, she really does not go out; she is in fear of apprehension. Her circle is very limited to the immediate family in the flat, which although spacious is plainly overcrowded, but neither she nor the children have any real sense of social integration.

71 The children are not in full-time education; they are not receiving proper tutoring, merely informal assistance from their mother. They have no access to proper healthcare. Although that is not an issue since their health is good, it remains, nevertheless, an important deficit. There is no real element of social interaction. There is no evidence of frequently going out and visiting and participation in activities, and there is no evidence and I find little financial stability for the mother or the children. They are, I suspect and I find on the evidence, highly dependent upon charitable help from the family. The mother has, I am satisfied, an online and social media profile, but that, if anything, reinforces the point of isolation rather than proving integration.

72 As was conceded in the earlier skeleton and confirmed by Mr Jubb, it is untenable to suggest that the children and she are habitually resident in the United Kingdom. The question is, therefore, whether they are habitually resident in Saudi Arabia. This is a very troublesome matter. Habitual residence, as a matter of common sense, should be found, if possible, to be

somewhere. But on the very unusual and extreme facts of this case I have come to the conclusion that they are not habitually resident in Saudi Arabia either. There is simply no significant element of social integration. They are, in fact, frozen in this legal and practical limbo.

73 I accept that that is an unusual finding and one I confess to being somewhat uncomfortable about making. Superior courts have often advised judges, if possible, to strive to find habitual residence, if possible, as that is a practical and commonsensical thing to do. In this situation I have come to the conclusion that I have but because of the uncomfortable nature of such a finding I propose to consider the alternative, namely had I found habitual residence in Saudi Arabia. If, as I have found, there is no habitual residence, there is no obvious starting point and I simply have to look at the exercise of jurisdiction in England and Wales, unless I am persuaded that it is preferable to stay the proceedings and allow Saudi to deal with the matters themselves. Miss Momoh quite properly concedes that it is not a formal evidential burden, but the weight of authorities suggests that she is the one that has to satisfy me that a stay is preferable.

74 If, on the other hand, habitual residence does lie in Saudi Arabia, the Courts of England Wales, and, in particular, the Family Division, can nevertheless exercise jurisdiction but in those carefully defined circumstances and in the way that Baroness Hale has set out in *A v A*, to which I have already referred. The further decision of *In Re B (A child)* [2016] AC 606 is also important. In the Supreme Court the appeal was allowed and the holding reads that:

> "In adult disputes about children the presence of children in a particular state on a day was an unsatisfactory foundation of jurisdiction, because by moving the children from one state to another one of the adults could easily invoke a favourable jurisdictional or pre-empt invocation of an unfavourable one, but because of the modern international primacy of the concept of a child's habitual residence it was important that where

possible a child should have habitual residence; that it was not in the interest of children routinely to be left without one."

I have already dealt with that difficulty. It goes on:

"If interpretation of that concept could reasonably yield both the conclusion that a child had a habitual residence and alternatively the conclusion that he lacked any habitual residence, the court should therefore adopt the former. Under the modern international concept of a child's habitual residence, with which the meaning given to habitual residence by the Courts of England Wales should be consonant, the expectation was that only when a child gained a new habitual residence would he lose the old one and so it was unlikely, albeit conceivable, that if he would be without a habitual residence that the judge had asked herself far too narrow a question."

75 I refer to those to underscore the degree of the uncomfortable feeling that I have, but nevertheless I adhere to the finding. I have already referred to the test for habitual residence which Baroness Hale in that case, as in the other, reiterates, but then significantly at page 608 in the second quotation from Baroness Hale's judgment the headnote reads:

"The circumstances justifying the exercise of the court's inherent jurisdiction based on the nationality of a British child, who was not habitually resident in England where the proceedings began, are not confined to dire and exceptional cases which are at the very extreme end of the spectrum. The basis of the jurisdiction is that of a child of British nationality regardless of whether he is in or outside the country and is entitled to protection. The real question is whether the circumstances are such that a particular British child requires the protection."

In other words, the Supreme Court is avoiding a gloss on the general approach. Of course, the central point is protection and it is a powerful jurisdiction which should be exercised with care and with circumspection, but without any artificial constraint upon how it should be approached.

76 I will not, if I may be forgiven, refer in detail to the other two authorities in the bundle, although I confirm familiarity with the decision, *Surrey County Council v NR and RT* [2017] EWHC 153, a decision of MacDonald J and *London Borough of Waltham Forest v X, Y and Z* [2019] EWHC 846, a decision of Gwyneth Knowles J. They are both examples which are illustrative but not determinative. In fact, a further decision of my Lord, MacDonald J, has exercised the minds of both counsel and detailed submissions have been made, and I have been provided with an electronic copy of that. It is *W v F (Forum Conveniens)* [2019] EWHC 1995. In that decision, the facts of which, of course, are very different and so do not help, His Lordship at paragraph 32 deals with the approach to be taken when determining an application for a stay. He says:

> "The starting point when determining whether the party seeking the stay has established that England is not the appropriate forum for a case concerning a child is that the court with the pre-eminent claim to jurisdiction is the place where the child habitually resides (although habitual residence will not be a conclusive factor)."

Then he goes on to cite, at some length, the words of Waite LJ in *In Re M* (*Jurisdiction: Forum Conveniens)* [1995] 2FLR 224

77 In paragraph 33, and I need not, I think, recite it all because it is a very lengthy citation, his Lordship looks at the jurisprudence around this area from the earlier decisions and leads

into the very recent decisions in the Family Division in the context of the guidance of the Supreme Court.

78 Drawing all of those strands together, bearing in mind the approach to be taken, as described by Baroness Hale, I nevertheless caution myself and accept that extreme circumspection should be deployed. There is a dispute as to the appropriate forum. Even if, as I find, England and Wales has jurisdiction, because plainly it has, even without a finding of habitual residence on the basis of the protective *parens patriae* jurisdiction, it is not inevitable that I should find that this court is the appropriate forum.

79 The father says that Saudi is already seized of it and in the sense that there have been previous proceedings, to which I have referred, he is, in part, correct, but more importantly he says it is obviously better placed to dealing with it. Even contrary to my principal finding as to habitual residence, it is submitted, on his behalf, that there is nothing to displace the view that the children are there, it is their practical place of residence for the time being, and so that that court ought to decide the matter.

80 The mother says whether or not habitual residence has been found, and I have given my ruling on that, her position is that the position in Saudi is untenable. She says that Saudi has already resolved the point in her favour and there is nothing left to decide. On the basis of my factual findings, that is correct. Any theoretical appeal to the Supreme Court has not been issued or there is no evidence that it has been, and there is no reasonable evidence before me as to its approach. It would be wholly artificial to postpone or, indeed, to refuse to accept jurisdiction on that tenuous basis.

81 Equally, the practicalities of the case, in my judgment, are important. The father is here. It may be that he wishes he was not, although he is, to some extent, equivocal, but he has not

made credible plans. As I have said, I am not satisfied that I know enough about his circumstances or his finances. He is, it appears, heavily in debt. His expectations for his business may be either exaggerated or based upon false optimism; I simply do not know. He also says he wishes joint care and control. As I have said, I doubt that that is really his true feeling, but even taking that at face value, how is that achievable? He appears unsuccessfully to have sought sole custody in Saudi Arabia. If his expectation is now to seek to have care and control on a joint basis, the obvious location for that would be in the United Kingdom as the mother has no wish to remain. He appears, notwithstanding the preference for Saudi Arabia, to have confidence in the Courts of England and Wales and he has, albeit with a difficult and uncooperative start, played a full part in this litigation.

82 Significantly in her final submissions, and having taken specific instructions, Miss Momoh conscientiously advised me that the father was neutral on the question of habitual residence and it followed on forum. That was explored and clarified and I am satisfied that that is so. Of course, the court cannot give itself jurisdiction where none exists, but I am satisfied, in principle, jurisdiction is available and since the father remains neutral on the question of forum, that is a factor that I am able to take into account.

83 I am satisfied that there is no extant risk of a conflict of proceedings. Indeed, it seems to me highly probable that the courts would come to broadly the same conclusions, although I make no finding as to that; that is merely an impression. The father's appeal is procedural rather than substantive and there is no evidence before me that it has any real prospect of getting going forward at all. The family can be here; welfare can be considered here.

84 Importantly these children are British and because the test is one of protection, I have to be satisfied they require the court's protection and that subsequent matters should be dealt with here. I am satisfied they do require protection. I underscore, with emphasis, that this is not a

criticism of Saudi Arabia, its culture or its judicial process, but it has come about because of the circumstances in which the mother and children find themselves and by the actions of this father, which I am sorry to say have caused harm and almost certainly have acted to their detriment. I am satisfied that England and Wales has jurisdiction and, indeed, should exercise it. Therefore, I reject any application for a stay either in the longer term or any presumed application in the short term whilst further matters are investigated before the Supreme Court, and otherwise.

85 It follows from all that I have said that orders will be required to secure the return of the children to the United Kingdom. There are heavy financial burdens. I hope very much that they will be waived and if anything I say can assist in that regard I am plain, in my view, that this mother does not hold any blame for the fact that she has become, by dint of circumstances, an overstayer in that Kingdom.

86 Of course, quite apart from financial penalty, there is the question of living expenses and return costs to the United Kingdom. The father has said that although he could not afford to underwrite or indemnify the financial penalties, which amount to some £12,500 equivalent, he would do what he could to facilitate their return. I hope he is genuine in that and has not simply said it in order to make good his position with the court. I hope that a practical solution can be thrashed out. I will make such orders as after further argument from counsel will achieve that end.