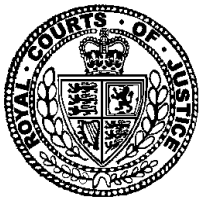

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the child and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Neutral Citation Number: [2024] EWHC 1433 (Fam)

Case No: FD23P00232
NG21P00200

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 June 2024

Before :

MR JUSTICE PEEL

- -

Re C

- -
- -

Graham Goodwill for the **Applicant**
The Respondent did not attend and was not represented

Hearing date: 7 June 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE PEEL

Mr Justice Peel :

Introduction and background

1. The relevant child (to whom I shall refer as "C") is a girl who is now nearly 4 years old. She is a UK national.

2. It is the case of the Applicant that he is C's father. It is the case of the Respondent mother that he is not. For convenience I shall refer to them as F and M, whilst noting that paternity is very much in dispute.

3. According to F, he and M married in October 2019, and lived together until July 2020 when they separated. After the birth of C, he was permitted by M to see C from time to time.

4. In February 2021, F issued an application for a Child Arrangements Order in the Nottingham Family Court.

5. Shortly afterwards, on 12 April 2021 M left the jurisdiction with C and travelled to Pakistan where they have remained ever since. I am satisfied that this was a wrongful removal in that it took place without F's knowledge or consent. They live in Islamabad at an address which is known to F and to the court. M's email and mobile telephone details are also known. As I understand it, although F has long known that M and C are in Pakistan, he was not aware of the precise address until March 2023.

6. M has not at any time engaged with the Nottingham proceedings save that a Cafcass Officer was able to speak to her over the telephone in June 2021, and was told by her that:

   i) F is not C's father.

   ii) F and M had an Islamic wedding ceremony in October 2019, but separated after one night because F sexually assaulted her.

   iii) F is a violent man and may try to kidnap C.

   iv) She and C intended to remain in Pakistan.

   v) F is pursuing the application for immigration reasons.

7. The reference to immigration proceedings is that F is a Pakistani national whose application for permission to remain in the United Kingdom was refused on 29 September 2020. His appeal against that refusal has been adjourned pending the outcome of the family proceedings.

8. The Children Act proceedings in Nottingham were adjourned generally on 5 April 2023 to enable F to apply to the Family Division for a return order.

9. On 24 April 2023, F accordingly applied to the High Court of the Family Division for orders under the inherent jurisdiction.

10. In September 2023 there was an exchange of texts between a Cafcass Officer and M in which M reiterated that she and C would not return to England.

11. Various hearings have since taken place which M has not attended although I am satisfied she was aware of the proceedings and hearing dates.

12. On 4 October 2023 Theis J recorded that F had filed a witness statement exhibiting photographs and social media messages which supported F's account of (i) the duration of his relationship with M, and (ii) that he had contact with C after her birth. Theis J made an order for M to return C to this jurisdiction by 30 November 2023. She added that "In the event that these proceedings or the related [Nottingham] proceedings are not restored to the court for further orders before 19 January 2024, they shall both be dismissed". I assume that Theis J was in effect endorsing one final attempt by F to secure C's return to this country, but any lack of progress would require the proceedings to be brought to an end.

13. M did not comply with the order although I am satisfied she was served with it.

14. On 17 January 2024 F applied to restore the inherent jurisdiction proceedings, although no progress had taken place.

15. On 29 February 2024, the proceedings were listed in front of me. I was told that, according to F, M and C had been seen in Nottingham about 10 days previously. I accordingly made a location order and adjourned the proceedings to 11 April 2024.

16. The location order drew a blank. Border checks confirmed that there was no indication M and C had entered the country at any time since they left for Pakistan. Attendance at various addresses in Nottingham suggested by F yielded nothing. F accepted at a hearing before me on 11 April 2024 that the sighting was a mistake. He had made some enquiries in Pakistan and both C and M had been there throughout.

17. I adjourned the application to be listed before me on 7 June 2024 for what I intended to be a final hearing. Para 8 of the order reads:

> "8. At the next hearing the Court will consider (1) what further order, if any, that should be made and (2) whether the proceedings should come to an end."

It seemed to me that proceedings (whether in the Nottingham Family Court, or in the Family Division) has been ongoing for over 3 years with no substantive result, and required resolution. I gave directions, including so as to enable F to take legal advice in Pakistan.

18. The birth certificate of C was filed at Nottingham Family Court by M at the outset of the children proceedings in that court. It gives a name for C which is different from the name for her used by F. The certificate is blank as to the identity of C's father. Despite these oddities/gaps, for these purposes I intend to take F's case at its highest and therefore assume that (i) he is C's father, and (ii) he had a relationship with C after her birth. Given (i) that M has not filed any evidence, and has not engaged in the proceedings other than some brief exchanges with Cafcass officers, and (ii) F, as I have indicated, has produced prima facie evidence of his case on these matters, it seems to me to be reasonable to proceed in this way.

Habitual residence

19. I adopt the helpful summary given by Hayden J at para 17 of **Re B (A Child)(Custody Rights: Habitual Residence) [2016] EWHC 2174 (Fam), [2016] 4 W.L.R. 156**, save for sub para (viii) which Moylan LJ suggested in **Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention) 2020 EWCA Civ 1105** should be omitted. Moylan LJ went on to say:

> "61. In conclusion on this issue, while Lord Wilson's see-saw analogy can assist the court when deciding the question of habitual residence, it does not replace the core guidance given in *A v A* and other cases to the approach which should be taken to the determination of the habitual residence. This requires an analysis of the child's situation in and connections with the state or states in which he or she is said to be habitually resident for the purpose of determining in which state he or she has the requisite degree of integration to mean that their residence there is habitual."

20. How quickly and easily habitual residence may be lost and/or gained will be a question of fact and degree. Per Baroness Hale in **Re LC (Children International Abduction: Child's Objections to return) [2014] UKSC 1** at para 63:

> "63. The quality of a child's stay in a new environment, in which he has only recently arrived, cannot be assessed without reference to the past. Some habitual residences may be harder to lose than others and others may be harder to gain. If a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly. If a person leaves his home country for a temporary purpose or in ambiguous circumstances, he may not lose his habitual residence there for some time, if at all, and correspondingly he will not acquire a new habitual residence until then or even later. Of course there are many permutations in between, where a person may lose one habitual residence without gaining another."

21. I also bear in mind the dicta of Moylan LJ In **Re A [2023] EWCA Civ 639** at paras 41 to 48, and in particular paras 47 and 48:

> "47. In *Re G-E*, I also quoted the "expectations" set out by Lord Wilson in *Re B 2016*, at [46], which bear repeating, namely:
>
> > "(a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;
> > (b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and
> > (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."
>
> 48. I have already dealt with the legal approach to habitual residence at some length in this judgment but, finally, I would refer to *In re B (A Child) (International Centre for Family Law, Policy and Practice intervening)* [2020] 4 WLR 149 when, at [83]-[89], in addition to *Re B 2016*, I referred to the CJEU's decision of *Proceedings brought by HR (with the participation of KO) (Case C-512/17)* [2018] Fam 385 and to Black LJ's (as she then was) judgment in *In re J (A Child) (Finland) (Habitual Residence)* [2017]

> 2 FCR 542 ("*Re J*"). Black LJ, at [57], referred to "the relevance of the circumstances of a child's life in the country he has left as well as the circumstances of his life in his new country" and, at [62], she said:
>
> > "What is important is that the judge demonstrates sufficiently that he or she has had in mind the factors in the old and new lives of the child, and the family, which might have a bearing on this particular child's habitual residence."

22. C was born in England to parents living in England. She lived in England until removal in April 2021. Prior to removal, she was settled and integrated in this jurisdiction. I am satisfied that until 12 April 2021, she was habitually resident in England and Wales; accordingly, she was habitually resident here when the Children Act application was issued in Nottingham Family Court.

23. The next milestone date for these purposes is 24 April 2023, when F applied to the High Court for inherent jurisdiction orders. By then C had been living continuously in Pakistan with M for about two years. She had not returned to England and, from everything I have read and heard, she was settled and integrated in Pakistan. I am satisfied that by 24 April 2023 (and probably long before that, although I do not need to make a specific finding about when her habitual residence changed) she was habitually resident in Pakistan, and continues to be so to this day.

Jurisdiction for the Inherent Jurisdiction proceedings

24. I have concluded that at the date of removal (12 April 2021), C was habitually resident in this jurisdiction, but by the date of the inherent jurisdiction application for a return order (24 April 2023) she was habitually resident in Pakistan.

25. Thus, at 24 April 2023 this court did not have jurisdiction to make a return order under Article 5 of the 1996 Hague Convention (as C was not habitually resident here), or under s3 of the Family Law Act 1986 (as C was neither habitually resident here, nor physically present here).

26. I do not consider that Article 7 of the 1996 Hague Convention applies, as Pakistan is not a signatory to the 1996 Hague Convention; **H v R and the Embassy of the State of Libya [2022] EWHC 1073 (Fam)** at paras 51-58).

27. If I am wrong about that, it does not assist F in any event. Article 7 provides as follows:

> "(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and
> *a)* each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
> *b)* the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.
> (2) The removal or the retention of a child is to be considered wrongful where

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

28. Thus, if (contrary to my view) Article 7 can apply as between this country and a non-contracting state (in this case, Pakistan) it does not assist F because (i) C has resided in Pakistan for at least one year after the removal, (ii) F (who was aware that C was in Pakistan) did not apply for a return order until two years after the removal and (iii) C is settled in her environment in Pakistan.

29. Accordingly, jurisdiction does not lie under the 1996 Hague Convention or the Family Law Act 1986.

30. The only remaining basis for this court to make a return order is C's British nationality in accordance with the principles set out in **Re M [2020] EWCA Civ 922**. Counsel for F agreed that this is the jurisdictional basis for the application before me. Moylan LJ summarised his conclusions on the use of the parents patriae jurisdiction as follows:

> 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.

31. Moylan LJ at para 97 expressly approved dicta by Holman J:

> "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?"

32. I note that at para 87 of **In re B (A Child) (Reunite International Child Abduction Centre and others intervening) [2016] AC 606**, Lord Sumption specifically referred to:

> "a peril from which the courts should 'rescue' the child"

33. In my judgment, the case for making orders under the inherent jurisdiction as sought by F does not meet the test, or threshold, set out in **Re M** for the following reasons

i) There is no evidence of any risk to C in the care of her mother in Pakistan. F accepted through counsel at an earlier hearing before me that as far as he is aware she is well cared for. There is no "peril" from which she imperatively requires rescue. This is not a case where it can reasonably be said that C's welfare requires an immediate return, uproot her from her settled home, society and environment with her mother in Pakistan. C has now been living in Pakistan for over three years.

ii) F delayed two years before applying for a return order.

iii) Until very recently, F has not sought any orders in Pakistan. F has now executed a Power of Attorney authorising his brother to conduct proceedings in Pakistan on his behalf. A solicitor has been instructed to seek a return order, and child arrangements orders, in the Pakistani court. In my judgment, Pakistan is clearly now the appropriate forum for all these matters; proceedings are on the point of being initiated there by F, C and M both live there, and F is a Pakistani national.

iv) Any order made by this court is, in reality, likely to be futile or, at a bare minimum, extremely difficult to implement. M categorically says she will not

return with C to this country. There is nothing before me to indicate that the Pakistan courts would be likely to make reciprocal orders swiftly or at all, particularly given the passage of time.

34. I will dismiss the inherent jurisdiction application brought in the High Court.

35. I will also dismiss the private law Children Act application brought in the Nottingham Family Court. Although the court had jurisdiction to entertain the application, because of C's habitual residence and physical presence in this country at the time of the application, it is futile to continue the proceedings unless and until M and C are present in this jurisdiction or M participates in proceedings here. It is far more logical for proceedings to take place in Pakistan.

36. I reject the submission that these wardship proceedings should be adjourned until the conclusion of the Pakistani proceedings, or for a minimum of 6 months, as suggested by F. As a matter of principle, the appropriate forum is Pakistan, and in any event, it is all but impossible to envisage what more can or should be done in this country if the Pakistani court declines to make a return order. Further delay in concluding these proceedings is not justified.