Neutral Citation Number: [2022] EWFC 132

IN THE FAMILY COURT

Before:

His Honour Judge Sharpe

(sitting as a High Court Judge)

B E T W E E N:

A LOCAL AUTHORITY

Applicant

-and-

A Mother

1st Respondent

A Father

2nd Respondent

DM

3rd Respondent

A Child

(Through her Children's Guardian)

4th Respondent

RE KM (A CHILD)(JURISDICTION: HABITUAL RESIDENCE)

Ms Markham QC and Ms Targett-Parker for the Applicant
Ms Wheeler QC and Ms Gasparro for the 1st Respondent
Ms Kirby QC and Mr Bartley-Jones for the 2nd Respondent
Mr Setright QC and Mr Langford for the 3rd Respondent
Ms Henke QC and Ms Koucheksarai for the 4th Respondent

Hearing date: 2 February 2022

Approved Judgment

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His Honour Judge Sharpe

[In this judgment the names of family members have been replaced with initials. The name of the country of origin of the child, a southeast Asian state which is not a contracting state to the 1980 or 1996 Hague Conventions, has been substituted with "Country A" and the names of places within the country of origin have similarly been replaced with appropriate anonymisation]

Introduction

1. I am concerned with an application to determine jurisdiction in respect of care proceedings which have been ongoing since August 2020. The sheer length of time which these proceedings have taken to arrive at this point is a matter of concern for all involved, a concern which is only intensified by the fact that the determination of such issues should ordinarily be achieved at a very early stage within proceedings and not after a period some three times over the expected length of the totality of the proceedings. Be that as it may it is important to set out that a decision about jurisdiction is to be determined not by reason of the best interests of the child (however perceived) nor by reference to the consequences for litigation timetables if one decision is made instead of another. Whilst welfare and the litigation timetable are both matters of importance for a child neither ordinarily has a place in the determination of jurisdictional disputes and have not done so here.

Background

2. These proceedings concern a child, whom I shall call KM, now an older teenager. KM was born in Country A to AA (the mother) and KK (the father). She is their fourth and youngest child. Like her parents, KM is a national of Country A, she holds a Country A passport issued by Country A and there is no doubt but that for a very large part of her life she has lived in Country A.
3. It is equally clear that KM lived with her parents only for the first few months of her life in their village in Country A. At the age of approximately 5 months KM moved from her parents' care by reason of a private arrangement made between AA and a woman called Mrs S, whose daughter, Mrs M, was at that time married to a man called DM.
4. The arrangement was that KM would be cared for by Mrs M and DM in the Capital of Country A but that upon request AA and KK would be able to visit KM. It is not material for the purpose of the issue of the determination of jurisdiction but I should record that the reason for the arrangement being made appears to have been a combination of the relative poverty in which her parents found themselves coupled with ill-health on the part of AA and a fear for KM's welfare if either were to significantly impact upon their family. There is no evidence that KM was an unloved or abandoned child in the eyes of her parents and I have no difficulty in accepting that the driver for this arrangement on the part of her mother was a concern to ensure that KM was spared

hardships all too familiar to them but instead enjoyed opportunities which they probably believed were beyond what they could ever provide.

5. Although there was an agreement about her parents being able to spend time with KM initially at least it appeared that this did not happen either at all or at a frequency to the satisfaction of KM's parents. Each of the parents refer in their statements prepared for these proceedings not then seeing KM for approximately three years until one day DM brought KM to their village, unannounced and unexpected, and they enjoyed a short period of time with her. Thereafter there is disagreement between the parents as to whether a second visit only occurred after a further two years or happened sooner and with more frequency. In any event there were visits to the village as well as KM's family travelling to the capital of Country A on occasions and whilst they may not have been either regular or frequent they enabled her parents to see that KM was being well cared for by DM.
6. By February 2009 DM and Mrs M had divorced and KM remained with DM, apparently by court order in the absence of agreement between DM and Mrs M. The date of the divorce was included in documents drawn up following an application by DM to the District Court of the capital of Country A to better secure his legal status vis-à-vis KM. The documents as translated from Country A refer to both an intention to adopt KM as well as confirming a status as a foster parent. Irrespective of what status was intended to be conferred upon DM and/or KM it is clear that the date of this legal change was 14 May 2013, when KM would have been days away from her seventh birthday.
7. As part of the process of information gathering an expert in family law of Country A, Ms T, has provided detailed expert evidence in relation to the legal effect of the order in question. Her evidence, which I accept, is that the order resulting from that application was one of legal guardianship rather than adoption or fostering. The effect of such an order in Country A was not to sever the legal ties between the child and her parents but to largely, although not completely, to displace them in favour of the guardian, DM. The parents retained the right to determine that the child should marry a specific individual[1] but otherwise ceded, as opposed to merely sharing, their parental responsibility for KM. It is clear on the face of the documents that the parents apparently consented to this order being made, according to the declarations on the face of the order each parent was present in the courtroom at the time and confirmed their consent to it being made[2]. It is right to note that certain of the assertions made, such as the parents each being in the employ of DM, do not appear to be factually accurate but in the absence of a challenge to the order being launched in the court of Country A the order continues to be valid.
8. Both KM's parents agree that following that visit to the capital of Country A and their attendance at the courthouse there was only one further contact with KM in the capital of Country A when

[1] The *wali nikah*
[2] The father asserts that he remained outside but this is disputed by the mother

she was either eight or nine years old. The parents spent a few days in DM's home and then were returned to their village. Thereafter they received little information concerning their daughter although they appeared to be aware that by 2020 KM's material circumstances were deteriorating as she was moving to ever smaller apartments away from their original larger home and without a nanny (caregiver) or a driver, both of whom had been longstanding parts of the arrangements to which KM had become accustomed.

9. Possibly Scottish by birth[3] DM has certainly always been a national of the United Kingdom but one who spent the majority of his working life away from this country and who, at the time that KM came to live with him and his then wife, was living and working in Country A. He had been in and around that part of the world for an extended period but without ever abandoning his British citizenship or his ties to this country. He might fairly have been regarded as an ex-patriate and enjoyed the ex-patriate lifestyle. It would certainly appear to be the case that he was successful in his business endeavours and had certainly given his family back in the United Kingdom the impression that he was relatively wealthy.
10. However, there was real evidence of change from a number of different sources.
11. From the statements of members of DM's family living in the United Kingdom what appeared to be happening to DM was the development of increasing cognitive impairment. Following a couple of years during which DM had not travelled to the United Kingdom and just prior to the onset of the Covid pandemic he visited his sister in this country whilst on a business trip and she along with other family members were all aware of evidence of memory loss.
12. This ties in with the account provided by KM of an accelerating downturn in their standard of living as DM struggled with memory loss and found it harder to conduct his business. She describes them then getting by with the assistance of financial support from friends and associates of DM before resorting to selling items, including both their laptops. All the while DM appeared to be becoming less capable of managing himself and caring for KM. He had developed arthritis and was also more prone to falling. This raised the spectre of DM falling and injuring himself to the extent that medical assistance would be required in a society for which such assistance was not free. All of this had its effect upon KM's academic performance which was picked up by at least one teacher at her then school in the capital of Country A and to whom she apparently confided about their domestic difficulties and about her view that they should move to England. DM was far less enthusiastic to make such a change and resisted it on the basis that he had work to do.
13. There is no dispute that on 28 July 2020 both DM and KM flew to England apparently having had flight tickets purchased for them by friends of DM's. KM had a return ticket with a return flight in January 2021 but DM arrived on a one-way ticket. From the information provided by DM

[3] He informed the assessing Clinical Psychologist that he was born in Scotland but told the Official Solicitor he was born in London

himself it would appear to be the case that friends in Country A had taken the view that his situation was best met back in England, possibly with free medical and social care resources in mind, and given the risks presented by Covid, a factor which had loomed large in KM's mind. There were no advanced arrangements made with family to be ready for them or even to inform them of their arrival in the country. DM's older daughter was contacted by a friend of DM's in the capital of Country A to inform her that the pair were en route to England.

14. In any event within weeks of being back in England and having been accommodated in a hotel at his elder daughter's expense it became clear that DM had care needs which he was unable to meet for himself and which necessitated his move to a care home, where he has now been since August 2020. DM had his eightieth birthday on the first day of this hearing. He suffers from Dementia and a cognitive assessment undertaken for the purpose of determining whether he had capacity to conduct litigation was clear that due to significant cognitive memory impairment he would be unable to do so. As a consequence, the Official Solicitor now acts on his behalf.
15. At the same time this Local Authority recognised that KM was effectively lacking any person capable of exercising parental responsibility for her and made an application to the court on 17 August 2020.

These proceedings

16. The application was listed before myself on 18 August 2020 when an interim care order was made. The order was necessary because it was clear at that stage that in the absence of DM (at the time assumed to be an adoptive parent and therefore holding parenting responsibility for KM) there was no one in a position to act with lawful authority on KM's behalf.
17. The order was considered to be validly made (i.e. not lacking in jurisdiction) because jurisdiction at that early stage of proceedings could properly be exercised on the basis that the presence of KM in this jurisdiction in circumstances where the question of her habitual residence could not be determined and where the conferment of jurisdiction through the operation of Article 12 could not be achieved: see Article 13 of Council Regulation (EC) No 2201/2003 (Brussels IIA), further discussed below. In any event the ability to take immediate protective measures even in the face of jurisdiction being properly held elsewhere is provided by Article 20 of the same Regulation.
18. The issue of interim or immediate jurisdiction was not a difficult issue to determine given the absence of anyone in a position to exercise parental responsibility for KM. The decision was supported by the only participating parties at that initial hearing: the Local Authority and the child through her Guardian. Whilst the absence of both DM and the parents made the jurisdictional issue uncontentious at that point their continued absence has not assisted the litigation and has been one of the difficulties which contributed to the fact that these proceedings are now over eighteen months old and without a welfare outcome ever being in sight.

19. DM had been made a party to the proceedings at the initial hearing on the basis that he was KM's (adoptive) father and therefore held parental responsibility for her even if he was not in any position to exercise it. Unfortunately a recurring difficulty was immediately encountered in that whilst he was identified and his whereabouts known DM's apparent incapacity meant that there were significant difficulties in either securing for him legal representation or otherwise enabling him to participate. The acceptance by the Official Solicitor of an invitation to act on DM's behalf on 29 October 2021 following receipt of a cognitive assessment first directed in 2020 but for reasons unconnected with the reporting expert not completed until 7 October 2021 has undoubtedly been of great assistance not only in remedying the recurring defect consequent upon breaches of the procedural rules intended to ensure protected parties are not disadvantaged but also in the experience offered by leading and junior counsel instructed on her behalf.
20. The assistance rendered by the Official Solicitor has been equalled and quite possibly bettered by that which has been provided by the Country A Embassy in London and, through it, the government of Country A. At the initial hearing there was little information available regarding the identity or the whereabouts of either parent aside from their forenames. However the Local Authority was in communication with the Embassy and with their active co-operation and full support for both KM as a national of Country A in this country and for her parents, as citizens of Country A needing support and assistance in this legal system. As a consequence of their work the parents were identified, provided with legal advice of high quality and enabled to participate remotely in hearings. Embassy officials have been assiduous in liaising with the authorities in the capital of Country A to ensure that information and particularly court documentation pertaining to KM has been made available for these proceedings. In addition, the Embassy has worked collaboratively with the Local Authority as the holders of parental responsibility for KM and her Guardian to fulfil their obligations to speak with their national whilst at the same time respecting the on-going nature of these proceedings. I should like to place on record my thanks to the Embassy officials for all that they have done to date.
21. The glacial progress which the litigation has made to any point of resolution of any issue is indicative of the complexities of the litigation process and the constellation of problems which have been generated and does not reflect the efforts and endeavours of all those who have done their best to assist in driving it forwards.

The jurisdiction issue and the positions of the parties in respect of it

22. After eighteen months of litigation the immediate issue is whether the court actually has jurisdiction to allow this litigation to continue. The position can be set out thus:
    a. Having jurisdiction to make valid orders is an essential prerequisite to any determination of welfare issues.

b. The satisfaction that a court has jurisdiction is a necessary exercise which the court must conduct in every case.
c. Whilst it is possible for parties to litigation to consent to a court making orders (as opposed to consenting to the terms of the order to be made) any such offer is incapable of being taken up if the court lacks jurisdiction because the criteria to exercise jurisdiction are not made out.
d. In the face of any challenge to the jurisdiction of the court, the necessary exercise must be conducted irrespective of whether any finding of a lack of jurisdiction may have consequences regarded as deleterious to a child or unintended by any of the parties.

23. Immediately upon their active involvement in the case each parent raised an objection to this court continuing to exercise jurisdiction over KM on the grounds that the criterion for such jurisdiction, namely habitual residence, was not made out. Their shared position is as follows:
    a. KM is a national of Country A.
    b. She has lived almost all her life in Country A and the time that she has spent outside of the country can be measured in weeks when it is remembered that all of the time spent in this jurisdiction following the instigation of proceedings does not count when determining the question of whether this court has jurisdiction because the relevant date is not 2 February 2022 but 17 August 2020, i.e. the date the proceedings started.
    c. Her family, her friends, her associations, her attachments, her memories and her experiences are all associated with Country A.
    d. By contrast she left for England in the company of a man:
        i. with whom she has neither a genetic nor permanent legal relationship,
        ii. who is not in a position to care for her,
        iii. who cannot live with her,
        iv. who is largely unable to see her, and
        v. against whom the Home Office has made a decision that there are Conclusive Grounds to accept that KM is a victim of modern slavery.
    e. And having left Country A with a plan to continue to live with this man, despite all of the above, that plan itself broke down almost immediately following arrival in this jurisdiction and what resulted was a total absence of any form of parental care let alone family life, thereby undermining the very basis of the departure for England.
24. Against that argument lined up the Local Authority, the Official Solicitor on behalf of DM and KM herself, supported by her Guardian. Their collective position is equally clear:
    a. KM left Country A for good reasons which remain true today.
    b. Her departure was not:
        i. a surprise to her and for which she was wholly unprepared,
        ii. forced upon her,

iii. made in the teeth of opposition by her or others who could claim to be able to exercise responsibility for her,
iv. contrary to any agreement not to leave made with any other person,
v. contrary to any law of Country A nor court ordered prohibition.

c. Insofar as KM lived a life in Country A it was a life lived in the company of DM, a man she knows as 'Dad' and who is effectively the only adult with whom she has had a constant, lifelong relationship. Absent DM her life in Country A would be hollowed out as he was and is the central figure in her life.

d. The presence of family in Country A is immaterial given the effective absence of them from her life for many years to the point where, whilst she is aware of them, she does not know them in any real or meaningful sense.

e. The longevity of her time in Country A or, conversely, the shortness of her time in this country is immaterial compared to the purpose of her being out of Country A and therefore here. The purpose of KM being in this jurisdiction is to be with her Dad but her Dad had to leave Country A to ensure his own welfare needs were met and therefore KM wanted and needed to leave too in order to prioritise her family life over her nationality and origin as a Country A.

25. In advocating a lack of jurisdiction, the parents, whilst accepting that such a conclusion does not automatically mandate the removal of the child from this country, would in due course invite a proper exploration of the possibility of KM being returned to Country A, an outcome considered deeply unattractive by the child.

26. In contrast those inviting a conclusion that I have jurisdiction acknowledge that such an outcome does not exclude the possibility, as the proceedings shifted forward to welfare considerations, that a planned, managed and appropriately supported return to Country A may be in KM's best interests, notwithstanding her currently clearly expressed views to the contrary, but hold as their primary position that remaining in this jurisdiction is the starting point for the duration of these proceedings and beyond.

The law

27. The legal principles which govern the determination of jurisdiction in respect of care proceedings are clear, comprehensive and set out in a disproportionately large number of decisions of the superior courts. Those principles have been set out in detail and with precision in the high quality Skeleton Arguments which I have received from all leading counsel and to whom I am grateful.

28. My analysis of the learning contained in the documents provided to me causes me to conclude that the legal position is as follows:

a. The basis of jurisdiction in public law proceedings is the same as that in private law proceedings:

b. The basis of jurisdiction in private law proceedings is governed by s.2 of the Family Law Act 1986 which in turn gives primacy to one of two international instruments: Council Regulation (EC) No. 2201/2003 (BIIA) or the 1996 Hague Convention on the Protection of Children.

c. In this case, by reason of the fact that these proceedings commenced before 31 December 2020 (the date of the withdrawal of the United Kingdom from the European Union) the governing international instrument is BIIA.

d. BIIA applies notwithstanding the fact that the subject child is a national of a state which has never (and could never) have been a member state of the European Union.

e. Under BIIA the primary basis for jurisdiction in matters pertaining to children is set out in Article 8 wherein it is stated that 'the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.' (my emphasis)

f. 'At the time the court is seised' simply means when proceedings were commenced, i.e. in this case in August 2020 as opposed to any later date.

g. 'Habitual residence' has a clear, uniform meaning now derived from the jurisprudence of the European Court of Justice as set out in a number of domestic authorities but most helpfully summarised by Hayden J in *re B (A Child)(Custody Rights: Habitual Residence) [2016] EWHC 2174* in terms which have been almost entirely approved by the appellate courts:

    i. The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A, adopting the European test).

    ii. The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence *(A v A, Re KL)*.

    iii. In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': A v A (para 80(ii)); Re B (para 42) applying Mercredi v Chaffe at para 46).

    iv. It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (*Re R*);

    v. A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (*Re LC*). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child

focused. It is the child's habitual residence which is in question and, it follows, the child's integration which is under consideration.

vi. Parental intention is relevant to the assessment, but not determinative (*Re KL, Re R* and *Re B*);

vii. It will be highly unusual for a child to have no habitual residence. Usually a child lose[s] a pre-existing habitual residence at the same time as gaining a new one (*Re B*);

viii. …….

ix. It is the ***stability*** of a child's residence as opposed to its *permanence* which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there *(Re R and earlier in Re KL and Mercredi);*

x. The relevant question is whether a child has achieved ***some degree*** *of* integration in social and family environment; it is not necessary for a child to be *fully* integrated before becoming habitually resident (*Re R)* (emphasis added);

xi. The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (*A v A; Re B)*. In the latter case Lord Wilson referred (para 45) those '*first roots*' which represent the requisite degree of integration and which a child will '*probably*' put down '*quite quickly*' following a move;

xii. Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (Re R).

xiii. The structure of Brussels IIa, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, "if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former" (Re B supra).

h. Hayden J continued in the following paragraph of his judgment:

> 18. If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child. The approach must always be child driven.'

i. The excision of (viii) above followed from further reflection by the Court of Appeal in M (Children)(Habitual Residence: 1980 Hague Child Abduction Convention) [2020] EWCA Civ 1105 wherein it was held that disproportionate consideration of previous connections to other places should be avoided because the focus for determination was on the current situation (i.e. that which existed at the relevant date).

29. The law is clear that the facts to which the law must be applied are critical in the correct application of those legal principles but the facts are those which pertain to the child, their circumstances and their situation at the relevant time.

The evidence

30. It is not my practice to incorporate into a judgment, particularly one intended to be short, focused and delivered in a reasonably short term, long recitations of evidence which is available in documentary form and the issue is being determined on submissions.
31. Considering all of the evidence available to me I find the following facts:
    a. KM is a national of Country A who was born in that country and has effectively lived all of her life there prior to her departure for this country in 2020.
    b. She is fluent in both a native Country A language as well as English.
    c. She was schooled entirely within the Country A education system prior to July 2020.
    d. She has parents and siblings who continue to live in Country A.
    e. Her relationship with her parents and her siblings continues to exist, albeit that it is limited, primarily historic and, at this point in time, of greater importance to her family than it would appear to be to her.
    f. Her primary relationship is with DM, she calls him 'Dad', she has lived with him for the vast majority of her life and he is, on any basis, her social and psychological parent.
    g. That father-daughter relationship continues for each of them, notwithstanding DM's cognitive difficulties and the infrequency of opportunities that KM has had to spend time with him since being in this jurisdiction.
    h. As a matter of Country A law DM is entitled to exercise parental responsibility for KM and has done so for many years to the exclusion of KM's parents.

i. KM was undoubtedly habitually resident in Country A up until the point that she and DM left.

j. KM's quality of life in Country A was deteriorating for a significant period prior to her departure.

k. That deterioration was multi-faceted.

l. There was a deterioration in material / financial terms through DM being increasingly unable to work and their having to downsize their apartments, sell personal items and dispense with domestic staff.

m. There was an increasing sense of insecurity for KM about her future given her Dad's increasing physical and mental difficulties, her own limited ability to cope with those consequences (such as being unable to pick him up off the floor) and her complete inability to assist DM if he required medical care which she believed would be unaffordable to them.

n. That sense of insecurity increased with the spread of the Covid-19 virus and KM's perception that this presented a potentially serious problem for DM and therefore for her.

o. Her home life, or to borrow a phrase used elsewhere, 'the life in which her family and social environment had developed' was effectively collapsing around her over a period of several months. In her own words 'life was horrible.'

p. All of that was evidenced by her decreasing academic performance which was picked up by a school counsellor.

q. Within that period she, separately to any other individual or responsible adult, conceived the view that she and DM needed to leave Country A and go to England where help would be available. I am unable to find that KM had any specific view about the availability of free medical and social care but she certainly had a clear view that their problems could not be solved by staying where they were and their only option was to leave.

r. Although I am unable to find as a fact that KM engineered the provision of flight tickets through the generosity of friends as I have no clear evidence of how that decision was made I can conclude that the very fact that someone decided to pay for their flights to England is evidence of both an inability on the part of DM to do so, contrary to what he had so regularly done in the past, and an obvious need for a drastic step to be taken by a third party in the light of the problems KM and DM were facing.

s. At no point did KM consider leaving DM either to return to her parents or simply prioritising staying in Country A over maintaining her attachment and commitment to her Dad. Her view throughout appears to be that *they* needed to leave Country A.

t. Given DM's difficulties as reported immediately upon arrival in this jurisdiction (going missing within the hotel) it is highly likely that KM had had to organise their arrangements and certainly their packing to make the trip. Again I find that this is clear evidence of her intention not just to leave but to leave with DM and because of DM.

My decision

32. Having heard all the submissions each party wished to make in respect of habitual residence I informed the parties that I had concluded that there was jurisdiction for these proceedings to continue because in my judgment KM was habitually resident in this country at the material time.
33. My reasons for so deciding are as follows.
34. The legal basis for determining habitual residence requires taking a hard look at the factual situation of the child and considering whether what is there seen demonstrates some degree of integration by the child in a social and family environment. I have concluded that the primary social and family environment for KM was not living in reasonable proximity to her birth family, it was certainly not being fixed within her social environment of school, friends and lifestyle and it was not even living in Country A.
35. For KM her primary social and family environment was living with DM as a family. That view is not only borne out in their shared history stretching across KM's life but also in their sharing of the collapse of that life towards the end of their time in Country A. There was no question in KM's mind of 'cutting and running' from DM but only of securing their future together.
36. That DM was an essential part of KM's family cannot be in doubt. The clear reality is that for KM DM *is* her family. She was separated from her birth family at an age which precluded her forming any real in the sense of continuing attachments to them and, despite the contact which did take place, they have been separate from her not only in terms of proximity but also in terms of her lived experience. KM, as her parents intended, has lived a life wholly different from the other members of her birth family, she has been an Country A child living a western expatriate lifestyle in Country A with experiences outside of anything her family could offer or understand. As a consequence, she has few memories of her family, very limited experience of them and shares virtually nothing in common with them in terms of her day-to-day living experiences.
37. That DM is her family is not just true in fact but also in law.
38. It was submitted yesterday by Mr Setright QC that family life is what it is. I agree. More importantly, this is also the settled position in law. Article 8 of the ECHR does not limit 'family life' to the relationship between a parent and child but is engaged in respect of any relationship which amounts to 'close personal ties'. The essence of a family relationship is not in its form or label but in the quality of the personal relationship between the child and that other person and this is recognised in the law, '...family life... is essentially the real existence of close personal ties': Lebbink v The Netherlands (App NO. 45582/99, judgment of 1 June 2004).
39. The litmus test was succinctly set out by Munby J (as he then was) in *Singh v Entry Clearance Officer New Delhi [2004] EWCA Civ 1075*:

> 'Typically the question will be, ... , whether there is a 'close personal relationship', a relationship which has 'sufficient constancy and substance to create *de facto* family ties.'

40. There can be no doubt that for KM her family life revolved around DM. It continues to do so today but, importantly for the issue of founding jurisdiction, it is what drove the departure from Country A. In my judgment KM intended to leave Country A despite her nationality, her singular experience of living in that country, the presence there of her birth family and of her cultural and linguistic associations with that country because she knew that her Dad needed to be somewhere else and she wanted to be with her Dad.
41. All of this is important because it provides not just the context but also the cause of KM being in England in July 2020. Insofar as KM had been habitually resident in Country A up until the day of departure, when she left Country A she did so with the intention of moving to England and of staying there in order to safeguard and protect the only family life she had ever known.
42. Whilst all of the factual penumbra of KM's life needs to be considered in the assessment of the issue of habitual residence it is a factual issue and as such the concept of a magnetic factor (not unknown in family law, albeit usually applied in very different contexts), where properly evidenced, in my judgment can exist. The judgment of Hayden J in re B (A Child)(Custody Rights: Habitual Residence) (supra) included a number of helpful matters meriting consideration when seeking to understand the child's degree of integration with her environment and his final offering was 'an appreciation of which adults are most important to the child.' Whilst Hayden J was not delivering a guidance judgment given with the approval of the President and his suggestions of relevant factors were not offered as anything other than a helpful checklist and certainly not an exhaustive set of criteria, that particular suggestion in my view completely encapsulates the critical metric by which to judge whether KM was habitually resident in this jurisdiction.
43. In my judgment this factor, that of being with DM, is a matter which not only cannot be ignored but which is the real lodestone by which this issue of jurisdiction can be properly navigated. The point was eloquently made by Ms Kirby QC who captured the essence of the issue when she described KM's relationship with her father; he was, she said, 'the only person with whom she retained a link to all she had ever known.' Whilst the almost immediate departure of DM to a care home upon their arrival in this country and the consequent enforced separation between 'father' and daughter is cited as a reason to conclude that Country A remained the place of habitual residence for this child, in my analysis the converse is true. The necessity for his departure to that care home was for the very reason that DM needed to depart from Country A for England, his deteriorating mental faculties but this was, for KM, the reason that she *left* Country A. Her Dad needed to leave and so KM left too because she wanted to be wherever he needed to be and for such length of time as that required.
44. On that basis it cannot be said that KM continued to be habitually resident in Country A despite the huge disparity in the associations with that country compared to England because the essential aspect of her life, her relationship with her Dad, required her to be here and accordingly she wished to be here and, as importantly, did come here.

45. Just because KM was no longer habitually resident in Country A it did not automatically follow that she would have acquired a new habitual residence in this jurisdiction. However in my judgment this is what had occurred, even as swiftly as August 2020, for the following reasons:
    a. DM had neither the means nor the opportunity to return to Country A, as had been expressly stated to him ('you will have to fund your own return'), and in reality all concerned knew that it was highly unlikely that he would ever return to Country A.
    b. KM intended to remain in this jurisdiction because DM was here.
    c. KM had a plan regarding how she wanted arrangements to be made. She intended to stay with DM and when she was precluded from doing so by his admission into a care home for reasons that where necessary for his welfare, she wanted to stay near to him with members of his wider family.
    d. Insofar as there was a lack of stability in her arrangements that must be seen in the context of what was occurring and her limited ability to react to that.
    e. She was in a very limited position to set up obvious connections to this jurisdiction (e.g. securing a school place, registration at GP and Dental Surgeries) by reason of DM's incapacity, the time of year (the school summer holidays) and the absence of anyone able to authorise any action in respect of her. As such the absence of such evidence cannot be construed to be evidence of its deliberate absence and therefore indicative of a lack of desire on KM's part to remain in this jurisdiction.
    f. Had KM held any desire to return to Country A the very removal of DM from her immediate proximity and the consequent limitations on her ability to spend time with him would have provided her with the obvious opportunity to request that she be enabled to return to Country A with all its familiarity and associations for her. Again to borrow from Ms Kirby QC, KM will have been 'all at sea' and the temptation to leave and head for something at least familiar would have been strong had she not had a powerful reason to want to stay.
46. As a consequence of all of the above I have reached the clear conclusion that KM's centre of interests by August 2020 was in this jurisdiction, she had no intention of returning to Country A, which had become a hollowed out existence for her by July 2020 and one that she actively wanted to leave and she every reason to stay in England because of the likely permanent presence here of her 'Dad' and her clear attachment to him as her most significant family relationship.

Conclusion

47. Following receipt of this judgment and an appropriate period of reflection on the part of all parties but particularly the parents I invite submissions as to the timetable for these proceedings to (and not just towards) a final welfare hearing at which all options for KM can be fully considered.

48. Yesterday upon hearing my decision the mother was understandably upset. It is important however that both parents understand that the role of an English court is not to prioritise this country, this culture and this legal regime as well as the time that KM has spent here but to consider what is best for KM and to do so without regard to geography, familiarity or nationalism (as opposed to nationality). When welfare decisions about what is best for KM come to be made the parents can take confidence that all options will be open as possible outcomes for their daughter, including a permanent return to Country A or putting in place significant opportunities for her to rebuild her ties with her family in order to solidify her own understanding of herself as a child of Country A, with a variety of cultural, linguistic and familial associations all of which are important to her as an individual. KM's future remains to be determined, this decision merely identifies the court system which will now undertake that task.
49. That is my judgment.

3 February 2022