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 children 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: [2022] EWHC 2053 (Fam)

Case No: FD21P00445 & FD21P00447

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
IN THE MATTER OF THE SENIOR COURTS ACT 1981

IN THE MATTER OF S (A Child)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 July 2022

Before :

MR JUSTICE PEEL

- -

Between :

M	**Applicant**
- and -	
F	**1st Respondent**
- and -	
U	**2nd Respondent**
- and -	
A	**3rd Respondent**

- and -

S **4th Respondent**
(through his Children's Guardian, Kay Demery)

- -
- -

Edward Bennett (instructed by **Dawson Cornwell**) for the Applicant
The 1st, 2nd and 3rd Respondents appeared in person
Michael Edwards (instructed by **Cafcass Legal**) for the 4th Respondent

Hearing dates: 25-27 July 2022

- -

Approved Judgment

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MR JUSTICE PEEL

Mr Justice Peel :

Introduction

1. In January 2022 I handed down judgment after a 3 day fact finding hearing in wardship and 1980 Hague Convention proceedings. The anonymised version is published as **Re S [2022] EWHC 214 (Fam)**. This judgment should be read in conjunction with my earlier judgment. This hearing, in the light of my earlier findings, took place to determine the future welfare arrangements for the child at the centre of this case.

2. I continue to be concerned with S, who is nearly 2 years old. The applicant is his mother ("M"). The first respondent is his father ("F"). The second and third respondents are his paternal uncle and aunt ("U" and "A"). The fourth respondent is the child himself. Since 28 September 2021, S has been a ward of court. He is a Portuguese national of Pakistani origin. The proceedings arose out of: (i) the removal of S by F from Portugal, and out of the care of M, to be placed with U and A in Manchester on 22 November 2020 when he was 2 months old; and (ii) M's departure from Portugal to Pakistan the very next day, accompanied by F's brother and wife.

3. The issues identified for me at that hearing were identified in previous court orders as "to determine the circumstances in which the child came to be physically present in this jurisdiction, including whether the Mother was stranded in Pakistan as she alleges, and whether the Mother consented to the child being brought to England and Wales as the Father alleges, and any Hague Convention order".

My findings at the January hearing

4. I set out the chronology in full in my earlier judgment and do not propose to rehearse it.

5. I said this at paragraph 47 of my judgment:

"In summary I find that:

a. S was forcibly removed from M's care in Portugal and taken to England without M's consent.
b. M was taken to Pakistan against her will, and stranded there.
c. F, with the complicity of extended family members, has exerted a powerfully controlling and coercive pull over M's life, undermining her to the extent that she had minimal autonomy. His, and his family's intention, has been to write M's existence out of his life, and that of S.
d. F during the relationship was guilty of physical abuse perpetrated upon M.
e. F and his family have no intention of returning S to the care of M, or permitting her to be involved in S's life in any meaningful way. That has been their resolute intention throughout.
f. F and his family have, in my judgment, perpetrated unspeakable cruelty upon both M and S."

6. I made an order for a return to Portugal under the 1980 Hague Convention, suspended pending M obtaining a visa to re-enter Portugal. At the time, M, having been taken from Portugal to Pakistan and stranded there, was unable to secure the right to re-enter Portugal.

7. M had, by the time of the hearing, obtained a 6 month visa to stay in this country. I declined to make immediate orders under the wardship jurisdiction placing S in her care, not least because there had been very limited evidence about the welfare aspects of the case; the focus had been on findings of fact. I joined the child to the proceedings, and a Guardian was appointed. I gave directions for the filing of evidence.

8. S has since November 2020 been in the care of U and A. F has spent limited time with S, only when he has visited fleetingly from Portugal where he was resident until he moved to England in April 2022. By the time of the hearing before me in January, M had not seen S since he was removed from her care.

9. Further to my findings in January 2022, I made an order for interim contact between S and M three times per week between 1pm and 4pm. Since then, I have held two further interim hearings, and the contact has progressed (albeit nor formally expressed as a "lives with order") to:

    a. 1pm every Tuesday until 12 noon on Thursday; and
    b. 12 noon until 5:00pm every Saturday.

Representation and Ground Rules

10. At this hearing, M, F and U attended in person. A attended by video link. All required the assistance of an interpreter. Participation directions were made by me in like terms to those in place for the January hearing. The new provisions of the Domestic Abuse Act 2021 about cross examination did not apply as this is an "old" case under previous rules.

Oral evidence

11. I received oral evidence from M, F, U, A and the Guardian.

12. As before, I generally found M to be reliable and truthful, whereas F, U and A were rather unsatisfactory. M is currently living with her cousin. In about 6 months' time she plans to move in with her brother who will be buying a house in Manchester. He does not have any family living with him, so that M and S will have separate rooms. She is being financially supported by her cousin and brother, although she has a part time retail job earning £500pm. At present, to travel by bus from her cousin's house to the house of U and A for the purpose of contact takes 2 hours. When she moves house, the contact journey would take about 1 hour.

13. As I noted in the January hearing, there did not seem to me to be any acknowledgment by F, U or A of the wrong done to M in, as I found, forcibly removing S from her, stranding her in Pakistan and preventing her from resuming any form of family life with S. It is hard to think of anything more devastating for a parent, yet there did not seem to me to be even the faintest acceptance of the impact on M, and of course on S who was deprived of his mother's care and society at such a young age.

14. Throughout these proceedings, F has told me he lives in Portugal, principally because of his business and his medical needs (he has a chronic kidney condition), and travels to England from time to time; when he does so, he sees S. At this hearing, he told me for the first time he had in fact moved to England on 12 April 2022, and does not intend to return to Portugal; he lives with U and A and anticipates living there permanently. He told me that he had not been back to Portugal since 12 April 2022, but under cross examination said he had been back once for medical treatment. He could not easily explain why his most recent statement says that "it will be important for [S] to return to his/her country of origin [Portugal]". I was surprised to hear he had been in this country all this time without informing the court, and it seems neither he, nor U and A, informed the Guardian of this significant change of circumstances.

15. F says that S should live with U and A, and he will be living in the same house. In practice, it is clear that A is the primary care giver. F told me that S refers to U as "Papa" and to A as "Mama". He, the father of S, is referred to by S as "uncle". F seemed to think this was all perfectly fine, saying he is "happy" with these deceits whereby S does not know who his key family members are. He has not in any way tried to encourage S to talk about M as "mama" and S appears oblivious to this relationship. He plans to tell S the truth when he is older, and say to him that M "did not accept him" and left him which is, of course, the opposite of the truth as I have found it. He made clear in cross examination that he does not accept the findings made by me.

16. U told me that he does not accept my findings. Initially, U told me that he thought S should live with F and M, which was a departure from his stance throughout these proceedings that S should live with him and A, and that came to me as something of a surprise. Then he said that they (i.e U and A) want S to live with them as his primary carers, and to adopt him, which in my judgment was the truth of what U and A want to achieve. He said that S is very attached to them, that he sees himself as S's father and A as S's mother. He added that he does not think S benefits from having contact with M, and went so far as to say that he would prefer it if M returned to Pakistan. A told me that she agreed with everything said by U.

17. The Guardian, having observed M and S together, comments that S is becoming increasingly settled and relaxed in her care, and their bond is developing. M has demonstrated commitment to S, including undertaking the lengthy round trips for contact. M's confidence in her own parenting is improving and there are no safeguarding reasons not to place S in her care. There is no reason, in her view, why S should not live with M. She considers that S has suffered emotional harm through being removed from M. S believes that U and A are his parents, and his cousin is his brother. This "myth", as the Guardian aptly describes it, cannot, in her view, continue, and I agree. She is concerned that there is a lack of recognition among F, U and A as to M's role in S's life, and she is troubled that they do not accept the findings made in January. She was clear that S should move to M's care, more or less straight away.

The parties' positions

18. M seeks an order that S be placed permanently in her care, and shall have contact with F, U and A in accordance with the Guardian's recommendation. The Guardian supports the transfer of care to M. The Guardian's view is that contact with F, U and A should be

supervised, in F's case, and supported, in the case of U and A, with a 6 week settling in period before such contact starts at a contact centre.

19. F does not put himself forward as the primary carer of S. He wants S to remain in the primary care of U and A, with him living in the same house.

20. U and A believe that S should remain permanently in their care. They have indicated a wish to adopt S. They could not countenance the idea of S being placed with M. I concluded in the January hearing that they both seemed highly possessive of S. Both said how deep an impact it would have on them if S were removed, which suggested to me a self-centred approach to his needs. As I observed in my January judgment, the longer S is in their care, the more they point to his bond with them which is, in one sense, a self-fulfilling statement.

Article 13 of the 1996 Hague Convention on the Protection of Children

21. The history and status of legal proceedings in Portugal is not entirely clear, despite the best efforts of the Central Authority to assist. It seems that:
    a. In March 2021, a procedure was instituted in the Portuguese court for "residence, parental visits and alimony". **P.221**
    b. On 1 July 2021 F applied for a child arrangements order in Portugal. **P.522/117**
    c. On 6 July 2021 M applied in England for return orders under the 1980 Hague Convention and the inherent jurisdiction.
    d. An email from the Portuguese authority on 24 September 2021 referred to an "ongoing" file regarding parental responsibilities.
    e. On 19 November 2021, the relevant Portuguese court informed the Portuguese Network Judge that under the terms of the last order given "it waits for the knowledge of the decision to be rendered by the English court" and "I promote to wait for the decision to be rendered by the English court **p.561**
    f. On 26 November 2021, the Network judge for Portugal said that there is an "open" process regarding parental responsibilities.
    g. An email dated 24 January 2022 from the Portuguese Justice Department refers to a case opened by the Public Prosecutor following allegations made by M against F and describes the file as "ongoing".
    h. On 13 May 2022, M applied in this jurisdiction in Form C2 for a Child Arrangements Order.

22. Counsel agree that jurisdiction in respect of the welfare aspect of this case (i.e the original wardship application, and M's application for a Child Arrangements Order) is governed by the 1996 Hague Convention.

23. At the Pre-Trial Review, and again at this hearing before me, counsel for M and the Guardian suggested that:
    a. S has undoubtedly become habitually resident in England. Therefore, Portugal does not have jurisdiction under Article 5.
    b. At the time of removal in November 2020, S was habitually resident in Portugal. Accordingly, by Article 7 of the 1996 Hague Convention the starting point is that Portugal keeps jurisdiction under that Article.
    c. Both M and F accept (as recorded on the face of an order of 18 February 2022 in these proceedings) that S's welfare falls to be determined in England rather than Portugal. They have both, therefore, acquiesced in the retention of S in

England, and, by reason of Article 7(1)(a), jurisdiction has transferred from the state of origin (Portugal) to the receiving state (England).

d. By no later than July 2021 F issued proceedings in Portugal, prior to issue of proceedings in England.
e. Therefore, the lis pendens provision of Article 13 requires the English court to cede jurisdiction to Portugal on welfare matters because of the existing Portuguese proceedings which pre-date the English proceedings. The English court retains the jurisdiction only to make temporary or provisional measures under Articles 11 and 12. That is so even if habitual residence transferred from Portugal to England, because habitual residence was originally in Portugal and proceedings were subsequently issued there.
f. Thus, it was submitted, the English court should make a request to the Portuguese court under Article 13(2) to decline jurisdiction, at which point (if the request is accepted) the English court would be entitled to resume consideration of the long term child arrangements. In the absence of a positive response from Portugal, at this final hearing before me, intended to determine the long term arrangements for S, I would be permitted only to make interim orders.

24. I expressed some doubt to counsel about this approach.

25. For a start, all parties had agreed, as recorded in a previous order in this jurisdiction made on 18 February 2022, that all issues about S's welfare should be determined here. F told this court (as recorded in an order dated 12 April 2022) that he has filed papers with the Portuguese court seeking to conclude proceedings there, although it is not clear if he has in fact done so. It would be an unhelpful outcome if the court in this jurisdiction is stymied from making long term welfare decisions, notwithstanding the unanimous view of the parties that it should do so.

26. Moreover, the Portuguese court, although undoubtedly in receipt of one or more applications made in Portugal, is currently taking no steps to consider the application(s). Presumably, that is at least in part because F himself is not pursuing the applications there. It is clear (see the communication of 19 November 2021) that the Portuguese court is awaiting the outcome of the English proceedings. There have been no directions, no interim orders, no timetabling and so on. The Portuguese courts are, understandably, doing nothing. If counsels' construction is correct, this child would be in a state of limbo, caught between the English court which has the power only to make interim orders, and the Portuguese court which is not taking any active steps to determine his long term welfare. That would obviously be unsatisfactory and contrary to S's welfare.

27. Article 13 is as follows:

"Article 13
(1) The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request **and are still under consideration.** [emphasis added]

(2) The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.

28. I expressed the view to counsel that the critical words are "and are still under consideration". That, in my judgment, on a plain and purposive reading, means that the lis pendens provision only applies where the contracting state (in this case Portugal) is <u>actively</u> considering the application. Active consideration might include making orders, giving directions, providing for the voice of the child to be heard, or any other steps which make plain that the court is entertaining the application(s) and intends to proceed to final determination. Otherwise, a situation like this might arise where no action is being taken at all, yet the contracting state, despite its own inaction, retains jurisdiction indefinitely. I do not consider that can be right. Understandably, given the proceedings taking place here and the unanimous agreement of the parties that England is the appropriate jurisdiction to consider welfare matters, the Portuguese court is taking no steps at all. It is de facto deferring to the English courts. That is unsurprising given that S has been living in England since November 2020, U and A live here, M is now here, and F has also recently relocated to England.

29. The wording of Article 13 is different from the equivalent provision under Article 19 of BIIA (which is not applicable to this case):

"(2) Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
(3) Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.
In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised."

That article does not contain the words "…and are still under consideration".

30. Counsel are not aware of any authorities dealing with the meaning of "and are still under consideration" in the 1996 Hague Convention. Authorities on the lis pendens provision in BIIA do not assist given the different wording. It appears to be a novel point.

31. It seems likely to me that, for the reasons given, the lis pendens provision under Article 13 does not apply, and this court holds jurisdiction to make final welfare orders.

32. However, counsel for M and the Guardian urge me to err on the side of caution and suggest that I should:

    a. Make an interim child arrangements order.
    b. Serve this order upon the Portuguese Central Authority, with appropriate recitals recording the court's approach.
    c. Should there be no response from the Portuguese authorities within 28 days, make a final order.

<u>Analysis</u>

33. I have well in mind s1 of the Children Act 1989, the paramountcy principle and the welfare checklist.

34. The findings I made in January 2022 speak for themselves and to my mind weigh heavily in the balance. Had it not been for the abusive conduct of F, and his family, this child would have remained in the care of his mother. She did not voluntarily give him up; he was forcibly removed from her, and she was then removed to Pakistan, far from S, unable to exercise any relationship with him.

35. I acknowledge that at one level U and A provide adequately for S in material terms. He is fed, clothed, and cared for. They show love and devotion. There are no concerns about the physical care provided by them. He has been in their care for a year and a half and there is a bond between them. The far greater risk is the emotional and psychological harm caused to a child who grows up in the care of extended family rather than being brought up by a parent, and who believes that U and A are his parents, and his cousin is his brother. This falsehood, or more accurately web of falsehoods, denying S the truth about his birth family and identity, cannot and must not continue. He needs an honest narrative as soon as possible. The alternative, to deny him the truth about who he is, would be almost unimaginably harmful for him. The fact that F, U and A regard this as acceptable demonstrates an almost staggering lack of empathy and insight. The emotional risks for S are self-evident. In my judgment, F, U and A see this in terms of their own needs, not the needs of S. They are perpetuating abusive and controlling behaviour to M, marginalising her and denying S his fundamental right to grow up with his mother. I find it difficult to trust them to ensure that S has any knowledge or understanding of M's role in his life, let alone a balanced view of M, if he were to remain living with U and A.

36. It is clearly preferable for a child to be brought up by one or both parents. F does not put himself forward as a primary carer, preferring to outsource to U and A. M needs some support, which fortunately she receives from her family. She needs housing and financial assistance; she currently lives with her cousin and will be able to live with her brother, both of whom provide financial support, and she has some earnings from her part time job. Her application under the EU Settlement scheme which would give her security of immigration status has been accepted and she awaits the final decision; her immigration lawyers are confident of her prospects and in the meantime, she is permitted to live in the United Kingdom, work, and access benefits. She will take time to adjust to caring for S, having been deprived of his company for so long. But I am confident that she will be able to provide consistent, loving, and stable care for S. The Guardian's view is that S will thrive in M's care, and I agree. She also considers that S will be able to adjust in moving from U and A to M, and again I agree. I propose to make an order that S lives with her. It sems to me that this should be implemented on Monday (with S not spending the weekend with M, as would otherwise have been the case); I suggest a handover at 12pm.

37. Contact with F and his family is less straightforward. Prima facie, it is in S's interests to continue to spend time with them, so as to have a balanced view of both sides of the family. He has a bond with U and A and has been happy in their care for a year and a half. However, the findings are damning. In my judgment, contact with F, U and A should start on a professionally supervised or supported basis. I cannot ignore (i) F's actions in causing S to be removed from M against her will, and M to be stranded, (ii) the findings of domestic abuse and (iii) the fact that under my order S will henceforth be living with M, against the will of F, U and A. Given the history of this case, abduction of S by F and/or his family

remains, in my view, a tangible risk. I am concerned also about the narrative which F, U and A might seek to impart to S. There needs to be a period of time with proper scrutiny to be satisfied that S is not at risk during periods of contact with F, U and A.

38. I agree with the Guardian that there should be a 6 week period of stability in M's care without any contact between S and F, U and A. Thereafter contact should be monthly, on a supervised or supported basis, for the reasons given. Specifically:

    a. Contact between F and S should take place once per month, supervised at a contact centre, for a 2 hour period, to be paid for by F;
    b. Contact between U and A and S should take place once per month, supported at a contact centre, for a 2 hour period, to be paid for by U and A.

The Guardian helpfully indicated that she would assist with liaising between the parties, making the referral and setting up the contact. I cannot do so at this stage as there has been limited inquiry into the available options.

39. I propose to set aside the Hague Convention return order under FPR 2010 rule 12.52A, and formally dismiss the Hague Convention application. It seems to me that there has been a "fundamental change of circumstances" to warrant the order being set aside as envisaged by para 4.1A of PD12 F and **In Re B (A Child) (Abduction: Article 13(b)) [2020] EWCA Civ 1057, [2021] 1 WLR 517** at paragraph 83, per Moylan LJ. M cannot enter Portugal, the country to which the return order has been made. She is living in this jurisdiction. All parties agree that welfare orders should be made here, and that S should live here. In the circumstances, I am satisfied that a set aside order is warranted.

40. I further propose to discharge the wardship order, and make a child arrangements order as outlined. In accordance with Counsel's suggestion, the order shall in the first instance be interim under Article 12. If, after 2 months (which seems to me to be a more realistic period than 28 days with the holiday season upon us), the Portuguese authorities have not made any substantive comments to the contrary, the order will be made final.

41. Other ancillary orders to be made include:

    a. Should M and/or S be required to leave the country for immigration reasons, this order will need to be reviewed.
    b. The existing port alert in respect of S should be discharged, and a free standing fresh port alert be made for the duration of S's minority. Clearly, that can be reviewed upon application to the court.
    c. Once S is handed over to M's care, the location order directed against U and A can be discharged, and their passports returned.
    d. Prohibited Steps Orders against U, A, F and M not to remove S from the jurisdiction of this court.
    e. F to cooperate in M securing a passport for S.
    f. Recitals designed to inform the Portuguese courts, via the Central Authorities, of the steps taken here.
    g. Any future applications in respect of child arrangements to be made to the local family court.