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Case No: FD23P00546

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 February 2024

Before :

MR JUSTICE CUSWORTH

- -

Between :

WB **Applicant**

- and –

VM **Respondent**

- -
- -

Martha Gray (instructed by **The International Family Law Group LLP**) for the **Applicant**
Mehvish Chaudhry (instructed by **Goodman Ray solicitors**) for the **Respondent**

Hearing date: 30 January 2024

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JUDGMENT

This judgment was handed down at 10.30am on 14 February 2024 by circulation to the parties or their representatives by e-mail and by release to The National Archives.

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 and

legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Cusworth :

1. This is an application for a return order in relation to R, who was born in 2022, and so has just had her 2nd birthday. R was born in England, and aside for a short holiday of about a fortnight in September 2022 had lived her life in England up to 24 August 2023, when she was taken by her father to Jordan. She has remained there since, living with her paternal family. Her mother now applies for a return order to this jurisdiction, having made an application, dated 18 October 2023, but which was issued by the Court on 30 October.

2. I have conducted this hearing remotely on 30 January 2024, with the father attending from Jordan, and the mother from England, before reserving this judgment for a period of 36 hours. Both parties have been represented by experienced counsel in Ms Gray for the mother and Ms Chaudhry for the father. I have not heard evidence, but I have had the benefit of reading 3 statements from each of them, and I have heard oral submissions from both counsel to augment their full skeleton arguments. I have also been provided with a full bundle of authorities, and indeed a further number after the conclusion of submissions, in light of points discussed during the hearing. This matter had been listed before me for a day, which was always likely to be too little, given the issues between the parties.

3. R holds British and American passports, and is included in her father's Jordanian Family Book. I have not had to enquire as to whether this also confers on her Jordanian nationality. The father accepts that when he took R to Jordan, he did this without the mother's knowledge or consent. He then obtained, again without notice, an order from the Jordanian Court to prevent R being removed from Jordan, dated 20 September 2023. Since then there have been no further Court proceedings in Jordan relating to R, and Ms Chaudhry has confirmed that there are no ongoing proceedings there. The father says that he did inform the mother that he had obtained this order, but he does not suggest that she was afforded the opportunity to be involved in the process by which the order was obtained.

4. After a hearing before MacDonald J on 12 January 2024, the parties did agree to attend a session of mediation, on 23 January, which I am told lasted for several hours. Sadly it failed to produce any agreed way forward between R's parents, and so the application comes before me today. Whilst there has been no direct contact between R and her mother since 24 August 2023, it is also clear that there had been no consideration of any direct meeting in any other country than Jordan or England, and it is to be hoped that that possibility will be explored in the event that the issues between these parents around where R is to live continue to be disputed between them going forward.

5. Both Counsel broadly agree the law that I should be applying today, and the different issues which have to be determined, the first of which, fundamentally, is whether this court has jurisdiction to hear the mother's application, in circumstances where Jordan is not a signatory to either the Hague Convention 1980 or the Hague Convention 1996.

6. Both Counsel in this regard invite me to follow Peel J's decision in *H v R and the Embassy of the State of Libya* [2022] 2 FLR 1301, recently approved by the Court of Appeal in *Re London Borough of Hackney v P and Others (Jurisdiction: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 1213, which would lead me first to determine whether R was habitually resident here as at the date that the mother's application for a return order under the inherent jurisdiction was dated or issued, on respectively 18 or 30 October 2023; and secondly, whether if she was, given the passage of time of a further 3 months, that habitual residence may now have been lost, with the consequence that the provisions of the Family Law Act 1986 may need to apply in place of Art.5 of the 1996 Hague Convention.

7. Before dealing with that factual issue, I will first set out the relevant parts of Peel J's careful decision. He first set out:

[33] I turn to the 1996 Hague Convention. By Art 5(1):

'The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.'

…

[39] [Paul Lagarde's Explanatory Report (HCCH, 1997), at para 42] goes on as follows:

'On the other hand, in the case of a change of habitual residence from a Contracting State to a non-Contracting State, Article 5 ceases to be applicable from the time of the change of residence and nothing stands in the way of retention of jurisdiction, under the national law of procedure, by the authority of the Contracting State of the first habitual residence which has been seised of the matter, although the other Contracting States are not bound by the Convention to recognise the measures which may be taken by this authority.'

[40] … this suggests to me that the position is different where the other State is a non-Contracting State. If at the date of the final hearing, habitual residence lies in the country of origin, then so does jurisdiction. If, however, between issue and final hearing habitual residence moves to the non-Contracting State, jurisdiction does not travel with it, but nor does it remain with the Contracting State under the Convention. Therefore, as the report says, Art 5 ceases to apply and national law takes over.

8. The first question for me to determine is whether R remained habitually resident in England and Wales when the mother made her application on 18 October 2023, or as the father would have it, when it was issued by the court on 30 October. Ms Chaudhry for the father says that even by then, 2 months after her removal to Jordan by her father, her habitual residence may have transferred. She cites the synopsis of Supreme Court authority contained in the judgment of Hayden J in *Re B* [2016] EWHC 2174 (Fam):

17… : (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 inquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, In re L). (iii) In common with the other rules of jurisdiction in Council Regulation (EC) No 2201/2003 ("Brussels IIA") 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); In re B, para 42, applying Mercredi v Chaffe (Case C-497/10PPU) EU:C:2010:829; [2012] Fam 22, 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 (In 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 (In 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 (In re L, In re R and In re B). (vii) It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (In 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 (In re R and earlier in In re L 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 (In re R) (emphasis added). (xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (article 9 of Brussels IIA envisages within three months). It is possible to acquire a new habitual residence in a single day (A v A; In re B). In the latter case Lord Wilson JSC referred (para 45) to 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 (In 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" (In re B supra).

9. Sub-paragraph (viii) was removed from that list of considerations following the decision of the Court of Appeal in *In re M (Children)* [2020] EWCA Civ 1105, where Moylan LJ said:

61. In conclusion on this issue, while Lord Wilson JSC's see-saw analogy [from In re B [2016] AC 606] 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.

62 Further, the analogy needs to be used with caution because if it is applied as though it is the test for habitual residence it can, as in my view is demonstrated by the present case, result in the court's focus being disproportionately on the extent of a child's continuing roots or connections and/or on an historical analysis of their previous roots or connections rather than focusing, as is required, on the child's current situation (at the relevant date). This is not to say continuing or historical connections are not relevant but they are part of, not the primary focus of, the court's analysis when deciding the critical question which is where is the child habitually resident and not, simply, when was a previous habitual residence lost.

10. More recently, in *A (A Child), Re (Habitual Residence: 1996 Hague Child Protection Convention) (Rev2)* [2023] EWCA Civ 659, the Court of Appeal cautioned that "'some degree of integration' is not a substitute for the required global analysis", drawing, in particular on two decisions of the Supreme Court:

(1) Lady Hale's comments in *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] AC 1038, when she referred, at [59], to whether the residence

had 'the necessary degree of stability' and when she said, at [60]:

"*All of these factors feed into the essential question, which is whether the child has achieved a sufficient degree of integration into a social and family environment in the country in question for his or her residence there to be termed 'habitual'*."

(2) Lord Reed in *Re R (Children) (Reunite International Child Abduction Centre intervening)* [2016] AC 76:

"[17] As Baroness Hale DPSC observed at para 54 of A v A, habitual residence is therefore a question of fact. It requires an evaluation of all relevant circumstances. It focuses on the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It is necessary to assess the degree of integration of the child into a social and family environment in the country in question. The social and family environment of an infant or young child is shared with those (whether parents or others) on whom she is dependent. Hence it is necessary, in such a case, to assess the integration of that person or persons in the social and family environment of the country concerned. The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce."

11. Applying those tests, as modified, to R's situation does not produce a straightforward outcome. There is no issue but that she was habitually resident in England and Wales up to the point of her removal to Jordan on 24 August 2023. However, thereafter she moved into a completely new environment (I do not consider that the brief holiday in September 2022 offers evidence of any advanced integration into Jordanian life for her). Fully considering Moylan LJ's analysis, I consider that R's lack of real former connections with Jordan, and the loss to her of her mother who, clearly, has been an important carer in her life – notwithstanding the father's case that he had been her primary carer, which I will deal with below – would have meant that she would not have begun any appreciable degree of integration into Jordanian life immediately upon her arrival. Whilst the father's family were around her, none of them can have been well-known or even recognisable to her before her arrival.

12. Whilst the father tells me through Ms Chaudhry that he used to work from home, it is his case as I understand it that he worked full-time whilst in England, and after the family trip to Jordan in September 2022, had only taken 2 further weeks holiday in early summer 2023, rather than any more extended periods of parental leave as had been suggested. This period of nearly a year, for a child born only in January 2022, would have been a critical one for R. I accept the mother's case that she was the primary carer for R immediately prior to her removal to Jordan in August 2023. So, whilst the focus must be on the degree of integration R would have achieved in Jordan, the loss of her connection to her mother must be relevant to the question of how quickly she can have become integrated into life with her father and his family in Jordan, and prevented any sufficient integration being immediate.

13. In this regard, I have full regard to all of the factors set out in Hayden J's checklist in *Re B*, as amended, but I have formed the clear view that as at late October 2023 (whether the date should be the 18th October (per Ms Gray) or 30th (per Ms Chaudhry) does not affect the position), and as provisionally determined in the earlier orders made in this application, R was still habitually resident in England and Wales at the date when this application was made. Whilst the father in his third statement purports to address the question of R's habitual residence in Jordan from an early stage after her removal, he only confirms that she has not yet started in the Jordanian education system. He speaks of seeing extended family, and of being able to access the health care system. He says that he is (on his case – he remains) her primary carer. But he does not provide any compelling evidence of early integration.

14. However, equally clearly, after the passage of a further 3 months, for a child of this young age, she will by now clearly have integrated to a more significant degree into life in Jordan with her father and his family. Now, after a period of 5 months rather than 2, for a child who has only just passed her second birthday, the level of integration will inevitably be such that she will more likely be habitually resident in Jordan than she had been when these proceedings began. It has to be said that the evidence in the father's third statement provides no more specific examples, but I consider that it would be unsafe to proceed on the basis that she remains habitually resident in England after the time which has unavoidably elapsed, and the reality for her of her life in Jordan, without direct contact with her mother. She does maintain

regular indirect contact with her, but there will by now be, in my judgement, a sufficient degree of integration into her surroundings that her habitual residence will have become Jordan.

15. On that basis, whether there remains jurisdiction in England and Wales will fall to be determined by the application of national law, following *H v R and the Embassy of the State of Libya* (above). Per Peel J in that case:

[46] It follows that, on that second scenario (ie. at the date of hearing habitual residence lay in Libya), jurisdiction is then governed by domestic law, ie. ss 1, 2, 3 and 7 of the FLA 1986 which cumulatively provide that the court has jurisdiction under English law if: (i) the order sought is a s 1(1)(d) order under the inherent jurisdiction giving care of the children to any person which, for reasons already given is, in my judgment, the case here; and (ii) the children were habitually resident in England and Wales at the relevant date, which is defined as the date of application.

16. I agree with that analysis. The next issue between the parties is therefore whether this is a case where the order sought by the mother is in fact a s.1(1)(d) order under the Family Law Act 1986 ('the 1986 Act'). That sub-section refers to orders coming within the court's jurisdiction in the following terms:

(d) an order made by a court in England and Wales in the exercise of the inherent jurisdiction of the High Court with respect to children –
(i) so far as it gives care of a child to any person or provides for contact with, or the education of, a child; but
(ii) excluding an order varying or revoking such an order;

17. Here, it is right that the mother's application on its face seeks no more than the return of R to the jurisdiction, on the basis that '*issues concerning the child are best dealt with by the English Court upon the child's return'*. However, there was provision in the Court's earlier orders that suggested that the application encompassed more than a simple return application. In the order of HHJ Parker dated 16 November 2023, the first order in these proceedings, there were included within its terms the following provisions:

9. Permission for the Mother to file a letter from her GP, outlining any mental or physical health conditions and any impact they may have on her ability to care for a child…

10. Permission for the Mother to file any assessments undertaken by the Local Authority in respect of the subject child...

18. Further, in the order of HHJ Moradifar dated 8 December 2023, there was the following recital:

5. It was agreed between the parties that contact between R and the Mother would continue as follows:
a) A call every day at 1pm GMT;
b) A call every day 1 hour before R is put to bed; and
c) The Father shall send regular updates to the Mother about R's health, wellbeing, developmental progress and likes/dislikes.

19. So here, as in *H v R and the Embassy of the State of Libya* (above), there is some evidence that (in the words of Peel J at [27] in that case) the mother '*did not seek solely an inward return order; she sought substantive child arrangements orders'*, thus avoiding the lacuna identified in *A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening* [2013] UKSC 60, [2014] AC 1, sub nom *Re A (Jurisdiction: Return of Child)* [2014] 1 FLR 111, at paras [25]–[28], where Baroness Hale of Richmond described the bare inward return order made under the inherent jurisdiction in that case as not encompassing care or contact and therefore not falling within s 1(1)(d) of the 1986 Act.

20. Whilst it is the case, as Ms Chaudhry for the father reminds me, that the mother has offered the exclusive use of the family's former home to the father and (impliedly) R – although the mother does not accept that she intended that both should go there – there can be no doubt that arrangements for her to be able to spend time with her daughter are uppermost in the mother's mind, and an integral part of the proceedings that she has brought. Indeed, I note that in her statement of 8 January 2024 at

paragraph 32, the mother makes reference to the fact that she '*would seek for a hearing to be listed as soon as possible so that issues in relation to coparenting can be determined'*. This must be understood as a hearing within the proceedings already commenced by the mother. I am therefore persuaded that this application does fall within the auspices of s.1(1)(d) of the 1986 Act.

21. This means, on the basis that as I have already determined R was habitually resident in England and Wales on the date when these proceedings were begun in October 2023, that there remains jurisdiction now to make the orders sought in respect of her welfare under Part 1 of the 1986 Act.

22. I can next deal shortly with Ms Chaudhry's application for the father for a stay of such proceedings if I am satisfied that the Court has jurisdiction. She accepted that, following the so-called 'Stop' order made in Jordan on 20 September 2023 at the father's instance, which would have the effect of preventing R being removed from Jordan unless revoked, there are currently no ongoing proceedings in Jordan in relation to her welfare, or at all. In those circumstances, I agree with Ms Gray that the issue of stay cannot arise as s.5(2)(a) of the 1986 Act enables the Court to grant a stay on an application for a Part 1 order, in circumstances where proceedings with respect to the matters to which the application relates are continuing outside England and Wales. There are none such here, and so the conditions required to enable the application to succeed are not met.

23. This then leads on to the final substantive question, which is whether on the summary basis, which is all that is possible after a one-day hearing conducted only after the assistance of brief submissions from counsel, it is appropriate now to make an immediate return order in respect of R. On the one hand, this is a clear and acknowledged case of a removal from the jurisdiction of her then habitual residence of a very young child by one parent without the knowledge or consent of the other; which other I am satisfied was her primary carer immediately before that removal. However, the removal was to a country which is not a signatory to any relevant convention, and one where both parties' counsel acknowledge that any orders made in this jurisdiction will have scant prospect of being enforced. And further, the making of a return order may serve to do no more than further entrench the parties, who have

already had one unsuccessful attempt at mediation, and make the prospect of R having a meaningful relationship with both of her parents, as she needs to, more remote than is already the case following the father's unilateral and precipitate action.

24. Ms Chaudhry argues that such an order should not be made in the absence of some expert evidence about the conditions in which R is living in Jordan, or about the legal system in place by which welfare decisions about R could be made. Set against this is the fact that there are currently no such proceedings in place in Jordan, and the father's expressed position is that he 'will not be returning R to England', and 'will not be able to visit England with her, whilst these proceedings go on'. So there is little prospect of any proceedings in Jordan where an open outcome may be possible.

25. I bear in mind too that in *PZ v TB* [2023] EWHC 243 (Fam), Morgan J dealt sensitively with the welfare stage of the proceedings which followed on from Peel J's earlier jurisdictional decision in *H v R and the Embassy of the State of Libya* (above), and decided that the children in that case should not be returned to this jurisdiction. In that case she had the benefit of a single joint expert's report on the Libyan legal system, and evidence given to her in court by a representative on behalf of the Libyan ambassador, as well as extensive evidence from an experienced CAFCASS reporter. However, one of her principal reasons there was the expressed opposition by the children to a return from Libya, at an age when their views carried significant weight (they were 14 and 12).

26. In this case, the position that the father puts to the court is simple. Either the mother comes to Jordan, or she will simply not have face to face meetings with R. I suggested that he might consider visits in a neutral third state – somewhere such as Dubai – but Ms Chaudhry indicated that such a possibility had not been considered as a way forward. I was told that it now might be. Meanwhile, it is inevitable that however attentive the father's family may be, R will be suffering emotional harm by being deprived of the opportunity to spend face to face time with her mother. I have seen no evidence that that will change in the absence of a return order, but there is no certainty that making such an order will achieve a positive outcome for R.

27. Clearly, the lack of enforceability is a significant issue. However, Ms Gray reminds me of the words of Baker LJ in *Re S (Children) (Inherent Jurisdiction: Setting Aside Return Order)* [2021] EWCA Civ 1223, where he said at [51]: '*the 'first and foremost' assessment which the court required to carry out is not the enforceability of its order but the welfare of the children. It is only after deciding what orders are required to secure the children's welfare that the court should turn to consider enforceability, and when it does consider that matter it will look first at the likelihood of the person against whom the order is made complying with the order and then the means of enforcing compliance if he does not. There may be various means of securing compliance without resorting to reciprocal enforcement in the courts of the other country.'*

28. Ultimately, I am driven to conclude that the evidence before me is not yet quite sufficient to conclude determinatively whether the return order being sought by the mother is the best way to secure R's welfare in the circumstances in which she finds herself. It may well prove to be the only available order for this court to make to attempt to persuade the father that R's interests, and his own, are best served by returning her to this country so that a proper welfare analysis can be carried out, the allegations that each party makes against the other can be investigated. I am aware, however, that the making of such an order may simply have the effect of leaving the father feeling unable to offer any direct opportunities for R to see and spend meaningful time with her mother.

29. I also have in mind the cautious approach to the making of orders under the Inherent Jurisdiction in relation to children who are currently within the jurisdictions of other courts mandated by the Court of Appeal in *Re M (A Child) (Exercise Of Inherent Jurisdiction)* [2020] EWCA Civ 922, although that was a more remote example of the jurisdiction's attempted use than that proposed here. Here, R's age means that her wishes and feelings are not yet a relevant, let alone determinative, consideration as they were in *PZ v TB*. It is her father who is flatly refusing to countenance returning R to the country where she had spent virtually all of her life prior to his removal of her, and from the daily involvement of her mother in her life and care.

30. In her arguments in support of a stay of these proceedings Ms Chaudhry argued that Jordan was the country more able to assess R's welfare needs, and that as the mother had been able to access some information about the Jordanian legal system, she should be treated as being able to litigate in Jordan. On any view, those arguments rang hollow in circumstances where there are no ongoing proceedings in Jordan, that before the mother was even aware that proceedings had commenced, the father had already obtained a 'stop order', and that the father has demonstrated that he is well able to litigate with high level specialist representation in the English Court. I can see little benefit to R in any adjournment to garner further information about the legal position in Jordan, about which the parents are not actually in disagreement.

31. However, rather than condemn R and her parents without further pause to the entrenched hostility which may well be the product of an unenforceable return order, I consider that both parties should consider further engagement with each other through some form of further mediation, perhaps through Reunite or some other FMA accredited scheme, in circumstances where I am satisfied that this court does have jurisdiction to make the orders sought by the mother, and would be minded to do so in the absence of any progress between the parents towards some form of agreement toward regular direct contact between R and her mother within a relatively limited period of time.

32. Consequently, I will adjourn a final determination of whether to make an immediate return order in this case for a further, but otherwise final, period of less than 21 days, to allow the parties to explore whether or not some progress can be made between them without the need for the making of this order. The matter should be relisted before me (if available) in the week commencing 19 February 2024, with a time estimate of 2 hours.

33. This is my judgment.