Neutral Citation Number: [2021] EWFC 68

Case No: LV21C01158

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/08/2021

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

Warrington Borough Council	**Applicant**
- and -	
T	**First Respondent**
-and-	
R	**Second Respondent**
-and-	
W	**Third Respondent**
-and-	
K (By his Children's Guardian)	**Fourth Respondent**

- -
- -

Mr Shaun Spencer (instructed by the **Borough Solicitor**) for the **Applicant**
The Second Respondent did not appear and was not represented
Ms Lisa Edmunds (instructed by **Watsons Solicitors**) for the **First Respondent**
Mr Simon Povoas (instructed by **Lewis Rodgers**) for the **Third Respondent**
Ms Ann Beattie (instructed by **Bell Lamb and Joynson**) for the **Fourth Respondent**

Hearing dates: 9 July 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10.30am on 31 August 2021.

Mr Justice MacDonald:

INTRODUCTION

1. I am concerned with the welfare of K. There is some uncertainty as to K's date of birth. On his birth certificate, K's date of birth is recorded as June 2014. On his passport, K's date of birth is however recorded as April 2014. In any event, based on the available evidence, he is seven years old. K is a national of Gabon (officially, the Gabonese Republic). He speaks Gabonese French. Warrington Borough Council, represented by Mr Shaun Spencer of counsel, brings care proceedings in respect of K under Part IV of the Children Act 1989.

2. The first respondent to the application, T, is K's mother (hereafter 'the mother'). The mother is represented by Ms Lisa Edmunds of counsel. The mother is also a national of Gabon and speaks Gabonese French. K's birth certificate names his father as R, whose whereabouts are uncertain. However, the mother has identified another individual, N as the child's father. N is a Polish National and it is on this basis that notification of the proceedings was made to the Polish Consulate with a request for assistance to locate N.

3. The second respondent to the application, W, is K's step-father (hereafter 'the step-father') and was married to the mother in Gabon by way of local custom in July 2015 and by way of civil ceremony in November 2015. The step-father appears to have parental responsibility for K by virtue of a parental responsibility order made in Gabon, a photograph of which document this court has been shown in the original French. No translation however, has been made available to the court. The step-father is represented by Mr Simon Povoas of counsel. K is represented by Ms Ann Beattie of counsel through his Children's Guardian, Kirsteen Bennett.

4. The local authority contends that this court has jurisdiction to make orders under Part IV of the Children Act 1989 in respect of K based on his habitual residence in the jurisdiction of England and Wales for the purposes of Art 5 of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereafter the 1996 Hague Convention). That assertion is supported by the mother and by the Children's Guardian but is disputed by the step-father, who contends that K remains habitually resident in Gabon. If K is habitually resident in Gabon, the local authority contends that the court is able to request that Gabon cede jurisdiction to England and Wales. That assertion is also supported by the mother and the Children's Guardian but disputed by the step-father.

5. In determining the questions of jurisdiction that are now before the court, I have had the benefit of reading the court bundle in this matter. I have also been greatly assisted by the written and oral submissions of counsel. All parties were agreed that it was not necessary for the court to hear oral evidence in this matter in order to determine the issues before it. Given the issues raised, I reserved judgment and I now set out my decision and the reasons for the same.

BACKGROUND

6. The step-father met the mother when he was working in Gabon. As I have noted, they married in Gabon in 2015. K was born in Gabon in 2014 and has lived the majority of his life in that jurisdiction. The step-father was granted parental responsibility for K in Gabon in May 2016, although the precise legal basis for that grant under Gabonese law is not yet clear. Both K and his mother are Gabonese nationals. The mother has another child from a previous relationship, a daughter now in her twenties. Both the mother and the step-father have made reference to allegations that the step-father had a sexual relationship with the mother's daughter in Gabon, an allegation that is disputed by the step-father. The mother also has extended family in Gabon. The mother and K are each francophone and speak no English. The step-father holds both Gabonese and British nationality.

7. The mother and K have visited the United Kingdom on a number of occasions since 2016, namely in 2016, 2017, 2018 and 2019, the mother and K always returning to Gabon following those visits. The step-father contends that the visits in 2016, 2017 and 2018 were for two week family holidays, with the family always staying in a hotel. However, the step-father characterises the visit in 2019 as an extended visit to the United Kingdom. I note in this context that the step-father states that he had by then reached retirement age in Gabon and had come to the end of an assignment. On that occasion the family were in the United Kingdom from February 2019 to July 2019. During that visit, after initially staying at various hotels, they lived at the family's property in this jurisdiction until the mother and K left the jurisdiction to return to Gabon in compliance with the terms of the mother's visa.

8. During the family's visit to the United Kingdom in 2019 the step-father states that the possibility of the mother obtaining a residential family visa was explored after the mother had spoken about coming to the United Kingdom. Whilst the step-father states that the mother was unable to complete an English language course in this jurisdiction as a pre-condition to obtaining a residential visa before she was required to return to Gabon, there is a suggestion that it was intended that she would take this step when she arrived in England in December 2020, although by that time the relevant centres had been closed by the COVID-19 pandemic. It is also suggested by the step-father that during the family's visit in 2019 the mother expressed the view that she would like to settle somewhere where French was spoken and that the family decided to look for houses in France.

9. The mother and K last entered the United Kingdom on 16 December 2020 on a category C visitor's visa. This followed a period during which the mother and K had been apart from the step-father for a period of some 17 months. The mother's visa was issued in September 2016 and is due to expire on 21 September 2021. Her visa entitles the mother and K to remain in the United Kingdom for 180 days at a time, and accordingly their due departure date for this visit was 15 June 2021. In the circumstances, the mother is now an overstayer, as is K.

10. The step-father's statement before the court suggests that on the arrival of K and the mother in the United Kingdom on 20 December 2020 there remained the possibility of a property being purchased in France and a search for French properties was commenced. During a police interview in March 2021, the details of which I will come to, the mother confirmed to the police that the step-father was going to take his

retirement and that the family's plan was to buy a house in, and to live in, France. The step-father now asserts that, at an unspecified point in time, the mother and the step-father had in fact agreed to abandon those plans. Within this context, the now step-father contends that they had decided to return to Gabon and that neither the mother nor he had any intention of staying in the United Kingdom.

11. On 31 March 2021, the family came to the attention of children's services in Warrington following a referral by health care authorities. According to the referral, on 30 March 2021 the Mother told a sexual health worker that the step-father had sexually abused K. The sexual health worker in question, who speaks French, reported that he had spoken with K, who stated that the step-father had come into his bedroom and that inappropriate sexual contact between the step-father and K had occurred. The mother asked the sexual health worker not to report the matter as she feared that the step father would harm K. It would appear that it was at this point that the mother further alleged that the step-father was having an affair with her adult daughter from a previous relationship. Upon the sexual health worker making clear that he had a duty to report the allegations made by K, it is alleged that the mother repeatedly pressed him not to do so.

12. Following the allegations made by K, the police and social services attended the family home on 31 March 2021. The police officers and social workers were concerned about the state of the family home, which was said to be unsafe and derelict, including an absence of flooring, tripping hazards, loose floorboards, loose and exposed bricks, mortar missing from the walls and mould. There was little furniture and cooking appeared to be taking place in the bathroom. K was required to sleep on a soiled mattress on the floor. The step-father later contended that the property had fallen into disrepair following the death of his first wife and his leaving to work in Gabon and that no remedial works had been undertaken on the property because of the intention of the family to move to France.

13. When the mother was spoken to by the social worker and police officers on 31 March 2021 through an interpreter she stated that the step father had been touching K and kissing his stomach. The mother then spoke to K, who responded by putting his finger in his mouth. From this exchange, the mother alleged oral sexual abuse by the step-father. The step-father was arrested and made no reply upon being cautioned.

14. The police exercised their powers of police protection in respect of K on 31 March 2021 and K was placed with foster carers where he remains to date. The Mother's agreement pursuant to s.20 of the Children Act 1989 was given on 1 April 2021. The local authority commenced proceedings under Part IV of the Children Act 1989 12 April 2021. K was made the subject of an interim care order on 16 April 2021, the court exercising jurisdiction pursuant to Article 11 of the 1996 Hague Convention. K was noted not to be registered with a school or with a General Practitioner. Whilst the mother and the step-father contended that K had been receiving online education from Gabon they were unable to provide any cogent details of this educational provision. Since that time, the step-father has exhibited to his second statement worksheets that purport to demonstrate that K was engaged in formal education provided by his private school in Gabon.

15. With respect to the allegations of sexual abuse made by K, during her police interview on 31 March 2021, the mother alleged that the abuse had been taking place

throughout the week of 15 March 2021, K telling the mother at that time, some two weeks before the mother made reference to the allegations when speaking to the sexual health worker, that the step-father would come into his bedroom at night. The mother made further and detailed allegations regarding oral sexual abuse alleged to have been perpetrated by the step-father against K. The mother also indicated to the Police that she had intended to catch the step-father sexually abusing K by hiding in a cupboard, she telling police that "My idea was to hide myself in the cupboard to see what happens. My idea was to try to film them". This raised further significant concerns regarding the extent to which the mother knew K was being abused prior to her reporting it some two weeks later on 30 March 2021. K's foster carer has reported that K has subsequently presented with some sexualised behaviour when playing out in the garden with the foster carer's adult daughter. The mother returned to the father following his release from custody.

16. During his police interview, the step-father denied sexually abusing K and alleged that the mother physically chastised K by hitting him on the backside and on his head. The step-father further asserted that K suffered from night terrors and speculated that this could be why allegations of sexual abuse had been made, K thereafter articulating what he had dreamed. The foster carer has not witnessed such behaviour in K.

17. Within the context of the question of habitual residence that is now before the court, it became apparent from the police interviews of the mother and the step-father that following his arrival in the jurisdiction of England and Wales K spent a lot of time in the garden or in the family bedroom at the family home and rarely left the home other than to go shopping. Within this context, I note that in his second statement, the step-father asserts as follows:

> "There have been no visits to family members or trips out and save for the weekly shop to a local supermarket which K would like to accompany me on, he has had very limited opportunity to experience life further and beyond the close family unit that has been confined to staying in the house or garden. After I had shown [the mother] how to use public transport during the 2019 visit there were occasions K would catch the bus with her to go into [the town centre] or walk to the neighbouring village, but the large part of K's time would be spent with his Mother and myself and very significantly at home."

18. The evidence before the court makes clear however, that K has settled well into his foster placement since 31 March 2021. He has been registered with a GP and dentist and is now attending school. His command of English has improved and he has been attending a holiday club. K has regular contact with his mother but does not see his step-father. Within this context, in her statement dated 7 July 2021 the social worker describes K's current circumstances in his foster care placement as follows:

> "[3] K is currently placed with Local Authority foster carers, he has been since the 31 March 2021. K is currently living in a stable and secure environment where he has integrated into the foster carer's family, he has routine and boundaries and is and has adapted to this very well. K is having all of his needs met to a good standard and through observations he is content within the home environment. K has his own bedroom which consists of a single bed, wardrobe and chest of draws. K has toy boxes

> under his bed which are filled with his new toys he got for his birthday last month. K has shown great gratitude for receiving his birthday gifts from his foster family and his mother. He is very proud to show how neatly his personal belongings are organised."

And with respect to schooling:

> "[5] K is now attending [school], since 24 June 2021. K was beyond excited to start school. Prior to starting school K was very proud, and excited to show off his school uniform, book bag and school shoes. K has shown great confidence in starting school despite the language barrier. K has settled well into school and is confident with socialising and interacting with other children. K's English language has significantly improved since being placed with his current foster carer and attending school. [The school] have recognised and praised K's foster carer for the amount of time which has been dedicated to K, in helping him to learn and develop new found skills especially within the English Language. To support K's learning he is provided with a learning tool known as 'Flash Academy'. K thoroughly enjoys using this to support both his English and French learning. K is very attentive to his teachers and foster carers needs and this is evident in him settling so well into a new environment."

19. Following a number of unsuccessful attempts to make contact with representatives of the Gabonese Republic at its Embassy in London, on 21 June 2021 the Embassy replied to the local authority in the following terms:

> "The Embassy of Gabon acknowledges receipt of your email regarding the situation of the Gabonese child, [K] and would like to inform you that it will seek to find out the whereabouts of his father, the possibility to contact any relative or next of kin of the child, as well as the issue on [R's] parental authority by relaying the information provided to the Gabonese Ministry of Foreign Affairs. The Embassy would also like to indicate that at this point and time, as much as it is deeply concerned about this situation, it will not seek to have a representative attend the next hearing on 9th July 2021 but will carry on working very closely with you in order to preserve the best interests of the child. The Embassy would like to thank you for your efforts to ensure the welfare of the Gabonese child and for the updates on the case."

20. Within the foregoing context, the local authority contends that K is now habitually resident in the jurisdiction of England and Wales and that, accordingly, this court has substantive jurisdiction in respect of K under Art 5 of the 1996 Hague Convention based on his habitual residence in this jurisdiction. That submission is supported by the mother and the Children's Guardian but is refuted by the step-father. The step-father submits that K remains habitually resident in Gabon and that this court therefore has no jurisdiction in respect of K beyond that provided for by Art 11 of the 1996 Convention with respect to urgent protective measures.

21. If the court finds that K is habitually resident in Gabon, the local authority asks this court make a request to the Gabonese Republic to transfer jurisdiction to England and Wales. In circumstances where Gabon is not a signatory to the 1996 Hague

Convention, the local authority submits that this step can be achieved under the inherent jurisdiction of the High Court. The mother likewise asks this court make a request to the Gabonese Republic to transfer jurisdiction to England and Wales if K is not habitually resident here. Ms Edmunds submits however, that this can be achieved by way of Art 11 of the 1996 Convention. Against this, on behalf of the step-father Mr Povoas submits that neither the inherent jurisdiction of the High Court nor Art 11 of the 1996 Convention provide a legitimate framework within which this court could request the Gabonese Republic to transfer jurisdiction in respect of K to the jurisdiction of England and Wales.

THE LAW

22. In *Re K* [2015] EWCA Civ 352 at [26] the Court of Appeal laid out the analytical structure for determining the question of jurisdiction in respect of a child. Namely, the court first determines whether or not the court in England and Wales has jurisdiction. It does so, depending on the countries involved, with or without reference to various international instruments, and in particular to the jurisdictional provisions of those international instruments. If the English court finds that it has jurisdiction on one of the applicable jurisdictional bases, it may go on to decide whether the other jurisdiction nonetheless should determine the matter. Once again, depending on the countries involved, this decision falls to be taken with or without reference to various international instruments and, in particular, the provisions in those international instruments concerning the transfer of jurisdiction. Where there is no international legal instrument operating as between the two jurisdictions concerned, the latter question will ordinarily fall to be decided by reference to the principle of *forum conveniens*.

Jurisdiction

23. Whilst Part IV of the Children Act 1989 empowers the court, by way of s.31 of that Act, to make an order placing a child with respect to whom an application has been made in the care of, or under the supervision of a local authority, the Children Act 1989 does not contain provisions that identify over which children the court has jurisdiction to make orders under Part IV of the 1989 Act. Further, whilst Part I of the Family Law Act 1986 stipulates the jurisdictional basis for making private law orders under Part II of the Children Act 1989, the 1986 Act does not contain provisions that establish the jurisdictional basis for making public law orders under Part IV of the Children Act 1989.

24. However, and within this context, in *Re R (Care Orders: Jurisdiction)* [1995] 1 FLR 711, Singer J held that there are strong policy reasons why the group of children in respect of whom applications can be made under in Part IV of the Children Act 1989 Act should be no less extensive than the group of children in relation to whom applications can be made under Part II of the 1989 Act. In these circumstances, Singer J considered that it was for the court to apply the statutory intent which was not expressed in the words of the Act and held that the jurisdictional basis for an application under Part IV was, effectively, the same as that in relation to the jurisdictional basis for an application under Part II established by the 1986 Act. Within this context, Singer J observed at p. 714 that:

> "I therefore take the view that the jurisdictional basis for an application under Part IV is effectively the same as that in relation to section 8 orders established by the Family Law Act 1986. I hold that for the court to have jurisdiction . . . the child . . . should be either habitually resident in England and Wales, which I take to mean the same as 'ordinarily resident in England and Wales' or that that child should be present in England and Wales at the relevant time, which it seems to me is the time when the application to the court is made."

25. In *Re M (Care Orders: Jurisdiction)* [1997] Fam 67 Hale J (as she then was) noted that the *ratio decidendi* of *Re R (Care Orders: Jurisdiction)* is limited to the conclusion that the court has jurisdiction in public law cases in respect of children who are present here even if they are or may be habitually resident outside the United Kingdom. However, Hale J went on to observe that the whole tenor of Singer J's reasoning was in favour of there being as wide a jurisdiction as possible to protect children from harm, a jurisdiction at least as extensive as that provided by the Family Law Act 1986 in private law cases.

26. Within the foregoing context, the jurisdictional framework for making private law orders under Part II of the Children Act 1989, provided for by Part I of the Family Law Act 1986 is, by reference to the decisions in *Re R (Care Orders: Jurisdiction)* [1995] 1 FLR 711 and *Re M (Care Orders: Jurisdiction)* [1997] Fam 67, also applicable to the question of the court's jurisdiction to make public law orders under Part IV of the Children Act 1989. Within this context, and in so far as relevant, s.1 of the 1986 Act provides as follows:

> "**1. Orders to which Part I applies.**
>
> (1) Subject to the following provisions of this section, in this part "Part I order" means-
>
> > (a) a section 8 order made by a court in England and Wales under the Children Act 1989, other than or order varying or discharging such an order"
>
> …/"

27. Within the foregoing context, s.2(1) of the Family Law Act 1986 provides as follows with respect to the jurisdictional basis for making private law orders under s.8 of the Children Act 1989 as follows:

> "**2. Jurisdiction: general.**
>
> (1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless-
>
> > (a) it has jurisdiction under the Council Regulation or the Hague Convention, or
> >
> > (b) neither the Council Regulation nor the Hague Convention applies but-

(i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2A of this Act is satisfied, or

(ii) the condition in section 3 of this Act is satisfied.

…/"

28. Section 2(1)(b)(i) is not relevant in these proceedings in that they do not arise in or in connection with matrimonial proceedings or civil partnership proceedings. However, the condition in s.3 referred to in s. 2(1)(b)(ii) is as follows:

"**3. Habitual residence or presence of the child.**

(1) The condition referred to in section 2(1)(b)(ii) of this Act is that on the relevant date the child concerned-

(a) is habitually resident in England and Wales, or

(b) is present in England and Wales and is not habitually resident in any part of the United Kingdom,

and, in either case, the jurisdiction of the court is not excluded by subsection (2) below.

(2) For the purposes of subjection (1) above, the jurisdiction of the court is excluded if, on the relevant date, matrimonial proceedings or civil partnership proceedings are continuing in a court in Scotland or Northern Ireland in respect of the marriage or civil partnership of the parents of the child concerned.

(3) Subsection (2) above shall not apply if the court in which the other proceedings there referred to are continuing has made-

(a) an order under section 13(6) or 19A(4) of this Act (not being an order made by virtue of section 13(6)(a)(i)), or

(b) an order under section 14(2) or 22(2) of this Act which is recorded as made for the purpose of enabling Part I proceedings with respect to the child concerned being taken in England and Wales,

and that order is in force."

29. Having regard to previous decisions of Singer J and Hale J (as she then was) in *Re R (Care Orders: Jurisdiction* and *Re M (Care Orders: Jurisdiction)* respectively, and within this statutory context, if either the European Union, Council Regulation (EU) 2003/2201 (hereafter Brussels IIa) or the 1996 Hague apply, then pursuant to s. 2(1)(a) of the 1986 Act the jurisdictional provisions of those instruments will provide the relevant legal framework for determining the jurisdiction of the court to make care or supervision orders under Part IV of the 1989 Act. If they do not then, pursuant to s. 2(1)(b)(ii) of the Family Law Act 1986, s.3 of the 1986 Act will provide the relevant legal framework for determining the question of jurisdiction.

30. Within the foregoing context, the jurisdictional bases for making public law orders under Part IV of the Children Act 1989 are (a) in cases commenced prior to the departure of the United Kingdom from the European Union at 11pm on 31 December 2020, the relevant provisions of Brussels IIa or (b) the relevant provisions of 1996 Hague Convention or, where (a) or (b) do not apply, (c) the habitual residence of the child in England and Wales or (d) the presence of the child in England and Wales where that child is not habitually resident in any part of the United Kingdom.

31. As noted, Brussels IIa has ceased to have effect in cases commenced after the conclusion of the transition period governing the departure of the United Kingdom from the European Union, which came to an end on 31 December 2020 at 11pm. Art 5 and Art 6 of the 1996 Hague Convention provides as follows with respect to jurisdiction to take measures directed to the protection of the person or property of the child:

> "**Article 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.
>
> (2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.
>
> **Article 6**
>
> (1) For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.
>
> (2) The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established."

32. With respect to the provisions of Art 6(2), having regard to the Explanatory Report for the 1996 Convention at [45], it would appear that the words "whose habitual residence cannot be established" encompass a child who does not, as a matter of fact, have a habitual residence. It has been said that the modern concept of habitual residence operates so that it is highly unlikely that a child will be left without a habitual residence (see *Re B (A Child)(Habitual Residence: Inherent Jurisdiction)* [2016] 1 FLR 561 at [45]), although there have been cases where that has been the outcome (see for example, *Re F (Habitual Residence: Peripatetic Existence)* [2015] 1 FLR 1303 per Peter Jackson J (as he then was) and *CL v AL* [2017] EWHC 2154 (Fam) per Keehan J). Within this context, I also note that the Lagarde Explanatory Report on the 1996 Convention notes as follows at [41]:

> "The change of habitual residence implies both the loss of the former habitual residence and the acquisition of a new habitual residence. It may be that a certain lapse of time exists between these two elements, but the

> acquisition of this new habitual residence may also be instantaneous in the simple hypothesis of a move of a family from one country to another. This is then a question of fact which is for the authorities called upon to make a decision to assess…"

And paragraph [4.17] of the Practical Handbook on the operation of the 1996 Hague Convention states that:

> "However, there are circumstances where it might not be possible to establish the habitual residence of a child. Such circumstances could include, for example: (1) when a child moves frequently between two or more States, (2) where a child is unaccompanied or abandoned and it is difficult to find evidence to establish his / her habitual residence or (3) where a child's previous habitual residence has been lost and there is insufficient evidence to support the acquisition of a new habitual residence"

33. In a situation where the child does not have a habitual residence, Art 6(2) of the 1996 Hague Convention will apply and the court of a Contracting State to the Convention will have a jurisdiction of necessity based on the presence of the child in its jurisdiction. As to the extent of that jurisdiction, the Lagarde Explanatory Report notes at [45] that:

> "The text does not specify whether the court of the Contracting State, on the territory of which the child who has no habitual residence is present, is to retain the jurisdiction attributed to it by Article 6, paragraph 2, where measures of protection for the child have been taken in a non-Contracting State, for example in the State of the child's nationality. It seems reasonable to think that the Convention does not limit the jurisdiction of a court based on presence, but rather leaves it free to determine according to its law whether it should recognise and give effect to the measures taken in this third State."

34. Finally with respect to the jurisdictional framework, and within the foregoing context, the United Kingdom is party to the 1996 Hague Convention and it came into force in this jurisdiction on 1 November 2012. Gabon is not a party to the 1996 Hague Convention. However, in circumstances where this court is the court currently seised of the issue of jurisdiction, and this jurisdiction is a signatory to the 1996 Hague Convention, I am satisfied that the question of whether this court has jurisdiction in respect of K falls to be determined by reference, *inter alia*, to the jurisdictional provisions that apply under Arts 5 and 6 of the 1996 Hague Convention, notwithstanding that Gabon is not a Contracting State to that Convention (see *Re A (Jurisdiction: Return of Child)* [2014] AC 1).

Habitual Residence

35. The concept of habitual residence is central to the determination of jurisdiction both under Art 5 of the 1996 Hague Convention and, if necessary, under s.3 of the Family Law Act 1986. In circumstances where the concept of habitual residence operates in the 1996 Convention to determine jurisdiction, it is a concept that must be interpreted autonomously having regard to the purposes of the Convention.

36. Within the foregoing context, habitual residence falls to be established by reference to the extent to which a child is, as a matter of fact, sufficiently connected to the jurisdiction in question. Within this context, the test for habitual residence provided in *Re A (Area of Freedom, Security and Justice) (C-532/01)* [2009] 2 FLR 1 with respect to Brussels IIa, namely that for the child to be habitually resident the residence of the child must reflect some degree of integration in a social and family environment, would appear apt when determining habitual residence for the purposes of Art 5 of the 1996 Convention.

37. Whether there is some degree of integration by the child in a social and family environment is a question of fact to be determined by the national court, taking into account all the circumstances specific to the individual case. As Moylan LJ observed in *Re M (Children)(Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105:

> "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."

38. Within this context, habitual residence must be established on the basis of all the circumstances specific to the individual case (*Case C-523/07* [2010] Fam 42). With respect to those circumstances, in *Re A (Area of Freedom, Security and Justice)* and *Mercredi v Chaffe* [2011] 2 FLR 515, the Court of Justice of the European Union identified the following, non-exhaustive, list of circumstances that might be relevant in a given case when determining the question of habitual residence under Brussels IIa:

    i) Duration, regularity and conditions for the stay in the country in question.

    ii) Reasons for the parents move to and the stay in the jurisdiction in question.

    iii) The child's nationality.

    iv) The place and conditions of attendance at school.

    v) The child's linguistic knowledge.

    vi) The family and social relationships the child has.

    vii) Whether possessions were brought, whether there is a right of abode and whether there are durable ties with the country of residence or intended residence.

39. In a series of decisions, namely *Re KL (A Child)* [2014] 1 FLR 772, *Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] 1 FLR 772, *Re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] 1 FLR 1486, *Re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2015] 2 FLR 503 and *Re B (A child) (Habitual Residence: Inherent Jurisdiction)* [2016] 1 FLR 561 the

Supreme Court has articulated the following principles of general application with respect to the question of habitual residence:

i) It is the child's habitual residence which is in question and hence the child's level of integration in a social and family environment which is under consideration by the court determining the question of habitual residence.

ii) In common with the other rules of jurisdiction, the meaning of habitual residence 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.

iii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must also weigh up the degree of connection which the child had with the state in which he resided before the move.

iv) The relevant question is whether a child has achieved some degree of integration in a social and family environment. It is not necessary for a child to be fully integrated before becoming habitually resident.

v) 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.

vi) In circumstances where the social and family environment of an infant or young child is shared with those on whom she is dependent, it is necessary to assess the integration of that person or persons (usually the parent or parents) in the social and family environment of the country concerned.

vii) In respect of a pre-school child, the circumstances to be considered will include the geographic and family origins of the parents who effected the move.

viii) The requisite degree of integration can, in certain circumstances, develop quite quickly. There is no requirement that the child should have been resident in the country in question for a particular period of time. The deeper the child's integration in the old state, probably the less fast his or her achievement of the requisite degree of integration in the new state. Likewise, the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his or her achievement of that requisite degree. In circumstances where all of the central members of the child's life in the old state to have moved with him or her, probably the faster his or her achievement of habitual residence. Conversely, were any of the central family members have remained behind and thus represent for the child a continuing link with the old state, probably the less fast his or her achievement of habitual residence.

ix) A child will usually, but not necessarily, have the same habitual residence as the parent(s) who care for her. The younger the child the more likely that

proposition but this is not to eclipse the fact that the investigation is child focused.

x) Parental intention is relevant to the assessment, but not determinative. There is no requirement that there be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely. Parental intent is only one factor, along with all other relevant factors, that must be taken into account when determining the issue of habitual residence.

40. In considering the question of habitual residence, it is not necessary for the court to make a searching and microscopic enquiry (*Re B (Minors)(Abduction)(No 1)* [1993] 1 FLR 988).

41. Whilst I am satisfied that the foregoing general legal principles will apply to the assessment of the question of habitual residence under the 1996 Hague Convention, the question of *when* the foregoing provisions fall to be applied for the purposes of the 1996 Convention requires some further illumination. Under Art 8 of Brussels IIa, the question of habitual residence fell to be decided at the point at which the court is seised. However, Art 5 of the 1996 Convention does not specify the point at which habitual residence falls to be determined for the purposes of establishing jurisdiction. In *Re NH (1996 Child Protection Convention: Habitual Residence)* [2016] 1 FCR 16 Cobb J at [24] expressed the obiter view that:

> "[24] Although like BIIa, the 1996 Child Protection Convention founds primary jurisdiction on the country of the child's habitual residence, unlike BIIa, the 1996 Child Protection Convention does not specify the time at which habitual residence is to be determined; in BIIa it is specifically said to be 'at the time the court is seised', words which are absent from the equivalent provision of the 1996 Convention. Ms Lucey and Mr Barda presented their respective submissions as if the words 'at the time the court is seised' were imported into art 5. It is not on the facts material for a determination of the issues in this case for me to identify specifically the date at which habitual residence is to be assessed; whether the evidence were to be evaluated as at 12 May 2015 (the date on which the proceedings were issued) or 21 July 2015 (the date of the hearing), the test would be unlikely to produce a different result. But as the principle of *perpetuatio fori* does not apply under the 1996 Child Protection Convention as it does under BIIa (see in this context art 13 of the 1996 Child Protection Convention) it seems to me that the phrase should be applied as at the date of the hearing (see generally, paras 38–43 of the Explanatory Report of Paul Lagarde, 1997)."

42. As Mr Spencer further submits, the provisions regarding the effect on jurisdiction of a change of residence during the course of proceedings pursuant to Art 5(2) of the 1996 Convention, namely that the principle of *perpetuatio fori* does not form part of the Convention and thus a change of habitual residence during proceedings leads to a change of jurisdiction, tends also to support the proposition that the question of habitual residence falls to be determined at the point the Contracting State in question is tasked with answering that question. Within this context, I am inclined to share the obiter view expressed by Cobb J in *Re NH (1996 Child Protection Convention: Habitual Residence)* that the question of habitual residence for the purposes of Arts 5

and 6 of the 1996 Hague Convention falls to be decided as at the date on which that question comes before the court for determination, in this case at this hearing. The corollary of this conclusion is, of course, that it will be important that the question of habitual residence in cases engaging the 1996 Hague Convention is determined without delay, in order to avoid the question of habitual residence being determined simply by mere effluxion of time over the course of protracted proceedings.

Transfer of Jurisdiction

43. The 1996 Hague Convention contains provisions to facilitate the transfer of jurisdiction in respect of a child between Contracting States to the Convention, which provisions are set out in Arts 8 and 9 of the 1996 Convention. As I have noted, whilst the United Kingdom is Contracting State to the 1996 Hague Convention, Gabon is not a Contracting State with respect to that Convention. The terms of Arts 8 and 9 of the 1996 Hague Convention refer expressly to transfer between Contracting States. The Practical Handbook on the operation of the 1996 Convention makes clear that that under the Convention jurisdiction can only be transferred between the authorities of Contracting States and cannot be transferred to the authorities of non-contracting States. Within this context, I am satisfied that these provisions cannot be utilised to effect a transfer of jurisdiction as between the Contracting State of England and Wales and the non-contracting state of Gabon. For reasons I will come to, it is not necessary for me to address in detail the submissions made by the parties regarding possible alternative mechanisms for transfer of jurisdiction.

Forum Conveniens

44. Where there exist competing claims for jurisdiction, and where there is no mechanism for transfer of jurisdiction between the competing jurisdictions, the question of in which jurisdiction the case proceeds will ordinarily fall to be decided on the basis of the principle of *forum conveniens*.

45. The question of *forum conveniens* is to be determined by reference to the principles set out in the case *of Spiliada Maritime Corporation v Consulex* [1997] AC 460 . These principles are as follows:

    i) It is upon the party seeking a stay of the English proceedings to establish that it is appropriate;

    ii) A stay will only be granted where the court is satisfied that there is some other forum available where the case may be more suitably tried for the interests of all parties and the ends of justice. Thus the party seeking a stay must show not only that England is not the natural and appropriate forum but that there is another available forum that is clearly and distinctly more appropriate;

    iii) The court must first consider what is the ‘natural forum’, namely that place with which the case has the most real and substantial connection. Connecting factors will include not only matters of convenience and expense but also factors such as the relevant law governing the proceedings and the places where the parties reside;

iv) If the court concludes having regard to the foregoing matters that another forum is more suitable than England it should normally grant a stay unless the other party can show that there are circumstances by reason of which justice requires that a stay should nevertheless be refused. In determining this, the court will consider all the circumstances of the case, including those which go beyond those taken into account when considering connecting factors.

46. In determining the appropriate forum in cases concerning children using the principles in *Spiliada Maritime Corporation v Consulex*, the child's best interests would not appear to be paramount, but rather an important consideration (whilst in *H v H (Minors)(Forum Conveniens)(Nos 1 and 2)* [1993] 1 FLR 958 at 972 Waite J (as he then was) held that the child's interests were paramount, subsequent decisions have treated those interests as an important consideration: *Re S (Residence Order: Forum Conveniens)* [1995] 1 FLR 314 at 325, *Re V (Forum Conveniens)* [2005] 1 FLR 718 and *Re K* [2015] EWCA Civ 352).

47. The starting point when determining whether the party seeking the stay has established that England is not the appropriate forum for a case concerning a child is that the court with the pre-eminent claim to jurisdiction is the place where the child habitually resides (although habitual residence will not be a conclusive factor). In *Re M (Jurisdiction: Forum Conveniens)* [1995] 2 FLR 224 at 225G Waite LJ observed as follows:

> "There is no limit, in legal theory, to the jurisdiction of the court in England to act in the interests of any child who happens to be within the jurisdiction for whatever purpose and for however short a time. In practice, however, if the child is not habitually resident in this country and there are legal procedures in the country of habitual residence available to achieve a fair hearing of competing parental claims regarding the child's upbringing, the English court will decline jurisdiction, except for the purpose of making whatever orders are necessary to ensure a speedy and peaceful return of the child to the country of habitual residence. The practice thus is to follow the spirit of the Convention, even though its formal terms are inapplicable."

DISCUSSION

48. Having regard to the evidence before the court and the comprehensive and helpful submissions of counsel, I am on a fine balance satisfied that this court has jurisdiction in respect of K pursuant to Art 5 of the 1996 Hague Convention by reason of his now being habitually resident in this jurisdiction as at the date of this hearing. I am further satisfied that this jurisdiction is the most appropriate forum for determining the substantive issues arising in respect of K's welfare. My reasons for so deciding are as follows.

Habitual Residence

49. For the court's jurisdiction in respect of K to be established on the basis of habitual residence, K must reflect some degree of integration in a social and family environment in England and Wales.

50. As noted in the foregoing exposition of the law governing the question of habitual residence, in assessing whether K has lost a pre-existing habitual residence and gained a new one, one factor that the court must weigh in the balance is the degree of connection which K had with Gabon. Within this context, the deeper K's integration in Gabon, the less rapid will have been his achievement of the requisite degree of integration in the jurisdiction of England and Wales. Within this context, the no party disputes that K was habitually resident in the Gabonese Republic as at December 2020. Further, it is clear on the evidence before the court that K retains links to Gabon. He is a Gabonese national, as is his mother, and he speaks Gabonese French as his first language. K has resided in Gabon for the majority of his life.

51. Against this, K has regularly travelled to England in each year since 2016 as a family and, latterly, for significant periods of time. The visit in 2019 was an extended visit of nearly six months and K has been in the jurisdiction on this visit since December 2020, i.e. a period of some eight months. In the circumstances, whilst maintaining strong links with Gabon in the manner I have described, K has had regular and extended experience of England in the four years preceding his arrival in 2020, and in particular in 2019 and 2020. Further, whilst there is some evidence that K continued an arm's length Gabonese education, through the provision of work sheets, there is no evidence that he retained substantial contact with his school in Gabon nor with his friends and peers in that jurisdiction following his arrival in England. I am satisfied that these factors will have made it easier, to a degree, to achieve a level of integration in a social and family environment in this jurisdiction on his arrival in December 2020, notwithstanding his continuing links to Gabon.

52. In examining the duration, regularity and conditions for K's stay in the jurisdiction of England and Wales since December 2020 I bear in mind that, in this context, that it is the stability of a K's residence, as opposed to its permanence, which is relevant. This is a qualitative and not quantitative assessment, in the sense that it is the integration of the K into a social and family environment rather than a mere measurement of the time he has spent in the same that is important. Within this context, I have taken account of the fact that K was in this jurisdiction between December 2020 and the end of March 2021 as part of a family unit and was, to that extent, integrated in family life. However, against this, I bear in mind that the step-father alleges that during this period K's interaction with the wider world in this jurisdiction was limited, including a lack of involvement with education or healthcare, and that the mother alleges that he was the subject of sexual abuse at the hands of the step-father. Whilst acknowledging that the father denies these allegations and no findings have been made, the consequent intervention of the police and local authority in the family can only have been disruptive in March 2021 to K's integration in a social and family environment. I also have regard to the fact that for that period the conditions in which K was living were less than settled in the sense that the state of the family home was said to be unsafe and derelict, including an absence of flooring, tripping hazards, loose floorboards, loose and exposed bricks, mortar missing from the walls and mould and with little furniture. Cooking appeared to be taking place in the bathroom and K was required to sleep on a soiled mattress on the floor.

53. With respect to the duration, regularity and conditions for K's stay in the jurisdiction of England and Wales since December 2020, I must also have regard to the present immigration status of K and his mother. Within this context, I have also born in mind

that it would appear that both the mother and K are now overstayers in this jurisdiction and subject to immigration control. Accordingly, it is plain that neither K nor the mother at present have any right of abode in this jurisdiction. This situation must necessarily impact on the stability of K's position in this jurisdiction.

54. Against these matters however, the picture regarding the duration, regularity and conditions for K's stay in the jurisdiction of England and Wales since December 2020 is further complicated by the fact that on 31 March 2021 K was taken into foster care and by the fact that, on the evidence before the court, K has settled extremely well in his foster care placement. With respect to his foster placement, the evidence of the social worker is that K currently living in a stable and secure environment where he has integrated into the foster carer's family, he has routine and boundaries and that he has adapted to this very well. The evidence further demonstrates that in foster care K is having all of his needs met to a good standard and he is observed to be content within the home environment. Since 31 March 2021 K has been registered with a GP and dentist and is now in education, on which K places a very high premium. He has also been attending a holiday club. In school K has been observed to have settled well and is confident with socialising and interacting with other children. He is very attentive to his teachers and foster carers needs, which the social worker considers is indicative of K settling well into a new environment.

55. Within this context, I have of course had regard to the fact that, by its nature, foster care is a temporary arrangement pending the determination of K's future welfare and that the family in which K is currently placed is not his birth family. However, I am satisfied that this does not by itself prevent K from being habitually resident in this jurisdiction as at the date of this hearing. As I have noted above, in determining the issue of habitual residence as a matter of fact, it is the stability of a K's residence, as opposed to its permanence, which is relevant and which is a qualitative and not a quantitative assessment. Foster care is designed to emulate, qualitatively, a stable "family" environment for children who are not able to remain with their birth family. Within this context, I note that Art 1(e) of the 1996 Hague Convention makes clear that the measures that can be taken under the 1996 Convention include measures in respect of the placement of the child in a foster family. In these circumstances, whilst the temporary nature of foster care will be a factor to be considered in determining the question of habitual residence, I am satisfied that the fact that K is in foster care does not, by itself, prevent him from being habitually resident in this jurisdiction if that placement is demonstrated, along with the other relevant factors that fall for consideration, to provide K with the requisite degree of integration in a social and family environment. Within this context, I am satisfied that the evidence before the court demonstrates that since coming into foster care in March of this year K has made significant progress in integrating in a social and family environment in this jurisdiction.

56. With respect to the question of the reasons for the move of the mother and the step-father to the jurisdiction of England and Wales, I bear in mind that the greater the amount of adult pre-planning of the move, including pre-arrangements for K's day-to-day life, the faster K will achieve integration in a social and family environment. I also note however, that parental intention is relevant to my assessment, but not determinative and that there is no *requirement* that there be an intention on the part of one or both of those with parental responsibility to reside in the country in question

permanently or indefinitely. Within this context, the position of the mother and the step-father is somewhat opaque on the currently available evidence. Their respective plans in December 2020 appear to have been, to a degree, in flux. It is clear on the evidence that whilst the trips to England made by the family between 2016 and 2018 appear to have been in the nature of holidays, from 2019 the visits became extended in nature and that the arrival of the family in December 2020 was intended to be for the full period of 6 months permitted by the mother's visa. Whilst the step-father contends that the family stayed for the full 6 months only because of the global COVID-19 pandemic, he states at another point the family had decided to return to Gabon when the step-father's assignment came to an end at the end of June 2021. The evidence also suggests that the family brought some possessions to England in December 2020. Within this context, the evidence suggests that whilst they had not settled on a final destination, the mother and the step-father were giving serious consideration to relocating to Europe. This is relevant to the question of the extent to which K's ties to Gabon were weakened by the arrival of the family in this jurisdiction in December last year, although I accept Mr Povoas' submission that the court must be cautious not to attach too much weight to what might be characterised as exploratory steps designed to evaluate the possibility of a future move.

57. With respect to the question of K's linguistic knowledge, whilst K's first language remains Gabonese French, there is clear evidence before the court that K's English language has significantly improved since being placed with his current foster carer and attending school, his English language being well promoted both by K's foster carer and specific work at school. With respect to K's views there is only limited evidence before the court. As I have noted, the social work evidence is clear that K places a very high premium on his current education in this jurisdiction, he has settled well in school and proudly shows people his uniform and his school equipment. The mother told Police that K has stated that he is content in both the jurisdiction of Gabon and the jurisdiction of England and Wales.

58. Having regard to the factors set out above, I have found the question of habitual residence to be a finely balanced one in this case. However, and on a *fine* balance, I am satisfied that as at the date of this hearing K is habitually resident in the jurisdiction of England and Wales.

59. In order to demonstrate habitual residence, what is required is a *degree* of integration. Whilst the test for habitual residence as articulated in *Re A (Area of Freedom, Security and Justice) (C-532/01)* cannot be treated as akin to a statutory provision, it is nonetheless the case that the need for a degree of integration was not qualified with other words such as "substantial" or "significant". Indeed, the authorities that I have referred to above make clear that in order to establish that a child is habitually resident in this jurisdiction it is not necessary for a child to be *fully* integrated before becoming habitually resident. Within this context, and satisfied as I am that the question of habitual residence for the purposes of Art 5 of the 1996 Convention falls to be determined having regard to K's situation as at the date of this hearing, I find that the degree to which K is integrated into a social and family environment in this jurisdiction is sufficient to establish habitual residence. In reaching this conclusion, I have placed significant weight on the evidence set out above that demonstrates clearly that since March 2021 K has integrated *extremely* well into social and family life and education whilst in foster care. In the context of that evidence, I am satisfied that it

can be said that K has now achieved a degree of integration in a social and family environment in this jurisdiction, notwithstanding the instability that preceded his being taken into foster care. In this context, I have also borne in mind that the fact of K's prior knowledge of this jurisdiction gained over the past five years will have assisted him in achieving the requisite degree of integration and that the fact of K being in this jurisdiction for some 8 months will have acted to substantially dissolve the degree of integration in a social and family environment in Gabon that resulted in him being habitually resident there, particularly in circumstances where there is no evidence that he maintained substantial links with his Gabonese education or with friends of peers in that jurisdiction after he arrived in England in December 2020.

60. In all the circumstances, I am satisfied that as at the date of this hearing K is habitually resident in the jurisdiction of England and Wales for the purposes of Art 5 of the 1996 Hague Convention and that accordingly, having regard to the decisions in *Re R (Care Orders: Jurisdiction)* and *Re M (Care Orders: Jurisdiction)*, this court has jurisdiction to make substantive orders under Part IV of the Children Act 1989 in respect of K on the jurisdictional basis articulated by s. 2(1)(a) of the Family Law Act 1986.

Forum Conveniens

61. In so far as the step-father contends that Gabon remains the appropriate forum for the determination of the dispute regarding K's welfare notwithstanding that this court has jurisdiction based on K's habitual residence in England and Wales for the reasons I have given, in my judgment it is plain that the convenient forum in this case is the jurisdiction of England and Wales. Applying the principles set out in *Spiliada Maritime Corporation v Consulex* it is clearly the case that England is the place with which the case has the most real and substantial connection. The allegations of sexual abuse and poor home conditions that triggered these proceedings concern alleged conduct that took place in this jurisdiction. The evidence to which the court will have to have regard arose in this jurisdiction and the agencies investigating those matters are based in this jurisdiction. As matters stand, the witnesses who will be required to give evidence are located in this jurisdiction. Within this context, there is in my judgment very little prospect of the step-father demonstrating not only that England is not the natural and appropriate forum but that the jurisdiction of Gabon is clearly and distinctly more appropriate.

Transfer

62. Having regard to the foregoing conclusion, and whilst grateful to counsel for their comprehensive and considered submissions, it is now not necessary for me to decide by what mechanism a request to transfer jurisdiction could be made by a Contracting State to a non-contracting State that has substantive jurisdiction based on habitual residence. I simply observe that, as is recognised in both the Lagarde Explanatory Report and the Practical Handbook, in such circumstances the 1996 Hague Convention would not be engaged (as neither the terms of Art 5 or Art 6(2) would be met in the Contracting State and the Convention would not, by definition, apply in the non-contracting State). Accordingly, the question of jurisdiction and forum as between England and Wales and a non-contracting State in public law proceedings would ordinarily fall to be determined by reference to domestic law, namely the principles set out in the Family Law Act 1986 Part I as applied to public law orders by

reference to the decisions in *Re R (Care Orders: Jurisdiction* and *Re M (Care Orders: Jurisdiction)*. In those circumstances, and in the absence of an international instrument governing the position between the jurisdictions in question, the English court would proceed to decide whether it had jurisdiction based on presence for the purposes of s.2(1)(b)(ii) and s.3(1)(b) of the Family Law Act 1986 and, if so, would go on to determine the question of which of the two jurisdictions in question was best placed to determine the matter by reference to the common law principles of *forum conveniens*.

CONCLUSION

63. In conclusion, and for the reasons I have given, I am satisfied that this court has jurisdiction under Art 5 of the 1996 Hague Convention to make orders under Part IV of the Children Act 1989 in respect of K. I am further satisfied for the reasons I have given that this court is the most convenient forum for the issues concerning K's welfare to be determined.

64. In the circumstances, I shall invite counsel to propose further directions for the case management of this matter towards a final hearing of the issues of fact and the welfare issues that remain for determination in this case.

65. That is my judgment.