Neutral Citation Number: [2020] EWHC 2971 (Fam)

Case No: FD20P00536

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2020

Before :

MR JUSTICE MOSTYN

- -

Between :

SS	**Applicant**
- and -	
MCP	**Respondent**

- -
- -

Ann Tayo (instructed by **IEC Solicitors**) for the **Applicant**
Dr Charlotte Proudman (instructed by **Middlesex Law Chambers**) for the **Respondent**

Hearing date: 22 October 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE MOSTYN

The court gives permission for this anonymised version of the judgment to be published. It would be a contempt of court if in any report of this judgment the identity of the child or her parents were revealed.

Mr Justice Mostyn:

1. I am concerned with P, a girl aged 3 years and 4 months. She is a British citizen but has lived in India since October 2018.

2. Before me on 22 October 2020 was listed the final hearing in the father's application for an order under the inherent jurisdiction of the High Court for the summary return of P issued on 26 August 2020. It is also listed to consider the mother's application for a specific issue order issued on 26 November 2019. I address the exact nature of both applications below. A preliminary issue as to whether this court has jurisdiction has arisen. I therefore reserved judgment on this preliminary issue. This is my judgment.

3. The parents are former partners. They had a religious ceremony, but it appears no legal marriage was solemnised.

4. Both parents are Indian citizens. The father has discretionary leave to remain in the UK until 2021. The mother has indefinite leave to remain in the UK.

5. The father was named on the birth certificate and therefore has parental responsibility for P.

6. The father asserts that until the removal of his daughter to India in October 2018 he was her primary carer, her mother going out to work. He says that he consented to the mother and P travelling to India for one month only in November 2017 in order to visit the maternal family. However, the mother and child stayed until April 2018. He also says that he further consented to the mother and child going to India for one month in October 2018 for Diwali. When the mother returned to the UK without P he says the fallout caused them to argue and eventually to separate in December 2018.

7. The mother gives a very different account. She denies that the father was P's primary carer or indeed that he had very much involvement in her life at all. For her part she says that she is surprised by the father's application given the lack of interest the father had shown P since her birth. She says that the date of separation was much earlier than December 2018; rather, it was around June/July 2018.

8. Further, the mother says that the father was abusive towards her and the child during the course of the relationship. A Scott Schedule of allegations has been prepared and replied to, but has not yet been considered at a fact-finding hearing. Due to the alleged domestic abuse, the mother says she fled to India in November 2017 for a period of four months as she had no support in the UK. Following further alleged domestic abuse, she says that she fled definitively with P to India again in October 2018.

9. The father further asserts that he travelled to India between March and May 2019 to look for P but was told by the mother not to visit the child. The mother says that she was aware of the father's trip but that he showed no interest in P during this time. He says that when he went to India, the mother brought P back to the UK and that when he returned to the UK the mother took P back again to India. This is disputed by the mother who says she brought P temporarily back to the UK in April 2019 for just under two weeks. This was done because P was not permitted under Indian immigration rules to stay in India for more than 180 days.

10. It is not disputed that P has not seen the father since 2018. The mother asserts that P has been continuously in India since April 2019, a period of 18 months, and that in that period has not set foot in England. The father does not know if this is true but has not been in a position to dispute it.

11. The father has since married another woman and had another child. He would like P to live with him, alternatively to have contact with her. The mother remains in England. She would like P to remain for the foreseeable future in India with the maternal grandmother. In the longer term she would like P to spend extended periods in India but also to spend time in England. In any event she says that because of the ongoing global health crisis P should remain in India.

12. Even making full allowance for the mother's case, it is strongly arguable that her conduct amounted to a wrongful removal of P to, and/or retention in, India.

13. On 26 November 2019 the mother applied to the Family Court at Chelmsford using Form C100 for a specific issue order for "permission to change jurisdiction of the child". This was an unusual form of words, but it is evident that what the mother was asking for was a declaration that P was habitually resident in India. She had been told by immigration authorities in India that she needed such a declaration or order before the immigration status of P in India, a British citizen, could be regularised. Within the application form the mother raises the issue of habitual residence writing: "the father is an Indian national and the child is temporarily in India on a visa. The mother seeks to allow her to remain".

14. The father says he had no notice of the mother's application until 5 August 2020. There was a hearing on 16 December 2019. The order from that hearing records that the court was satisfied that it had jurisdiction based on habitual residence. I questioned counsel as to how that view could have been formed when the child had been living in India for over a year (save for two weeks in April 2019). It seems probable that the circuit judge was not alerted to this issue because the mother's application notice states that "the mother is the only person caring for the child" and of course the mother was in the jurisdiction. This statement was significantly inaccurate because the child was in fact being cared for by the maternal grandmother in India.

15. There was a further hearing in the mother's application on 7 August 2020. The order further compounds the mischaracterisation of the mother's application as an application for permission to temporarily remove P from the jurisdiction.

16. On 26 August 2020 the father filed his application in the High Court for orders under the inherent jurisdiction in Form C66. In Box 3 of the application, where the applicant sets out what he wants the court to do, the father wrote:

> "1. To bring back the child to the UK from India who is a British citizen or any other country where the child is confirmed to be in.
>
> 2. For the applicant (the father) to know whereabouts of the child and to have contact with the child.

> 3. If the mother is also in India or elsewhere then make an order for the mother to return to the UK jurisdiction along with the child. The mother is a permanent resident in UK and having full-time employment in UK."

Thus, the father did not in his application seek that the child be made a ward of court. He sought, in effect, an inward return order and a contact order. His application for an order that the mother be made to return to the United Kingdom, if she were not already here, was not legally tenable and I need say no more about it.

17. At a hearing on 7 September 2020 P was made a ward of court. I do not know if this was of the court's own motion or if the father made an impromptu application for this at the hearing. I do not know what attention was paid to the question of the jurisdiction of the court to entertain the father's application. The position statement prepared in advance of the hearing by counsel then representing the mother runs to only two pages and does not raise the issue of jurisdiction although counsel reserved her "position to amend her positions" (sic).

18. The order as made by the court recites the parties' apparent agreement that England and Wales is the correct jurisdiction. It says:

> **"Jurisdiction**
>
> H. It has been accepted by both parents that the courts of England and Wales have jurisdiction in matters of parental responsibility over the child"

However, the agreed order submitted jointly to the court by counsel for both parties did not recite this agreement. Rather, it recited the court's satisfaction that it had jurisdiction. It said:

> "9. The court was satisfied on the basis of the evidence presently filed which was not disputed that: …
>
> (b) The parents and child were habitually resident in the jurisdiction of England and Wales"

It is unclear why the agreed draft filed by the parties and the order made by the court were so materially different in this respect.

19. The mother has subsequently sought permission to appeal the order making P a ward of court. The grounds of appeal make clear that the mother disputed that the child is habitually resident in England and Wales and that this court has jurisdiction. The decision of the Court of Appeal regarding the grant of permission is awaited.

20. The order from a further hearing on 16 September 2020 again recites the parties' acceptance that England and Wales is the correct jurisdiction. Again, I do not understand how that came to be. In counsel's position statement for the hearing on 16 September 2020 the mother emphatically disputed the court's jurisdiction to make substantive orders.

Jurisdiction

21. Jurisdiction in this case is governed by two pieces of legislation namely Council Regulation (EC) No 2201/2003 ("Brussels 2") and sections 1 – 3 of the Family Law Act 1986. Brussels 2 has direct superior effect, at least for the next two months, and is the first port of call (see *Re A (Children)* [2014] AC 1 at [20]). Brussels 2 confers jurisdiction on a member state in matters of parental responsibility in a number of circumstances, of which, for the purposes of this case, the following are relevant:

    i) Article 8: where the child is habitually resident in the member state at the time that the court there is seised;

    ii) Article 12: where jurisdiction is prorogued by the parties in favour of a member state; and

    iii) Article 10: where jurisdiction is retained by a member state in cases of child abduction.

22. Sections 1 – 3 of the Family Law Act 1986 do not add any possible additional jurisdictional grounds on the facts of this case. On the facts of this case the father must prove jurisdiction under Brussels 2, articles 8, 12 or 10. If he does not do so his application should be dismissed. The mother accepts that her application was entirely misconceived, both in the absence of jurisdiction to make it, and in the nonsensical relief that it sought, and that it should therefore be dismissed.

Article 8: habitual residence

23. I therefore turn to article 8 and the question of habitual residence. There have been at least three decisions of the Court of Justice and five from the Supreme Court about the extremely simple concept of habitual residence. At the end of the day all the learning always comes back to paragraph 56 of the decision of the Court of Justice in *Mercredi v Chaffe* [2012] Fam 22, where it is stated:

> "The concept of habitual residence … must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State -- other than that of her habitual residence -- to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State, and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child taking account of all the circumstances of facts specific to each individual case."

24. I make the following observations:

    i) The exercise is factual from first to last.

    ii) The intentions of the actors are facts, just like any other facts. They are not determinative. Habitual residence can be established notwithstanding the mental opposition of the actors or some of them. There are many situations where circumstances will dictate habitual residence contrary to the wishes and intentions of the person in question. I note the reference to Napoleon Bonaparte and Robinson Crusoe by the full court of the Family Court of Australia in the abduction case of *Zotkiewicz v Commissioner of Police No. 2* [2011] Fam CA FC, 147 at [117].

    iii) Habitual residence must be distinguished from mere temporary presence (see *Mercredi v Chaffe* at [51]). In the explanatory report to the 1996 Hague Convention at paragraph 40 Mr. Lagarde states:

> "Thus … the temporary absence of all the child from the place of his or her habitual residence for reasons of vacation, of school attendance or of the exercise of access rights, for example, did not modify in principle the child's habitual residence."

However, there is no requirement of permanent residence, as Lord Reed explained in *AR v RN (Scotland)* [2016] AC 76 at [16] where he said:

> "It is therefore the stability of the residence that is important, not whether it is of a permanent character. There is 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."

25. At the time that the father made his application on 26 August 2020 P had been in India for 22 months living with the mother's own mother. In that period, she spent two weeks in the United Kingdom in April 2019. Since then she has not set foot in this country.

26. Even allowing for the father's opposition to this state of affairs it simply cannot be disputed that as at 26 August 2020 P was fully integrated in an Indian social and family environment. Citizenship apart, her concrete factual connections with England were non-existent. The use of the word "temporarily" by the mother in her misconceived application of 26 November 2019 does not alter the concrete factual situation.

27. I find as a fact that on 26 August 2020 P was habitually resident in India and that there is therefore no jurisdiction in this case under article 8.

Article 12: prorogation

28. I turn to article 12. Although neither counsel referred to this in their principal position statements it seemed to me that it was potentially relevant in the light of the recitals contained in the orders of 7 September 2020 and 16 September 2020.

29. So far as is material to this case article 12 states:

> "(3) The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings …where:
>
> (a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;
>
> and
>
> (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child."

30. In *Re I (A Child)* [2010] 1 AC 319 the Supreme Court held that article 12 was not confined to a claimed prorogation in favour of another member state; rather, there was no territorial limitation on its application. Therefore, it was possible for the parties to prorogue jurisdiction in favour of a non-member state. It was further held that notwithstanding the literal meaning of article 12(3)(b) it was possible for the unequivocal acceptance of the jurisdiction of the courts of the other place to have occurred after the court of the member state had been seised: see Lady Hale at [35] and Lord Collins at [59].

31. However, in *L v M (R intervening)* [2015] Fam 173 the Court of Justice stated:

> "55. According to the actual wording of article 12(3)(b) of Regulation No 2201/2003, the jurisdiction of the court chosen must have "been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised". Article 16 of that Regulation states that a court is deemed to be seised, in principle, at the time when the document instituting the proceedings or an equivalent document is lodged with the court.
>
> 56 The clear wording of that provision, read in the light of article 16, thus requires the existence to be shown of an agreement, express or at least unequivocal, on the prorogation of jurisdiction between all the parties to the proceedings, at the latest at the time when the document instituting the proceedings or an equivalent document is lodged with the court chosen."

32. Therefore, the father must show, as at 26 August 2020, that the mother unequivocally accepted the jurisdiction of the English court. Now, it might be said that the recitals in the orders of 7 and 16 September 2020 provide compelling evidence that, at least at that time, the mother accepted the jurisdiction of the English court. However, as I have explained above, the origin of these recitals is extremely unclear, and it would not be justifiable for me to rely on them to fix the mother with an unequivocal acceptance of the English jurisdiction. On the contrary, it is clear that at the time she was contesting the jurisdiction of the English court. In my judgment those recitals cannot be used by a process of relation-back to fix the mother with unequivocal acceptance of the English

jurisdiction on 26 August 2020. Neither can the fact that the mother applied for some kind of declaration on 26 November 2019 be taken as an unequivocal acceptance by her of the jurisdiction of the English court to deal with all child arrangements and specific issues in relation to P. I have explained above how her application was completely misconceived. At its highest it was for a declaration of some type.

33. I find as a fact that at no time up to 26 August 2020 did the mother unequivocally accept that the English court had jurisdiction to deal with parental responsibility issues concerning P.

Article 10: child abduction

34. I turn to article 10. This provides:

> **"Jurisdiction in cases of child abduction**
>
> In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:
>
> (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
>
> (b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:
>
> (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;
>
> (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);
>
> (iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7); (iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention."

35. A literal interpretation of these provisions, uninfluenced by commentary or precedent, clearly suggests that the article is addressing a jurisdictional competition between two member states. In a case of abduction the original member state will retain jurisdiction until, first, the child has acquired habitual residence in the second member state to which she has been taken or kept; and second, that there is either proof of acquiescence by the left behind parent, alternatively proof of inaction by him for at least a year after he knew where the child was. The article by its terms provides a legal machinery for the bringing to an end of the retained jurisdiction of the original member state in favour of the second member state where the child is habitually resident. The literal language of the article clearly confines its territorial scope to the member states of the European Union.

36. This interpretation is reflected in the Brussels 2 Practice Guide issued in 2014 by the European Commission. At para 4.2.1.1 it states:

> "**Courts of the Member State of origin to retain jurisdiction**
>
> To deter parental child abduction between Member States, Article 10 ensures that the courts of the Member State where the child was habitually resident before the unlawful removal or retention ("Member State of origin") remain competent to decide on the substance of the case also thereafter. Jurisdiction may be attributed to the courts of the new Member State ("the requested Member State") only under very strict conditions"

37. Another reason for interpreting this article to confine its territorial scope to the member states is that were one not to do so it would leave the retained jurisdiction in the original member state extant indefinitely. This is because it would simply say, in a case where the abduction was to a non-member state:

> "In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction."

38. Therefore, the original state would be in a stronger position jurisdictionally vis-à-vis a non-member state than a member state. This is very difficult to understand.

39. However, an interpretation which favoured a global reach of article 10 was adopted by the Court of Appeal in *Re H (Abduction: Jurisdiction)* [2014] EWCA Civ 1101, [2015] 1 WLR 863, [2015] 1 FLR 1132 at [38] –[53] per Black LJ. In that case the children had been in Bangladesh for nearly 6 years. The Court of Appeal held that while the English court retained jurisdiction under article 10, that jurisdiction would nonetheless not be exercised and the application for a return order would be dismissed. It can therefore be seen that strictly speaking the decision as to the existence of a retained jurisdiction in England under article 10 was *obiter dicta*.

40. The global reach interpretation has not been favoured by the Court of Justice. In *UD v XB* (Case C-393/18 PPU) Advocate General Saugmandsgaard Øe delivered an opinion on 20 September 2018 where he said at Footnote 4:

> "By contrast, certain provisions of the Brussels IIa Regulation dealing with jurisdiction refer specifically, as their wording indicates, to potential conflicts of jurisdiction between the courts of several Member States (see Articles 9, 10, 15, 19 and 20 of that regulation). Moreover, the provisions of the Brussels IIa Regulation on recognition and enforcement are applicable only to judgments delivered by the courts of the Member States (see the order of 12 May 2016, *Sahyouni* (C-281/15, EU:C:2016:343, paragraphs 19 to 22), and the judgment of 20 December 2017, *Sahyouni* (C-372/16, EU:C:2017:988, paragraph 27)). It is also common ground that the application of Article 11 of that regulation, dealing with the return of the child, assumes that the removal or retention of the child occurs from one Member State to another. In sum, it is germane to enquire, not about geographical scope of the Brussels IIa Regulation in its entirety, but about the applicability of each of its provisions."

41. On 17 October 2018 the Court of Justice delivered a judgment where they agreed with this aspect of the Advocate General's opinion. At [33] the court said:

> "As the Advocate General observes in points 23 and 25 of his Opinion, it follows that, unlike certain provisions of Regulation No 2201/2003 concerning jurisdiction such as Articles 9, 10 and 15, the terms of which necessarily imply that their Application is dependent on a potential conflict of jurisdiction between courts in a number of Member States, it does not follow from the wording of Article 8(1) of that regulation that that provision is limited to disputes relating to such conflicts."

42. It is tolerably clear, therefore, that both the Advocate General and the Court of Justice interpret article 10 as applying only to a jurisdictional dispute between member states. However, this aspect of their rulings was not strictly necessary for the decision in hand, namely the scope of article 8, and can therefore also be characterised as *obiter dicta*.

Wardship

43. At this point I divert to deal with the wardship. The father's application was made to the High Court pursuant to the inherent jurisdiction although it sought no more than a specific issue order (namely the return of the child) and a contact order. It did not seek wardship. In *Re N* [2020] EWFC 35, following the Supreme Court decision of *Re NY (A Child)* [2019] UKSC 49, I held at [9] that an applicant seeking an inward return order would need to demonstrate strong reasons of exceptionality to justify applying to the High Court to exercise its inherent powers rather than applying to the statutory Family Court to exercise its statutory powers. I observed that it was hard to conceive of circumstances where approaching the High Court would be justified. It has not been explained to me what the exceptional circumstances are that justify approaching the High Court. At all events, approaching the High Court did not create any additional ground of jurisdiction. Even if the father had confined his application to no more than a bare order for the return of his daughter that would have been covered by Brussels 2: see *Re A (Children)* at [29].

44. In *Re B (a child)* [2016] AC 606 the Supreme Court considered whether the High Court could exercise its inherent powers in respect of a child who was a British citizen but in respect of whom jurisdiction could not be established under either Brussels 2 or sections 1- 3 Family Law Act 1986. At [85] Lord Sumption (who was not in a minority on this point) stated:

> "[The] inherent jurisdiction should not be exercised in a manner which cuts across the statutory scheme. If, as Lady Hale and Lord Toulson suggest, the use of the inherent jurisdiction is not reserved for exceptional cases, the potential for it to cut across the statutory scheme is very considerable. I have no doubt that it would do so in this case. In the first place, it would fall to be exercised at a time when the child will have been with her mother in Pakistan for at least two years, and will probably have become habitually resident there. Secondly, it seems plain that if an application under the inherent jurisdiction had been made by, say, an aunt or a sister of the respondent, there could be no ground for acceding to it. It is necessary to make this point in order to remind ourselves that it is to protect her relationship with the child on the basis that she should be regarded as a co-parent that the appellant is invoking the inherent jurisdiction of the court. The real object of exercising it would be to bring the child within the jurisdiction of the English courts (i) so that the court could exercise the wider statutory powers which it is prevented by statute from exercising while she is in Pakistan, and (ii) so that they could do so on different and perhaps better principles than those which would apply in a court of family jurisdiction in Pakistan. Thirdly, this last point is reinforced by the consideration that the appellant's application in the English courts is for contact and shared residence. This is not relief which the statute permits to be ordered under the inherent jurisdiction, in a case where there is no jurisdiction under the Council Regulation or the 1996 Hague Convention. I do not accept that the inherent jurisdiction can be used to circumvent principled limitations which Parliament has placed upon the jurisdiction of the court. For these reasons, in addition to those given by the judge and the Court of Appeal, I do not think that an order for the child's return could be a proper exercise of the court's powers."

45. In my judgment, it would be wholly unprincipled, and a wrong exercise of the court's powers, for me to make orders on the father's application pursuant to the High Court's inherent powers in circumstances where he has not established jurisdiction under either Brussels 2 or sections 1 – 3 Family Law Act 1986.

46. Wardship does not take the matter any further. FPR PD12D para 1.3 states:

> "The court's wardship jurisdiction is part of and not separate from the court's inherent jurisdiction. The distinguishing characteristics of wardship are that:

> (a) custody of a child who is a ward is vested in the court; and
>
> (b) although day to day care and control of the ward is given to an individual or to a local authority, no important step can be taken in the child's life without the court's consent."

47. It is hard to understand what practical, as opposed to symbolic, power the court can exercise in relation to this ward of court in circumstances where the child is in India and has been for nearly two years.

48. At all events is clear that the wardship does not endow the court with any additional power to make the orders that the father seeks.

Jurisdiction: conclusion

49. Accordingly, it is my judgment that the jurisdiction of the court depends on the territorial reach of article 10. The legal position is unclear. Therefore, it is appropriate, in my judgment, for the following question to be referred to the Court of Justice for an urgent preliminary ruling pursuant to article 19(3)(b) of the Treaty of the European Union, article 267 of the Treaty of the Functioning of the European Union, and Article 107 of the Rules of Procedure of the Court of Justice:

> **"Does Article 10 of Brussels 2 retain jurisdiction, without limit of time, in a member state if a child habitually resident in that member state was wrongfully removed to (or retained in) a non-member state where she, following such removal (or retention), in due course became habitually resident?"**

50. Pending receipt of the answer to the question the proceedings will be stayed.

51. That is my judgment.
