Neutral Citation Number: [2020] EWHC 549 (Fam)

Case No: ZW19P00598

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/03/2020

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

AB	**Applicant**
- and -	
EM	**Respondent**

- -
- -

Ms Charlotte Baker (instructed by **Anthony Louca Solicitors**) for the **Applicant**
Ms Clare Renton (instructed by **Gulbenkian Andonian Solicitors**) for the **Respondent**

Hearing dates: 2 March 2020

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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 MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter the following issues fall to be determined by the court in respect of M, born in 2015 and now aged 4:

   i) At the time M was taken to Egypt on 30 April 2019 was she habitually resident in the jurisdiction of England and Wales for the purposes of Art 10 of Council Regulation (EC) 2201/2003 (hereafter BIIa) and was that removal wrongful for the purposes of Art 10?

   ii) At the time the mother issued her application under the inherent jurisdiction of the High Court on 26 November 2019 was M habitually resident in the jurisdiction of England and Wales?

   iii) If this court does not have jurisdiction in respect of M pursuant to Art 10 of BIIa based on a wrongful removal at a time she was habitually resident in England and Wales, or under the inherent jurisdiction of the High Court based on her habitual residence in England and Wales at the time proceedings were issued, should this court in any event exercise its *parens patriae* jurisdiction in respect of M based on her British citizenship?

   iv) If the court determines that it has jurisdiction in respect of M on one or more of the foregoing bases, is England and Wales the convenient forum for determining the dispute between the parties as to M's welfare?

   v) If the court determines that it has jurisdiction in respect of M on one or more of the foregoing bases, and that England and Wales is the convenient forum, is it M's best interests to order her summary return to the jurisdiction of England and Wales for the purposes of determining the dispute between the parties as to M's welfare?

   vi) Is the order made by the Sunnite Sharia Court of Beirut on 6 February 2019 in proceedings commenced by the mother in Lebanon in November 2018, incorporating and approving an agreement between the parties to these proceedings regarding custody and access with respect to M, capable of recognition in this jurisdiction and, if so, what impact should this have on the courts welfare determination?

2. The applicant, AB, is the mother of M. She is represented by Ms Charlotte Baker of counsel. The mother is a Lebanese national. She has permanent leave to remain in the United Kingdom. On behalf of the mother, Ms Baker asserted that it is the mother's intention to remain living in the United Kingdom, although at present she does not have secure accommodation or employment. The mother contends that this court has substantive jurisdiction in respect of M by reason of Art 10 of BIIa or in the alternative under the inherent jurisdiction of the High Court or in the further alternative under the *parens patriae* jurisdiction of the High Court based on M's British Citizenship (the mother arguing that this is a case in which the exercise of this jurisdiction is required to protect M in circumstances where the mother alleges she has been the victim of domestic abuse, M has been removed to Egypt, her

circumstances in Egypt are unclear, there is no one in Egypt with parental responsibility for her and where she is being prevented from having any relationship with her mother). If the English court accepts it has jurisdiction, the mother further contends that the jurisdiction of England and Wales is the most convenient forum for determining the welfare issues in respect of M and that the court should order the summary return of M from Egypt to this jurisdiction. The mother submits that the English court the order of the Beirut court of 6 February 2019 is not capable of recognition by this court and should not prevent the court making the orders sought.

3. The respondent, EM, is the father of M. He is represented by Ms Claire Renton of counsel. The father is also a Lebanese national. He has permanent leave to remain in the United Kingdom and intends to apply for British Citizenship when he becomes entitled to do so in May of this year. Ms Renton confirmed that as part of the good character declaration on that application the father will be required to declare his breach of a location order in these proceedings and his subsequent arrest. Through Ms Renton, the father informed the court that upon gaining British Citizenship it is his intention to reside in Egypt with M. The father submits that this court does not have jurisdiction in respect of M on any of the jurisdictional bases identified by the mother or otherwise. In the alternative, the father contends that if the English court does have jurisdiction then it should stay these proceedings as the Lebanese courts are the most convenient forum. Finally, were this court to determine that it has jurisdiction in respect of M and that this jurisdiction is the most convenient forum, the father submits that it is not in M's best interests to order her summary return from Egypt. The father submits that the English court can and should recognise the order made by the Beirut court on 6 February 2019.

4. M is a British Citizen. She is currently in Egypt having been taken to that jurisdiction by the father on 30 April 2019, and is said by the father to be in the care of her paternal relatives. The father contends that this step was entirely lawful, having been taken pursuant to the terms of the order of the Beirut court dated 6 February 2019. As I have alluded to, the mother contends that this removal from the jurisdiction of England and Wales took place without her consent and was wrongful for the purposes of Art 10 of BIIa. At the present time, whilst M is said to be in the care of family members, there is no one in Egypt who has parental responsibility for her in that jurisdiction, both of her parents being in England.

BACKGROUND

5. For the purpose of answering the questions set out above, the elements of the background to this matter which are central to the court's determination concern the factual situation of M prior to her removal from the jurisdiction of England and Wales on 30 April 2019, including the course of the proceedings commenced by the mother in Lebanon, and M's circumstances following that removal. It is those elements of the background on which I intend to concentrate in this judgment. Ms Renton makes clear in her Skeleton Argument that the dates of travel by the mother and M to and from the jurisdiction of Lebanon prior to M's removal from this jurisdiction to the jurisdiction of Egypt on 30 April 2019 are not in dispute.

6. It is right to note that the parents allegations against each other range far more widely than this. The mother makes extensive allegations of domestic abuse and controlling behaviour against the husband, alleging that he has beaten her, monitored he

electronic devices, accompanied her to the GP and attempted to remove M from her life entirely as punishment for ending the marriage. The father, in a five hundred and seventy seven page statement filed well out of time, accuses the mother of fabricating allegations of domestic abuse to disguise a number of affairs during the course of the marriage. Given the nature of the issues before the court, it is not necessary for me to adjudicate at this stage on the parents' numerous competing allegations against each other for the purposes of determining the legal question of jurisdiction and, if applicable, summary return. Most regrettably however, it is right to note that the father stooped to including as exhibits to his statement naked pictures of the mother taken from a video, albeit with her breasts and genitals blocked out. Whilst Ms Renton sought to contend that those pictures, (which have, by reason of the father's actions, now been seen by the father's legal team, the mother's legal team, this court and court staff, in addition to the lawyers in Beirut in December 2018), are somehow relevant to the mother's "credibility", I received no adequate explanation of how such deeply personal material was relevant to the legal and welfare issues before the court. I deprecate in the strongest terms the father's conduct in exhibiting to his statement the private images to which I have referred.

7. Finally, the mother also asserts that the agreement she entered into with the father in Lebanon regarding custody and access in respect of M, and approved by the Lebanese court and embodied into the Lebanese court order dated 6 February 2019, was obtained by means of duress. Ms Baker submitted that, given what she contends are the manifest barriers to the court recognising the order made by the court in Beirut, it was not necessary for the court to hear oral evidence in respect of the allegation of duress, the mother relying on her statement as evidence of the same and alleging in particular that the father threatened to disseminate embarrassing material (including the photographs I have mentioned) to the mother's family. Against this, the father relies on evidence before the court that he submits undermines the mother's assertions of duress, including the fact that it was the mother who commenced proceedings in Lebanon, that the mother's Lebanese lawyer drafted the agreement incorporated into the Lebanese order, that the mother benefited from legal advice throughout the process and signed the agreement having taken legal advice, that the agreement was ratified by the court in the presence of the mother who was legally represented before the court, statements made to the UK Border Agency in January 2019 and what the father says is a transcript of a voicemail left by the mother the tenor of which is that she was content with the agreement.

8. Within the foregoing context, both parties agreed that it was not necessary for the court to hear oral evidence in order to determine the issues before it and I turn now in detail to the relevant aspects of the background to this matter.

9. The parents met in 2008 and married in December 2012. In June 2015, whilst the mother was pregnant with M, the father moved to London for work. The mother joined the father in London and M was born in the United Kingdom on 1 August 2015. The parents decided that M should be born in England in order that she could become a British Citizen based on the father's then immigration status. In September 2015 the mother returned with M to Lebanon in order to obtain a spousal visa for the United Kingdom, and remained with M in that jurisdiction for a period of little under a year whilst the father continued to work in London.

10. The mother returned with M to the jurisdiction of England and Wales in August 2016 having received her spousal visa and authorisation to travel. At that time M was two years old. The family lived together with the paternal grandfather in London. Between March and May 2017 the family visited Lebanon in order for the father to receive medical treatment for a heart condition. In December 2017 the mother travelled to Lebanon with M and remained there until February 2018, a period of some three months. On their return to the United Kingdom, the mother and M again lived in the property of the paternal grandfather as the family home.

11. It is of note that at all times during these extended periods in Lebanon, and prior to the removal of M to Egypt in April 2019, M's family home remained the same, with no indication that either parent intended this arrangement to change. Within this context, I note that in his claim before the Beirut court dated 16 November 2018 to revoke the mother's custody of M, the father pleaded that the family "has resided in London, the United Kingdom quietly where the marital house exists". In September 2018 M was enrolled in nursery at the local Primary School. She attended nursery from September 2018 save for a period between October 2018 and January 2019 following her paternal grandfather's death. She continued thereafter to attend nursery until 30 April 2019 when she was suddenly removed. I note that, even at that stage, M's childminder anticipated that she would resume her role with M in the United Kingdom and that the intention, as communicated to the nursery, was that M's absence would be, as previous absences had, only be temporary, a letter from the nursery indicating:

> "M's attendance ended again from the week commencing 29 April 2019. Her family did not apply for 'Leave of Absence' however M's grandfather informed the school at the beginning of her absence that M had been taken to Egypt and that M would be absent for approximately 30 days."

12. The father contends that in March 2018 he discovered that the mother was having an affair. The mother alleges that she was thereafter placed under pressure by the father to continue the marriage. The mother once again travelled to Lebanon on with M on 29 October 2018 as a result of the sudden death of her father. The father purchased airline tickets for the mother and M with a return date of 5 December 2018. The father contends that whilst he consented to M being taken to Lebanon, the mother thereafter wrongfully retained M in Lebanon by failing to return by the date she had stated she would, namely 5 December 2018. Within this context father characterises the mother's departure for Lebanon at the end of October 2019 as a decision to leave England with M permanently, following her becoming "fed up" with life in London. He contends that on 1 December 2018 he found a handwritten note from the mother that he took as confirming her intention to leave the United Kingdom permanently. Within this context, I note that that when the mother spoke to the police in this jurisdiction on 16 April 2019 she was recorded as describing herself "living in Lebanon" and that in her application to the Family Court sitting at Barnet made on 24 April 2019 the mother alleged that the father was seeking revenge on her because "I asked for a divorce and that I didn't agree to get back to London to live there".

13. Within this context, and whilst still in Lebanon, the mother asked the father for a divorce during early November 2018. The mother instructed lawyers in Lebanon and commenced the Sharia divorce process in that jurisdiction, petitioning for divorce. The mother asserts that at this time she indicated she wished to keep M with her. The

father asserts that he was also informed by the maternal grandmother that M would not be returning to the UK. Upon learning of the mother's wish to divorce and retain M the father also instructed lawyers in Lebanon and sought the assistance of the Foreign & Commonwealth Office to secure M's return to the United Kingdom. The father states that the FCO advised him to seek relief in the courts in Lebanon. He exhibits to his statement an email dated 5 November 2018 advice provide by the Country Casework Team at the FCO, which advice included, *inter alia*, commencing proceedings in Lebanon.

14. On 16 November 2018 the father made a 'pre-claim' to the Beirut court seeking revocation of the mother's custody of M pursuant to Arts 11 and 24 of the Lebanese Family Code. In that claim the father alleged that the mother had unlawfully retained M in Lebanon and had engaged in acts that "violate morals and decency" comprising marital infidelity and adultery such as to justify the revocation of custody under Art 24 of the Family Code. On 16 November 2018 mother also made a claim in the Lebanese court, for an order banning M from being removed from the jurisdiction of Lebanon. Within this context, the father exhibits a WhatsApp message from the mother's sister where her sister advised that the parents should keep discussions between lawyers, rather than communicating directly.

15. The mother alleges that as a result of asking the father for a divorce she came under extreme pressure to agree to cede custody of M to the father, which pressure the mother asserts culminated in her being forced under duress to enter into and sign an agreement giving sole custody of M to the father under Lebanese law. As I have noted, the mother alleges in her statement that the father threatened to send embarrassing electronic material to her family and that he would kill the mother and her family. Within this context, and in the context of what she alleges was serious and persistent domestic abuse by the father during the course of the marriage, the mother asserts that she felt scared and intimidated and accordingly signed the agreement.

16. Against this, as I have noted, the father asserts that it was the mother who commenced proceedings in Lebanon, that the mother's Lebanese lawyer drafted the terms of the agreement, which were then the subject of negotiations between the parties, that the mother benefited from legal advice throughout the process having instructed reputable lawyers in Beirut, that the mother signed the agreement only after having taken legal advice and that the agreement was ratified by the court on 6 February 2019 in the presence of the mother who was legally represented before the court. The mother concedes in her statement that her lawyers advised her to sign the agreement and that she did so. She has not sought to file evidence from her own lawyers on the allegation of duress. In addition to these matters, which are set out both in the statement of the father and in an account provided by the father's lawyer in Beirut detailing the circumstances in which the agreement was reached, the father also relies on what he says is a voicemail left by the mother in which she discusses the negotiation process. On its face the transcript indicates that the mother indicates that she never wanted to make any amendments to the agreement, that her key concern, and that of her sister, in respect of M was to make the contact provisions more specific, that she was aware of and discussed the issue of relocation to Egypt with the father's lawyer, that she objected to any apology being incorporated into the agreement and that she had agreed to go to Egypt but could not spend two months

there. Through Ms Baker the mother indicated that she does not accept the translation, but no specific criticisms were levelled at it. Finally, the father relies on what he says were statements, the details of which I shall come to, made by the mother to the UK Border Agency in January 2019 that indicate she cooperated fully and without objection with the implementation of the agreement and the order of the Beirut court.

17. The precise date of the agreement reached between the parents is unclear. In the chronology prepared for private law proceedings it is suggested that this agreement was reached in September 2018 although there is no copy of an agreement with that date. The mother suggests the agreement was signed by her on 31 December 2018, although as I will come to the document she exhibits to her statement in these proceedings to evidence that fact is actually a copy of the court order, albeit dated 31 December 2018, ratifying the agreement between the parents and recording their signature thereto. The father exhibits the same order to his statement in the private law proceedings, which in translation is dated 6 February 2019, and asserts that the agreement between the parents was embodied into that order by the Lebanese court on that date. It would appear the explanation for the discrepancy is that the mother signed what we would term a consent order on 31 December 2018 at her lawyers' offices and the court formally approved the order on 6 February 2019 in the presence the parties lawyers at court (the father being in the United Kingdom at this point). The mother does not dispute that an order was made by the Lebanese court. The father asserts that the judge asked the mother whether she agreed to the order and that the mother signed the order in front of the judge. The mother contends she was not at the hearing.

18. The court has two separate translations of the Lebanese court order. Save for their respective dates, and some variations in translation, the translations of the court order are in broadly the same terms. The translation exhibited by the mother is easier to follow in plain English and, accordingly, I set out the relevant passages of that translation below. The order of the Beirut court embodies the agreement with respect to M's custody and was made at a hearing the mother attended with legal representation. With respect to M, the order provides that the Beirut court authorised the agreement between the parties as to M's care as being in conformity with the Sharia and legal norms:

> "Both parties have agreed that [M], daughter of the two parties, shall remain in the sole custody of the father until she becomes of legal age, and the divorcee shall not be entitled to claim custody of the child, practically or verbally, prior to legal age and in an amicable manner. The daughter shall stay with her father in the United Kingdom, Egypt or any other place according to his own discretion provided he guarantees the visitation rights of the mother and gives access to the latter so that she could check on her said daughter, whether in the United Kingdom, Egypt or Lebanon, and shall even bring the daughter to Lebanon in case the mother could not travel to the said daughter place of residence overseas, if the father could do the same. Bringing the child to Lebanon must not contradict with her education and shall be made in coordination with the two parents. Accordingly, the divorcee undertakes to surrender her daughter, M, to her father or whoever appointed by the same, with all her personal effects and

> belongings and Lebanese and British identification cards and passports. The said divorcee mother hereby irrevocably, for any reason whatsoever, and comprehensively undertakes not to prevent or restrict the travel of the child, [M], with her father or whoever appointed and nominated by the same, whenever the said father deem the same proper or necessary according to his own discretion. Moreover, the said mother nominates, authorises and empowers the father of M to obtain all identification documents for his daughter [M], whether from Lebanon or the United Kingdom, including ID cards, civil status documents, passports and other items and documents....Both parties hereby undertake to maintain the image of the other party to their daughter, M, and their community. They have also undertaken not to defame or smear each other or to talk about their disagreements or the issues that are precedent to the divorce before any third party under penalty of revoking this agreement and paying a penalty clause of one hundred thousand US dollars which shall not be amendable even by competent courts. The said amount shall be paid by the breaching party. Furthermore, the divorcee has undertaken to pay a penalty clause of one hundred thousand US dollars in case she, her mother, any of her sisters or relatives claims custody. This undertaking is absolute, comprehensive and irrevocable for any reason whatsoever, and the divorcee has willingly and deliberately agreed, acknowledged and subscribed to the same. This undertaking shall be enforceable by force in accordance with the provisions and measures of enforcing bills, securities and written acknowledgements before competent courts. Both the divorce and the divorcee have agreed that the present agreement shall immediately enter into force and effect and that it shall be enforceable before the Court of Enforcement of Beirut. Both parties asked this court to enter and legalise the same agreement and they rested their cases and signed in witness whereof...
>
> ORDERED, ADJUDGED AND DECREED THAT the said agreement concluded by and between the said two parties be approved and I have asked them to comply and abide by the same."

19. On 9 January 2019 M was taken back to the United Kingdom with her paternal grandmother. As I have noted, the father contends that the mother confirmed her consent to this course when contacted by the UK Border Agency upon M's arrival in the UK, confirming to the Immigration Officer that M was not being kidnapped but was lawfully being transferred to her father's custody. The father states that he showed the Lebanese court order to the Immigration Officer and M was given immigration clearance. Within this context, the father asserts that had the mother consented to the Lebanese court order under duress she could have informed the Immigration Officer of this during the private telephone call she had with him, but did not do so.

20. In January 2019 the mother asserts that she tried to secure the return of M to her care from the paternal grandmother but the paternal grandmother refused. The mother states that the last time she was able to communicate with the paternal grandparents was on or around 23 January 2019. The mother further asserts that she was sent some

photographs of M in February 2019 but that her requests to speak to M, made through her Lebanese lawyer, received no response from the paternal family.

21. On 16 April 2019 the mother returned to London from Lebanon. The father alleges that her entry was illegal in circumstances where her spousal visa could no longer be valid. The court, however, has no evidence to confirm the mother's immigration status at that time. The mother asserts that she went to the family home where she saw M playing outside with other children. In response, she contends the father called the police and characterised the mother's visit as attempted child abduction. In his statement the father seeks to attach significance to the fact that the police records at no point record the mother alleging that she was forced to agree to the order of the Beirut court (although she did so later) and, as I have noted, record the mother as stating that she lived in Lebanon. The police advised both parents to seek legal advice. The mother alleges that following this incident the father sent a text message to one of her relatives threatening the mother. The father accepts he sent that text message, which in full reads:

> "I thought u would understand as someone whos (*sic*) been backstabbed in the past, I though as a responsible father u will want the best for my daughter. I thought u were trust worthy (*sic*). Huge mistake u all convinced her to come to UK. Now I wont stop until this criminal is behind bars. Hope u, ur wife and her clueless cousins are happy now".

22. On 24 April 2019 the mother obtained a without notice non-molestation injunction pursuant to the Family Law Act 1996 from the Family Court sitting at Barnet. On the return date for that application on 25 April 2019 the father offered non-molestation undertakings that were accepted by the court. On 24 April 2019 the mother also issued applications for orders under s 8 of the Children Act 1989. In the form C1A completed by the mother on 24 April 2019 she asserts that she was working with her lawyer in Beirut to "revoke the agreement I was forced to do." That application made clear at Section 6 that the mother was worried that M would be removed from the jurisdiction of England and Wales. The mother contends that she sought an urgent hearing on the grounds that she feared that the father would remove M from the jurisdiction. The court did not give the matter an urgent listing.

23. On 30 April 2019 the father removed M from the jurisdiction of England and Wales to Egypt notwithstanding the existence of proceedings under the Children Act 1989. The father contends however, that this was an entirely proper step for him to take in pursuance of the Lebanese court order dated 6 February 2019 and the agreement between the parties that that court order embodied.

24. The manner in which the proceedings under the Children Act 1989 were dealt with by the Deputy District Judge at the Family Court sitting at Barnet has caused this court some concern. Notwithstanding that the case, plainly, involved potentially complex jurisdictional issues, a foreign order and that it had been alleged that there had been threats of child abduction in the context of a non-Hague Convention country, the matter was allocated by the Legal Adviser to be dealt with by a District Judge. At the FHDRA hearing on 25 June 2019 a Deputy District Judge proceeded to deal with the matter notwithstanding the complex jurisdictional issues that were plain on the face of the papers and decided, without giving any reasons, that the order of the Beirut court was determinative of the question of jurisdiction and, without identifying his power to

do so or giving any reasons, summarily dismissed the mother's application. I recognise that it *may* be the case that the Deputy District Judge was misled by certain assertions with respect to jurisdiction made by the Family Court Reporter in the CAFCASS safeguarding letter. Specifically, that the letter from the Family Court Reporter states that "[the mother] will need to refer this matter to the Egyptian or Lebanese courts, as the British court will not be able to manage this matter". In addition to it being well outside the remit if a Family Court Reporter to provide legal advice to the court on the question of recognition and jurisdiction, that statement is wrong in law for the reasons I will come to.

25. The mother has now had no direct or indirect contact with M since April 2019, notwithstanding the terms of the order made by the Beirut Court in February 2019. The application by the mother under the inherent jurisdiction of the High Court is dated 26 November 2019. The mother has not provided a detailed explanation for the delay in issuing proceedings under the inherent jurisdiction although she states that she believed over the Summer 2019 that M would be returned to the United Kingdom in time to start school in September 2019 and that she needed to find a new solicitor, make an application for legal aid and prepare her statement in support of the application. I note that the Form C66 makes no mention of the proceedings in Beirut or any consequent court order. The mother's statement in support describes the commencement of the Lebanese proceedings and the agreement entered into. The father further asserts that the mother was well aware as at 6 December 2019, when the matter came before Judd J at a without notice hearing, that M was in Egypt pursuant to the order of the Beirut court and misled the High Court in this regard to obtain a location order with its associated passport provisions. On 6 December 2019 M was made a ward of court and a location order was granted. The matter returned to court on 13 December 2019 when Francis J urged the father to return M to the jurisdiction of England and Wales voluntarily, which request the father declined, being prepared only to facilitate contact between the mother and M in Cairo and only if supervised by the paternal family.

26. On 23 January 2020, in breach of the location order made by Judd J, the father attempted to leave the jurisdiction and fly to Lebanon on a *laissez-paisser* obtained from the Lebanese Embassy. He had bought an airline tickets from Beirut to London returning on 24th January 2020. The father appears to have offered conflicting versions of why he attempted to leave the jurisdiction. On arrest, he stated to the police that he was leaving the country in order to take his father for a kidney transplant. In a statement filed on 24 January 2020 the father contended that he was attempting to leave the jurisdiction by reason of his heart condition. Finally, at this hearing and through Ms Renton, the father contends he attempted to leave the jurisdiction because he 'panicked'. On 24 January 2020 the father gave an undertaking to Judd J not to apply for further travel documentation pending this hearing and was released from custody on condition that he did not leave the jurisdiction and attended this hearing. The location order remained in force. Judd J refused an application by the mother for electronic tagging of the father.

LAW

Habitual Residence

27. Where the question jurisdiction issue arises as between Member State to which BIIa applies and a non-member third party state, that issue remains to be determined by reference to the terms of the regulation. In *Re A (Jurisdiction: Return of Child)* [2014] 1 AC 1 the Supreme Court made clear that BIIa applies when determining the question of jurisdiction regardless of whether there is an alternative jurisdiction in a non-member state. The Court of Justice of the European Union has confirmed in *UD v XB (ECJ) KC-393/18 PPU* [2019] 1 WLR 3083 that Art 8(1) of BIIa is not limited to disputes involving relations between the courts of Member States.

28. Art 8(1) of BIIa provides that the courts of a Member State, which at present includes the United Kingdom under the transitional arrangements governing the departure of the United Kingdom from the EU, shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised. Within this context, habitual residence is a condition precedent to this court having jurisdiction under either Art 10 of BIIa or under the inherent jurisdiction of the High Court.

29. For habitual residence to be established the residence of the child must reflect some degree of integration in a social and family environment (*Area of Freedom, Security and Justice) (C-532/01)* [2009] 2 FLR 1 and *Re A (Jurisdiction: Return of Child)* [2014] 1 AC 1). 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. 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:

    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.

30. 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 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. It is possible to acquire a new habitual residence in a single day. 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.

31. 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). In *Re B (A Child)(Habitual Residence: Inherent Jurisdiction)* Lord Wilson noted as follows at [45]:

> "The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it."

Art 10 BIIa

32. Art 10 of BIIa provides as follows with respect to the question of jurisdiction based on habitual residence in such cases:

> "**Article 10**
>
> **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."

33. Pursuant to Art 2(11) of BIIa the term 'wrongful removal' means removal or retention in breach of rights of custody under the law of the Member State where the child was habitually resident immediately prior to the removal or retention. Within this context, in *Re H (Jurisdiction)* [2015] 1 FLR 1132 the Court of Appeal considered the proper interpretation of Art 10 of BIIa, which provides a scheme for retention of jurisdiction in the Member State from which the child has been allegedly abducted, but also includes provision for the retained jurisdiction to come to an end where the child has acquired a new habitual residence in another Member State and certain other conditions are satisfied. In *Re H* the Court of Appeal concluded that that part of Art 10 which governs the circumstances in which jurisdiction is lost by the Member State from which the child has been abducted must be read as applying only to another EU Member State.

34. In the circumstances, the retained jurisdiction under Art 10 is not brought to an end where an allegedly abducted child's new habitual residence is in a non-Member State, even though the jurisdictional scheme in BIIa is not geographically limited to the EU (see *Re I (A Child)(Contact Application: Jurisdiction)* [2009] UKSC 10). As such, Art 10 will operate not only in respect of a child wrongfully removed to, or retained in a Member State, but will also operation in respect of a child wrongfully removed, or retained in a non-Member State. In such circumstances, and subject to the qualifications set out in Art 10, the courts of England and Wales will retain jurisdiction even if the child thereafter becomes habitually resident in the non-Member State. In such circumstances, the Court of Appeal has suggested that it will not be necessary to invoke the inherent jurisdiction where the court retains jurisdiction based on habitual residence under Art 10, although that latter point was not fully argued (see *Re H (Jurisdiction)* at [54]).

35. Where the court is satisfied that it has jurisdiction under Art 10 of BIIa to make orders, in determining whether such orders should be made, in cases of alleged wrongful retention in a non-Convention country the child's welfare is the court's paramount consideration (see *Re H (Jurisdiction)* at [63]).

Parens Patriae

36. I set out the legal principles underpinning the use of the court's *parens patriae* jurisdiction based on the child's nationality in *Re K and D (Wardship: Without Notice Return Order)* [2017] 2 FLR 901. Having considered the decisions in *Re P(GE)(An Infant)* [1965] Ch 568, *A v A and another (Children: Habitual Residence) (Reunite*

International Child Abduction Centre intervening) [2013] UKSC 60, *Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)* [2015] EWCA Civ 886 and *Re B (A Child)* [2016] UKSC 4 I concluded as follows at [33]:

> "It can be seen that whilst the existence of the inherent jurisdiction based on nationality is in no doubt, the test for exercising the jurisdiction does not yet appear to be conclusively settled. It is however, in my judgment, clear that the court is able, albeit with great caution and circumspection, to exercise its inherent jurisdiction in respect of a British child who is outside the jurisdiction based on the nationality of that child where the court is satisfied on the evidence before it that that child requires the protection of this court."

Forum Conveniens

37. Where the English court does have jurisdiction on one of the foregoing bases, but there are proceedings also in a third party non-member state, the issue of *forum conveniens* may arise. The issue 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 cardinal principles can be stated as follows:

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

38. Within the foregoing context, Williams J set out in *V M (A Child)(Stranding: Forum Conveniens: Anti-Suit Injunction)* [2019] 4 WLR 38 at [35(iii)] a helpful summary of the factors that will be relevant to the court's determination of the question of 'natural forum':

> "In assessing the appropriateness of each forum, the court must discern the forum with which the case has the more real and substantial connection in terms of convenience, expense and availability of witnesses. In evaluating

> this limb the following will be relevant; a) the desirability of deciding questions as to a child's future upbringing in the state of his habitual residence and the child's and parties' connections with the competing forums in particular the jurisdictional foundation; b) the relative ability of each forum to determine the issues including the availability of investigating and reporting systems. In practice judges will be reluctant to assume that facilities for a fair trial are not available in the court of another jurisdiction but this may have to give way to the evidence in any particular case; c) the availability of witnesses and the convenience and expense to the parties of attending and participating in the hearing; d) the availability of legal representation; e) any earlier agreement as to where disputes should be litigated; f) the stage any proceedings have reached in either jurisdiction and the likely date of the substantive hearing; g) principles of international comity, insofar as they are relevant to the particular situation in the case in question. However public interest or public policy considerations not related to the private interests of the parties and the ends of justice in the particular case have no bearing on the decision which the court has to make; h) it has also been held that it is relevant to consider the prospects of success of the applications."

39. 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. See *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).

40. Finally, in terms of analytical structure, and within the context of the principles set out above, in *Re K* [2015] EWCA Civ 352 at [26] the Court of Appeal made clear that in determining the issues of jurisdiction and forum the court should proceed as follows:

> "[26] In setting the scene, I should also make the following observation as a matter of law and structure. It is not necessary for me to descend to detail. The legal structure for these issues in an international private family case is plain. 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 provisions. In a case such as this, which is not one between Member States of the EU, the approach is straightforward. The court decides jurisdiction and decides it with regard to the habitual residence of the child at the relevant time. That determination in this case has been made and is not open to review or challenge and was not open to review or challenge at the hearing before Newton J.
>
> [27] It is then possible, if parties wish to do so, for the English court to be invited, despite a finding that it has jurisdiction, to consider the question of convenient forum. The court, if required to do so, approaches that on the well-known basis applicable to civil proceedings generally which is set out in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

> [28] Again, as a matter of structure, the normal approach is for the party asserting that England and Wales is not the convenient forum to apply for the English proceedings to be stayed. The burden is upon the applicant for such a stay to persuade the court, on the principles of Spiliada and related cases, that the stay should be granted and that, despite having jurisdiction, England and Wales should cede to another court which is the more convenient forum.
>
> [29] It is established that the welfare of the child is a relevant consideration in determining the question of convenient forum but it is not an issue, that determination, to which the paramount principle in section 1 of the Children Act applies.
>
> [30] The final structural step is that, if jurisdiction is established and if a stay is not imposed because of *forum conveniens* considerations, then the court is free to go on to make more generally based welfare determinations with respect to the child's future."

Effect of Foreign Custody Order

41. If the court determines it does have jurisdiction to make a return order in respect of M and that this jurisdiction is the most convenient forum, what principles govern the effect of the order made by the Lebanese court (if any) on the exercise of that jurisdiction?

42. Lebanon is not a party to BIIa, the 1980 European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Registration of Custody of Children or the 1996 Hague Convention. In these circumstances, recognition of the Lebanese order of 6 February 2019 will be governed by common law principles. In commentary on the rule that, subject to the provisions of international conventions given effect in English law, "a custody order made by a court of a State to which the Brussels IIa Regulation does not apply does not prevent an English court from making such orders in England as, having regard to the child's welfare, it thinks fit" the position at common law is summarised in Dicey at 19-094 as follows:

> "English law provided at a relatively early stage for the recognition of the decrees of foreign courts concerning the status of the parties, for example divorce decrees and adoption orders. The same is not true for foreign custody orders. In declining to be bound by foreign custody orders, English courts are prompted by two considerations. The first is that a custody order by its nature is not final and is at all times subject to review by the court which made it. The second is that by statute the welfare of the child is the first and paramount consideration. This has been interpreted to apply not only to domestic English cases, but also to cases involving a previous custody order made by a foreign court. This approach has disadvantages: it can create uncertainty, and also instability in the life of a child, and it can encourage litigation as a parent, denied custody by a foreign court, seeks a more favourable decision in England. A different approach is winning favour. The Child Abduction and Custody Act 1985 gives effect in English law to two international conventions providing for the recognition of

> foreign custody and access decisions in certain cases. The Rule will, however, continue to describe the approach of English courts to most custody orders made by courts outside the United Kingdom."

43. The principles summarised above in Dicey are drawn from a series of decisions, namely *Re B's Settlement* [1940] Ch 54, *McKee v McKee* [1951] AC 352 and *J v C* [1970] AC 668. With respect to the question of the weight to be given to the foreign order, the position is summarised in Dicey at 19-095 as follows, based on the same authorities and, additionally, *Re H Infants* [1966] 1 WLR 381 and *Re T (An Infant)* [1969] 1 WLR 1608:

> "Such an order deserves grave consideration, but the weight to be given to in England must depend on the circumstances of the case. An order made very recently, no relevant change of circumstances being alleged, will carry great weight. It is persuasive effect is diminished by the passage of time and by a significant change of circumstances, for example the removal of the child to another country or the supervening illness of one of the claimants. The status of the foreign court, and the nature of the proceedings in and the legal approach taken by the court, may all be taken into account. The effect of the foreign order will be weakest when it was made many years ago and has since been modified by consent and the child has nearly attained the age of his majority and so can decide for himself with which parent he wishes to live."

Welfare

44. Placing these principles in the context of an application for the summary return of the child to the country from which it is asserted he or she has been removed, having considered *Re B's Settlement*, *McKee v McKee* and *J v C* and the principles which they articulate, in *Re R (Minors) (Wardship: Jurisdiction)* (1981) 2 FLR 416 Ormrod LJ concluded as follows by reference in particular to the judgment of Lord Simonds in *McKee v McKee*:

> "The language is clear and unequivocal and must be applied in all these cases concerning children. It follows that the strength of an application for a summary order for the return of the child to the country from which it has been removed, must rest, not on the so-called 'kidnapping' of the child, or an order of a foreign court, but on the assessment of the best interests of the child. Both, or either, are relevant considerations, but the weight to be given to either of them must be measured in terms of the interests of the child, not in terms of penalizing the 'kidnapper', or of comity, or any other abstraction. 'Kidnapping', like other kinds of unilateral action in relation to children, is to be strongly discouraged, but the discouragement must take the form of a swift, realistic and unsentimental assessment of the best interests of the child, leading, in proper cases, to the prompt return of the child to his or her own country, but not the sacrifice of the child's welfare to some other principle of law."

45. Within this context, in *Re J (A Child)(Custody Rights: Jurisdiction)* [2006] 1 AC 80, Baroness Hale held as follows with respect to the proper application of the welfare principle in an application for summary return under the inherent jurisdiction where

there exists a foreign custody order, citing the passages from *Re B's Settlement*, *McKee v McKee* and *J v C*:

> "[22] There is no warrant, either in statute or authority, for the principles of the Hague Convention to be extended to countries which are not parties to it. Section 1(1) of the 1989 Act, like section 1 of the Guardianship of Infants Act 1925 before it, is of general application. This is so even in a case where a friendly foreign state has made orders about the child's future. This was explained by Morton J in *In re B's Settlement* [1940] Ch 54, 63-64:
>
> > 'I desire to say quite plainly that in my view this court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the courts of any other country.'
>
> [23] Despite some critical initial comment by authors on private international law, that view has now become orthodox. It was expressly approved by the Judicial Committee of the Privy Council in *McKee v McKee* [1951] AC 352 , 363-364 which emphasised that there was a choice open to the trial judge:
>
> > 'It is possible that a case might arise in which it appeared to a court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry. But it is the negation of the proposition ... that the infant's welfare is the paramount consideration, to say that where the trial judge has in his discretion thought fit not to take the drastic course above indicated, but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow on order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, although in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case.'
>
> [24] This House, in the leading case of *J v C* [1970] AC 668 , regarded it as clearly decided by *In re B's Settlement* and *McKee v McKee* that the existence of a foreign order would not oust the jurisdiction or preclude the operation of the welfare principle. This applies *a fortiori* where the foreign court would have had jurisdiction to make an order but has not done so, so that no question of comity arises: see Lord Guest, at pp 700-701, Lord MacDermott, at p 714f-g, and Lord Upjohn, at p 720c-e.
>
> [25] Hence, in all non-Convention cases, the courts have consistently held that they must act in accordance with the welfare of the individual child. If they do decide to return the child, that is because it is in his best interests to do so, not because the welfare principle has been superseded by some other

> consideration. This was so, even in those cases decided around the time that the Hague Convention was being implemented here, where it was held that the courts should take account of its philosophy: see, for example, *G v G (Minors) (Abduction)* [1991] 2 FLR 506 . The Court of Appeal, in *In re P (A Minor) (Child Abduction: Non Convention Country)* [1997] Fam 45 has held that the Hague Convention concepts are not to be applied in a non-Convention case. Hence, the first two propositions set out by Hughes J in this case were entirely correct: the child's welfare is paramount and the specialist rules and concepts of the Hague Convention are not to be applied by analogy in a non-Convention case."

46. As to the conduct of the overall welfare exercise, and within this context, in *Re J (A Child)(Custody Rights: Jurisdiction)* the Supreme Court set out a number of factors that will be relevant when the court is deciding in a non-Convention case whether it is in the child's best interests to make a return order. Whilst in *Re J* the court was concerned with an order returning a child from England and Wales to a foreign jurisdiction, the following principles in my judgment also assist in informing the decision of the court where an order for the summary return of the child to this jurisdiction from a non-Convention country is sought (see *Lowe, N., and Nichols, N.* International Movement of Children 2nd Edtn. at 31.11):

i) The court has power, in accordance with the welfare principle, to order the immediate return of a child without conducting a full investigation of the merits. The task is to perform a swift and unsentimental decision to return the child.

ii) Summary return should not be the automatic reaction to any and every unauthorised taking or keeping a child. On the other hand, summary return may very well be in the best interests of the individual child.

iii) The focus has to be on the individual child in the particular circumstances of the case.

iv) The judge may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that proposition will vary enormously from case to case.

v) One important variable is the degree of connection of the child with each country. Factors such as his nationality, where he has lived for most of his life, his first language, his race or ethnicity, his religion, his culture, and his education so far will all come into this.

vi) The length of time he has spent in each country. In this respect, Baroness Hale observed that "Uprooting a child from one environment and bringing him to a completely unfamiliar one, especially if this has been done clandestinely, may well not be in his best interests. A child may be deeply unhappy about being recruited to one side in a parental battle. But if he is already familiar with this country, has been here for some time without objection, it may be less disruptive for him to remain a little while longer while his medium and longer time future is decided than it would be to return."

vii) In a case where the choice lies between deciding the question here or deciding it in a foreign country, differences between the legal systems cannot be irrelevant. But their relevance will depend upon the facts of the individual case.

viii) The effect of the decision upon the child's primary carer must also be relevant, although again not decisive.

47. Finally, and in the context of the difficulties that the mother contends she has had in this case in maintaining any relationship with M following what the father says is the lawful implementation of the Lebanese court order, I note the following example of the exercise by the Supreme Court of the summary jurisdiction in *In Re L (A Child)(Habitual Residence)* [2013] 3 WLR 1597. Having emphasised once again that it has long been established that the existence of an order made by a foreign court of competent jurisdiction is a relevant factor, Baroness Hale concluded as follows on the facts of that case:

> "[36] The crucial factor, in my view, is that this is a Texan child who is currently being denied a proper opportunity to develop a relationship with his father and with his country of birth. For as long as the Texan order remains in force, his mother is most unlikely to allow, let alone to encourage, him to spend his vacations in America with his father. Whilst conflicting orders remain in force, he is effectively denied access to his country of origin. Nor has his mother been exactly enthusiastic about contact here. The best chance that K has of developing a proper relationship with both his parents, and with the country whose nationality he holds, is for the Texas court to consider where his best interests lie in the long term. It is necessary to restore the synthesis between the two jurisdictions, which the mother's actions have distorted."

DISCUSSION

48. Having considered carefully the submissions of Ms Baker and Ms Renton, and having read in their entirety each bundle of documents filed by the parties in this case, applying the legal principles set out above I find myself satisfied that (a) as at 30 April 2019 and 26 November 2019 M remained habitually resident in the jurisdiction of England and Wales, (b) accordingly, this court retained jurisdiction in respect of M as at the date proceedings were issued for relief under the inherent jurisdiction of the High Court (it not being necessary in the circumstances to decide the question of the applicability of Art 10 of BIIa or the applicability of the court's *parens patriae* jurisdiction), (c) the jurisdiction of England and Wales is the most appropriate forum for determining the welfare issues in respect of M and (d) having regard to all the circumstances, including the order of the Beirut court dated 6 February 2019, it is in M's best interests for her to be returned from the jurisdiction of Egypt to the jurisdiction of England and Wales in order that those issues can be determined by this court. My reasons for so deciding are as follows.

Habitual Residence

49. The question of habitual residence is a finely balanced one in this case. However, on balance, I am satisfied that M was habitually resident in the jurisdiction of England

and Wales as at 30 April 2019 and that she remained so on 26 November 2019, notwithstanding her removal to the jurisdiction of Egypt on the former date.

50. Prior to 30 April 2019, whilst I accept that M had spent periods outside England and Wales between her birth and 30 April 2019, I am satisfied that there are a series of factors that point to her being habitually residence in the jurisdiction of England and Wales on that date.

51. M was and is a United Kingdom national. Indeed, her parents specifically arranged for her to be born in the United Kingdom in order that she could benefit from this status. Both her parents intended her to be a British national. Within this context, the reason for M being in the United Kingdom was specifically to ensure she was a British citizen. English is M's first language (although she is now learning Arabic successfully following her move to Egypt on 30 April 2019). Whilst M spent periods outside England and Wales, the evidence indicates that on each occasion she returned to what was considered to be the family home in London with her paternal grandfather. The family home has been at same address in England throughout M's life. Between November 2018 and January 2019 her father actively sought her return to the United Kingdom. Within this context, in his claim before the Beirut court dated 16 November 2018 to revoke the mother's custody of M, the father pleaded that the family "has resided in London, the United Kingdom quietly where the marital house exists". Indeed, as I have noted, there is evidence, in the form of the letter from the child minder, that even upon her removal from the jurisdiction on 30 April 2019 it was anticipated that she would return to the family home. When M commenced nursery, she did so in the United Kingdom in September 2018 and attended thereafter save for the period between October 2018 and January 2019. There was no indication prior to 30 April 2019 of an intention on the part of either of her parents that she would be educated in any other jurisdiction. M returned to school in England on return from Lebanon in January 2019. Indeed, as I have again noted above, there is evidence, in the form of the letter from the nursery, that even upon her removal from the jurisdiction on 30 April 2019 it was anticipated that her absence from educational provision in England would be temporary.

52. The periods M spent outside the jurisdiction of England and Wales prior to 30 April 2019 were not, in my judgment, sufficient in either duration or character to result in her acquiring habitual residence in Lebanon during those periods. In particular, there is no evidence to suggest that on these occasions her parents intended her habitual residence to change. The period between September 2015 and August 2016 was expressly for the purpose of the mother securing a spousal visa that would allow the mother and M back into the United Kingdom to live as a family in this jurisdiction, as was the mother's intention at all times during that period. The period in 2017 was in order for the father to receive medical treatment. As I have noted, the period between November 2018 and January 2019 was one in which the father was actively seeking M's return to the jurisdiction of England and Wales based on his assertion that M had been wrongfully retained by the mother in Lebanon and with the assistance of the FCO. Save for the trip for medical treatment, M's father remained in England during her absences. Again, throughout each of these periods M's family home was considered to be in London.

53. The court order obtained in Beirut on 6 February 2019, embodying the agreement between both parents, expressly contemplated the United Kingdom as a jurisdiction,

amongst other jurisdictions, in which M would continue to reside. The United Kingdom appears first in the list of jurisdictions set out in the order. Pursuant to the order obtained in Beirut on 6 February 2019, embodying the agreement between both parents, it was to the jurisdiction of England and Wales that M returned as a British Citizen on 9 January 2019.

54. Within the foregoing context, I accept that M spent considerable periods outside the United Kingdom prior to 30 April 2019. However, whilst Ms Renton advances a mathematical calculation to demonstrate that as at 30 April 2019 M had spent twenty months in the United Kingdom but twenty-one months outside it, habitual residence is not defined merely by time spent in a location. I am satisfied that M had developed and maintained durable ties to the jurisdiction of England and Wales that constituted some degree of integration in a social and family environment in the jurisdiction of England and Wales in the period leading up to 30 April 2019. Notwithstanding periods in Lebanon, prior to that date, M's centre of gravity was in England, as was the centre of gravity of her parents. Her family home was situated in the jurisdiction, she was being educated in the jurisdiction, both her parents had permanent leave to remain in the jurisdiction and her father was working here. Members of her wider family also resided in the jurisdiction. Accordingly, on balance, I am satisfied that as at 30 April 2019 M was habitually resident in England and Wales.

55. I am further satisfied, on balance, that M did not lose her habitual residence in the jurisdiction of England and Wales between 30 April 2019 when she was taken to Egypt and the issue of the mother's application for relief under the inherent jurisdiction of the High Court on 26 November 2019.

56. There is a paucity of evidence as to M's practical situation in Egypt between 30 April 2019 and 26 November 2019 (this is in part because, rather than focusing on the evidence the court requires to determine the jurisdictional issues in this case, the father's statement concentrates, in at times an almost obsessive level of detail, on the conduct the mother). In the circumstances, whilst Ms Renton asserts that, self-evidently, between 30 April 2019 and 26 November 2019 M was in Egypt, there is very little evidence before the court to demonstrate the degree to which she was, during this period, integrated in a social and family environment in the jurisdiction of Egypt. Within this context, whilst the father makes broad assertions in his very late statement that M is *now* happy living with her paternal grandmother, aunt and cousin, "has made immense strides both emotionally and scholastically", has learnt to speak Arabic in both Egyptian and Lebanese dialects in Egypt, takes ballet classes and has friends at school, between April 2019 and 26 November 2019 it is not at all clear from the father's statement of evidence where M lived during that period, who she was cared for on a day to day basis, what provision was made for medical treatment, when she commenced school and whether she changed schools, how quickly she settled in Egypt, what her day to day life comprised of during the relevant period, whether and for how long she has spent time in other jurisdictions and what her understanding was during this period of how long she would be remaining in Egypt and when and if she would be returning to what, up until 30 April 2019, had been her family home in London. In addition, neither M nor her parents are Egyptian nationals. Prior to 30 April 2019 M had no substantial connection with Egypt.

57. Within this context, at all times in the period between 30 April 2019 and 26 November 2019 M remained a British national, both of whose parents remained

resident in the United Kingdom and present in that jurisdiction between the relevant dates whilst M was in Egypt. The family home remained in London during this period. Within this context, I again note that the order of the Beirut court contemplates that the jurisdiction of England and Wales would continue to be a jurisdiction within which M would reside pursuant to the agreement of the parents and the order of the Lebanese court. In the circumstances, and notwithstanding that the mother was not able to exercise any contact with M during this period, I am satisfied M retained durable ties with the jurisdiction of England and Wales between April 2019 and November 2019.

58. In these circumstances, and whilst Ms Renton once again advances a further mathematical calculation to demonstrate that as at 26 November 2019 M had spent twenty months in the United Kingdom but thirty-one months outside it, bearing in mind what I am satisfied was M's significant degree of connection with the jurisdiction of England and Wales prior to 30 April 2019, I am not satisfied that the evidence before the court is sufficient to establish that, as at 26 November 2019 when the mother issued her application under the inherent jurisdiction, M had lost the habitual residence that I am satisfied she had in the jurisdiction of England and Wales as at 30 April 2019 for the reasons given above.

59. For all these reasons, I am satisfied that as at 30 April 2019 M was habitually resident in the jurisdiction of England and Wales and remained so as at the date the mother's application for relief under the inherent jurisdiction of the High Court was issued on 26 November 2019.

Basis of Substantive Jurisdiction

60. In the circumstances, I am satisfied that this court has (by virtue of M remaining habitually resident in the jurisdiction of England and Wales as at 26 November 2019 for the reasons I have given) jurisdiction to consider the mother's application for orders in respect of M under the inherent jurisdiction of the High Court on the basis of that habitual residence pursuant to the provisions of Art 8 of BIIa.

61. In order to establish that the court also has jurisdiction on the basis of Art 10 of BIIa, in addition to being satisfied, as I am, that M was habitually resident in the jurisdiction of England and Wales as at 30 April 2020, I would have to be satisfied that the removal of M by the father from the jurisdiction on that date was wrongful for the purposes of Art 10. That question is complicated in this case by the existence of the order made by the Beirut court on 6 February 2019, incorporating as it does the agreement reached between the parents that the father would have custody of M and would reside with M in either the United Kingdom, Egypt or some other location of his choosing. Within this context, in circumstances where I am satisfied that the court retained jurisdiction in respect of M at the time the mother's application was issued on 26 November 2019, I do not consider it necessary to determine that question of wrongful removal for the purposes of determining the question of jurisdiction as at 30 April 2019. Likewise, in light of my being satisfied that this court has jurisdiction under the inherent jurisdiction of the High Court based on M's habitual residence in the jurisdiction of England and Wales as at 26 November 2019, I am satisfied that it is not necessary for me to deal with the mother's submissions as to the existence of a *parens patriae* jurisdiction in respect of M.

Forum Conveniens

62. Ms Renton submits on behalf of the father that the most convenient forum for determination of the welfare issues between the parties is the jurisdiction of Lebanon and that, accordingly, this court should grant a stay of these proceedings to allow the Beirut court to determine the welfare issues between the parties. I am not however, satisfied that the father has demonstrated that Lebanon is clearly the most appropriate forum for the determination of the welfare issues between the parties in this case.

63. I accept that the court in Beirut has already made an order in respect of custody and access as regards M a little over a year ago. Further, whilst the court does not have the benefit of expert evidence in respect of the law of Lebanon, I have borne in mind the information provided by the father's Lebanese lawyers. That information indicates the Lebanese court would have jurisdiction to entertain an application by the mother in respect of M under Art 75 of the Code of Civil Procedures based on the Lebanese nationality of the parents and M, notwithstanding M is plainly not habitually resident in that jurisdiction. The letter states that the timescale for the determination of any application with respect to M would be no more than three months and would result in an immediately enforceable order, including by way of committal, subject to any stay granted by the Lebanese Court of Appeal. The lawyer's letter further asserts that any order made by the Lebanese Court would be enforceable in Egypt according to Part V of the Riyadh Agreement for Judicial Cooperation. I have also considered carefully the fact that the father offers an undertaking not to enforce the penalty clause provisions of the order which place a penalty of $100,000 on the mother making an application to vary that order, the father's submission the mother has a clear remedy in Lebanon, namely an application for the return of M from Egypt to Lebanon and for custody, and the father's assertion that the Sunnite personal law tradition in Lebanon is that mothers are awarded custody of a daughter up to the age of 12.

64. Against these factors however, I am satisfied that there are weighty matters on the other side of the balance that indicate that the jurisdiction of England and Wales is the clearly the most appropriate forum for determining the welfare issues that arise in respect of M.

65. There is a plain welfare dispute between the parents in respect of M. M is a British citizen. Both parties the dispute to be determined are present in the jurisdiction, the father has permanent leave to remain and is shortly to apply for British citizenship. The mother evinces and intention to remain in this jurisdiction. Neither stated an intention to return to Lebanon, the father positing that he would move to Egypt to live with M upon securing British citizenship. M is not in the jurisdiction of Lebanon but in the jurisdiction of Egypt and there is no evidence that this will change in the short, or indeed medium term. Neither parent stated an intention to return M to Lebanon. In the circumstances, the child and the parties' closest connection with the competing forums is with this jurisdiction. The order of the court in Beirut recognises the jurisdiction of England and Wales as one of three that M will reside in. It does not make any provision for where disputes in respect of M are to be litigated. This court is already seised of proceedings and has jurisdiction to determine them based on M being habitually resident in the jurisdiction of England and Wales at the time they were issued. There are no proceedings currently on foot in Lebanon, or indeed in Egypt. The proceedings already on foot in this jurisdiction are subject to the statutory

duty set out in s 1 of the Children Act 1989 to avoid delay. The parents will be the primary witnesses in any litigation regarding M's welfare. The matters that give rise to the welfare dispute took place primarily within this jurisdiction. Within this context, it is self-evident that a hearing in this jurisdiction is the most convenient and least expensive option.

66. In order to succeed in his application for a stay of these proceedings the father must show not only that England and Wales is not the natural and appropriate forum but that the jurisdiction of Lebanon is clearly and distinctly more appropriate. On the evidence before the court, I am satisfied that he cannot do this. The father's proposal would involve two parents who are in England litigating in Beirut about a child who is Egypt. On the evidence before the court, the jurisdiction of England and Wales is, for the reasons I have given, the place with which the case has the most real and substantial connection. In the circumstances, I refuse to stay this application.

Welfare

67. In determining whether to grant the mother's application for an order under the inherent jurisdiction requiring the return of M, M's welfare is my paramount consideration. In this context, I accept that there are some factors that would point to it not being in M's best interests to order her summary return to the jurisdiction of England and Wales. M has now been in Egypt for some 8 months. If the court accepts the limited information provided by the father at face value, M is residing with relatives, has started school, has made friends and enjoys activities. Within this context, I accept that to return M to this jurisdiction would result in some short term physical and emotional disruption to her and would interfere with the relationships she has developed over the past eight months. Once again however, against this, I am satisfied that there are compelling arguments for a return to the jurisdiction of England and Wales being in M's best interests.

68. As I have noted, it is plain that there is a dispute between the parties as to the appropriate welfare arrangements for M to be resolved. The mother has had no substantial contact with M since January 2019. At present, the mother is having no contact with M despite the provisions of the order of the Lebanese court dated 6 February 2019. Within this context, as matters stand, M is a British child who is not being afforded a proper opportunity to develop a relationship with her mother. Having regard to the terms of the order of the Lebanese court regarding contact, for the father to simply state that the mother could travel to Egypt is no answer to this. Within this context, on the evidence currently available to the court, and without making any findings at this stage, like Francis J I consider that without a judicial determination of the issues between the parties, the prospects of the father facilitating the level of contact contemplated by the Lebanese court order, and likely in any event to be in M's best interests, is slim. Indeed, given the current lack of contact, on its face the father's statement that a child needs both parents rings hollow in the ears of this court. As matters stand, the father is not affording the mother consistent, good quality indirect and direct contact with M, this notwithstanding that prior to January 2019 the mother was M's primary carer. This situation is fundamentally undermining of M's relationship with her mother and will impact on her identity in circumstances where she is being deprived of a full relationship with her mother.

69. In this context, I consider that the best chance of ensuring that M can resume contact with, and develop a full relationship with her mother is for this court, having as it does jurisdiction in respect of M and being as it is the most appropriate forum, to order the return of M to this jurisdiction and resolve the welfare dispute between the parties by determining where M's best interests lie.

70. In addition, I am satisfied that there is a further important reason why it is in M's best interests to order her return to this jurisdiction. At present M is in a jurisdiction in which there is no one with parental responsibility for her. The father has deigned to provide only limited information regarding M's circumstances in Egypt, further exacerbating the disadvantages of such a situation being allowed to pertain. I am satisfied that, in particular given her age, it is in M's best interest for an order to be made returning her to the jurisdiction in which those with parental responsibility for her reside.

71. In reaching my decision, I have of course given very careful consideration to the fact that the Lebanese court made an order on 6 February 2019 dealing with the issue of custody, access and the locations in which M would reside. Depending on the circumstances of the particular case, foreign custody orders are to be accorded respect by this court. I am not however persuaded in the particular circumstances of this case, that the existence of that order can or should prevent this court ordering M's return to this jurisdiction.

72. It is plain that the level of access between M and her mother contemplated by the Lebanese court order is not taking place and, for reasons I have rehearsed above, is not likely to take place until a court has determined the welfare dispute between the parents. In the circumstances, matters have moved on significantly since the Lebanese court made its order a little over a year ago. As the authorities make clear, a custody order is, by its nature, not final. This, together with the fact that M's welfare is paramount means, as the authorities again make clear, that this court, if it has jurisdiction and is the most convenient forum, can form an independent judgment on the welfare issues now arising, giving such weight as is appropriate to the foreign judgment. In that latter regard, the Lebanese court order expressly contemplates the United Kingdom as one of the countries in which M will live and gives specific authority for the same. In the circumstances, an order for the return of M to the jurisdiction of England and Wales is not in any way outwith the circumstances contemplated by that foreign custody order. Further, if having heard the matter this court determined that the mother should resume contact with M, it would be doing no more than the Lebanese order sought to achieve in February 2019 by expressly recognising and endorsing the agreement between the parents. Were the court to go further and amend the custody arrangements as between the parents, this would be simply a reflection of the fact that the circumstances that pertained before the Lebanese court in February 2019 have changed in the twelve months since that order was made.

73. Having regard to the domestic authorities that deal with the wide nature of this courts discretion regarding the extent to which a foreign custody order is taken into account by the court, I do not consider it necessary to deal with the wider criticisms levelled at the order by Ms Baker nor, at this stage, with the allegations of duress raised by the mother.

CONCLUSION

74. In conclusion, and for the reasons I have given, I am satisfied that this court has substantive jurisdiction in respect of M. Further, I am satisfied that the jurisdiction of England and Wales is the most appropriate forum to determine the welfare issues between the parties in this case. Finally, I am satisfied that it is in M's best interests to order her summary return from the jurisdiction of Egypt to the jurisdiction of England and Wales and I so order. I will invite counsel to submit a draft order for my approval.

75. Finally, as I have noted, the father informed the court that he will shortly be making an application to the Home Office for British citizenship. It should go without saying that this court will expect the father to comply with the orders made by the High Court of the nation in which he seeks now to become a naturalised citizen. In circumstances where the court intends that the Tipstaff shall retain the father's travel documents until M is returned to the jurisdiction of England and Wales, to achieve this the father will need to facilitate M's return via an appropriate third party, as he was prepared to do, and did in January 2019.

76. That is my judgment.