Neutral Citation Number: [2021] EWHC 2306 (Fam)

Case No: ZZ20D05011
FD20P00158

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE MATTER OF COUNCIL REGULATION 2201/2003 (BRUSSELS IIR)
AND IN THE MATTER OF THE DOMICILE AND MATRIMONIAL PROCEEDINGS ACT 1973

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2021

Before:

THE HONOURABLE MR JUSTICE COBB

- -

Between:

P	**Applicant**
- and -	
P	**Respondent**

- -

P v P (Divorce: Jurisdiction)

- -

Anita Guha (instructed by **Dawson Cornwell**) for the Applicant
Roger Birch (instructed by **Direct Access**) for the Respondent

Hearing dates: 28-29 July 2021

- -

Approved Judgment

THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cobb:

Introduction

1. The parties to the proceedings are Mrs P (who I shall hereafter refer to as 'TP') and Mr P (who I shall hereafter refer to as 'NP'). They were married in 2016. They have one child, Maria[1], who was born early 2018, and who is now 3 years and 5 months old.

2. The parties are both Bulgarian nationals; NP also has British citizenship, while TP has leave permanently to remain living in England. They are both currently physically in the Republic of Bulgaria, albeit living apart. Maria is currently living with her mother and maternal grandparents; the father has not seen Maria for some time, though he seeks contact through the Bulgarian court.

3. The background history to this case is set out in a judgment which I delivered in November 2020 which is reported as *P v P (Re P: Discharge of Passport Order)* [2020] EWHC 3009 (Fam). Reference should specifically be made to [5]-[30].

4. It will be apparent from that judgment that over time since their separation in early 2020, these parties have issued multiple applications before the English Court and before the Bulgarian Court. Indeed, since my November 2020 judgment, yet further applications have been issued in Bulgaria by TP, including, significantly, proceedings under the *1980 Hague Convention*, and proceedings under *Article 127a* of its own Civil Law, by which TP seeks leave to remove Maria from that jurisdiction to bring her to England.

5. I am now required to determine issues which arise within two sets of family proceedings which are currently before the English Court:

    i) Wardship proceedings concerning Maria, which TP issued in the High Court on 16 March 2020[2];

    ii) Divorce proceedings which TP issued on-line in early 2020 and which have been stayed by order of the court since July 2020 given the uncertainty about jurisdiction (NP having issued divorce proceedings in Bulgaria). I referenced the existence of this divorce petition at [13], then at [48] - [50] of the earlier judgment.

    Central to my determination of the issues arising within the wardship is the factual question of where Maria is habitually resident. I gave directions for the scope of this hearing in April 2021, but since that date, TP's application for an order under the *1980 Hague Convention* has been revived in Bulgaria following her successful appeal in that country, and those proceedings have reached final hearing at first-instance, but are part-heard. In the circumstances, and for reasons which I set out more fully below (see §14 below), I do not consider that I should consider the wardship on any substantive basis here until the part-heard proceedings under the *1980 Hague Convention* have been concluded in Bulgaria. I raised this as a provisional view with counsel instructed on behalf of the parties at the outset of this hearing, and they agreed.

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[1] Maria is not her real name

[2] The range of relief sought is set out at §8 below.

6. Separately, on 6 May 2021, District Judge Prevatt at the Family Court sitting at Bromley considered TP's application for a discharge of the stay on her divorce petition and referred the application to me for hearing. Following discussion with counsel, it was confirmed that I would consider whether I could, at this stage, make orders which would have the effect of progressing the divorce. In this regard, the following questions would require to be answered:

    i) Precisely when did TP lodge her petition for divorce in England? Was this before or after the date on which NP issued his petition for divorce in Bulgaria?

    ii) Can the English Court 'establish' jurisdiction to deal with the divorce under the provisions of the *Domicile and Matrimonial Proceedings Act 1973* ('*DMPA 1973*') when read with *Article 3* of the *Brussels IIR regulation (2201/2003)* ('*BIIR*') (this being a 'legacy' case)?

    iii) Should I (as TP submits) determine at this hearing the factual issue of the Respondent's (NP's) habitual residence at the date of lodging the English petition (as the basis for 'establishing' jurisdiction), notwithstanding that it is agreed (see above) that I should defer any decision on the wardship application until the Bulgarian court has ruled on the issue of where Maria was habitually resident in early 2020 in the context of the *1980 Hague Convention* application? Or should I (as NP submits) adjourn any consideration of NP's habitual residence until after the Bulgarian Court has ruled on the *1980 Hague Convention*, wherein it will have considered the issue of Maria's habitual residence?

    iv) If I should determine the issue of NP's habitual residence at this stage, as a matter of fact where was the Respondent habitually resident when the English petition was lodged? Does this give the English Court jurisdiction?

7. I shall deal with the issues relating to the wardship proceedings first, before looking in more detail at, and reaching conclusions about, the divorce process.

The wardship proceedings

8. As earlier indicated, TP issued wardship proceedings in this jurisdiction on 16 March 2020. In those proceedings, she sought the following orders:

    i) A declaration that Maria is habitually resident in England and Wales;

    ii) For Maria to be made a ward of the English court;

    iii) For the father to provide to the mother with his written authority to enable Maria to leave Bulgaria, to return to England;

    iv) An injunction to prevent the father from removing Maria from England and Wales once she has been returned.

9. At a hearing on 16 March 2020, Judd J made Maria a ward of court. She made a further order that NP should provide the relevant authority to the mother to be able to leave Bulgaria with Maria to return to England. She made a passport order under which NP's passport was removed from him and held by the Tipstaff. For the avoidance of doubt,

she specifically did not order the father to facilitate the return of Maria to this jurisdiction.

10. The case has been before me on a number of occasions since that time. As earlier indicated, I had the case before me in November 2020, when I considered whether I should return NP's passport. I did so. I return to this later.

11. I had at one time contemplated directions on an application by the mother for committal of the father to prison for breach of the order requiring him to provide authority to the mother to return Maria to this jurisdiction. The father challenged the jurisdiction of this court to make any, or any further, substantive orders in the wardship, particularly as proceedings were then advancing in the courts in Bulgaria. In the circumstances, I paused the progress of the applications in this jurisdiction and caused enquiries to be made of the Bulgarian Network Judge through the International Family Justice Office as to the state of process in Bulgaria (answers were helpfully provided on 1 February 2021), and the parties commissioned an expert report on issues relevant to Bulgarian law.

12. In the meantime, on 15 January 2021, the mother exercised her right under *Article 29* of the *1980 Hague Convention* to apply to the Court in Bulgaria for the summary return of Maria from Bulgaria to this jurisdiction. That application was dismissed on 21 January 2021, on the basis that Maria was not unlawfully retained in Bulgaria as TP could have applied to the Bulgarian Court for permission to remove Maria (under *Article 127a* of the *Civil Code*) but had not done so. TP successfully appealed the dismissal of her *1980 Hague Convention* claim, and on 21 April 2021 the Bulgarian appellate court remitted the application for re-hearing. That re-hearing began on 14 June but was adjourned part-heard; a resumed hearing on 12 July was ineffective, and the case is now adjourned part-heard to 27 September 2021 (i.e., two months hence).

13. In the meantime, the Bulgarian court has stayed its own 'welfare' proceedings, pending determination of the *1980 Hague proceedings,* as indeed this court would have done under *rule 12.52 Family Procedure Rules 2010* ('*FPR 2010*').

14. As I indicated above, it is agreed that I should not undertake an examination of the question of Maria's habitual residence pending the outcome of the proceedings in Bulgaria. This consensus was reached for the following reasons:

    i) There has been no indication from the Bulgarian Court that it would find it "helpful" to have a declaration from this court on this issue under *section 8* of the *Child Abduction and Custody Act 1985* (see [*2.15*] of *PD12F*). The Bulgarian Court is well-placed to consider the issue, and all the judgments and orders filed from the Bulgarian proceedings confirm to my mind that it has taken its responsibilities in this case extremely conscientiously and approached the case just as this court would have done;

    ii) Were I now to seek to determine the habitual residence of Maria, I would be effectively commandeering the judicial process which is well underway in Bulgaria, and to which both parties are fully engaged;

iii) There would be a risk, as Lady Hale and Lord Toulson said in *Re B* [2016] UKSC 4 ('*Re B*') at [59], of a ruling on habitual residence emanating from both countries producing conflicting decisions.

15. Accordingly, I shall list the wardship proceedings for further case management once the outcome of the *1980 Hague Convention* proceedings in Bulgaria is known.

The divorce proceedings: the relevant legal framework

16. Both parties have issued divorce proceedings; TP has issued proceedings in England and NP has issued in Bulgaria. I summarised the situation in [13] of my earlier judgment ([2020] EWHC 3009 (Fam)) thus:

> "[13] Litigation between these parties began in earnest in early January 2020, when the mother applied (on-line) for a divorce in the Court in England; her petition was issued on 29 January 2020. On 4 February 2020, the father applied for a divorce (and child arrangements and financial relief) through the Bulgarian Court. Confusingly, on 21 February the English Court issued a second divorce petition on the mother's application (bearing the same case number). The mother claims that the Bulgarian divorce proceedings have not been served on her, a fact disputed by the father who points out that the mother applied successfully on 16 March 2020 within the Bulgarian proceedings for those proceedings to be transferred to her local court. The father has confirmed, by an Answer filed in England on 16 March, his intention to defend the English divorce proceedings on the basis of the divorce proceedings in Bulgaria; the English divorce proceedings have therefore currently been stayed."

I have no doubt that this jurisdictional skirmishing arises because TP and NP each seek juridical advantage in relation to financial relief proceedings which arise at the end of their marriage.

17. The factual situation is reasonably complex, but before addressing this, I consider it helpful to outline here the relevant law.

18. This is a 'legacy' case to which the provisions of *BIIR* still apply (the divorce process was begun in both Member States before 31 December 2020[3]). In the circumstances, *Section 5(2)* of the *DMPA 1973* provides that the court here shall have jurisdiction if it has jurisdiction under *BIIR*. The relevant provisions of *BIIR* are located in *Article 3*:

> "In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

[3] Therefore not caught by the *Jurisdiction and Judgments (Family) (Amendment etc) (EU Exit) Regulations 2019* (SI 2019/519)

(a) in whose territory:

- the spouses are habitually resident, or

- the spouses were last habitually resident, insofar as one of them still resides there, or

- the respondent is habitually resident, or

- in the event of a joint application, either of the spouses is habitually resident, or

- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses". (Emphasis by underlining added).

19. On these facts, TP asserts before me that I can satisfy myself of jurisdiction based upon the habitual residence of NP at the material time. In relation to the test for establishing 'habitual residence' in *Article 3* in the context of divorce, I was referred to the judgment of Munby J (as he then was) in *Marinos v Marinos* [2007] EWHC 2047 (Fam), especially at [33]-[34]:

"[33] Accordingly, in my judgment, the phrase 'habitually resident' in *Art 3(1)* has the meaning given to that phrase in the decisions of the ECJ, a meaning helpfully and accurately encapsulated by Dr Borrás in para [32] of his report:

'the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence'

and by the Cour de Cassation in *Moore v McLean* [2007] 2 FLR 1018 at 1030

'the place where the party involved has fixed, with the wish to vest it with a stable character, the permanent or habitual centre of his or her interests.'

[34] There is one important point I should add. In deciding where the habitual centre of someone's interests has been

> established, one has to have regard to the context. Many of the ECJ cases to which I have referred are cases where what was in issue was the entitlement of a worker to social security benefit. So the claimant's place of work was obviously an important factor in ascertaining the location for that purpose of the habitual centre of his interests. Here, in contrast, the issue is as to the identification of the court (or courts) which have jurisdiction in relation to family matters, specifically, in the context of *Art 3* of *Brussels II Revised*, in relation to matters of divorce, legal separation or annulment. So the place where the matrimonial home is to be found, the place where the family lives, qua family, is equally obviously an important factor in ascertaining the location for that rather different purpose of the habitual centre of a spouse's interests." (Emphasis by underlining to all quotes added).

20. The test in *Marinos* was approved by the Court of Appeal in *Tan v Choy* [2014] EWCA Civ 251, [2015] 1 FLR 492 in which it was confirmed that the court, in circumstances such as these, would be interested to establish:

    i) The permanence or stability in the residence of the person concerned in the relevant territory;

    ii) That this location was the centre of the person's interests;

    iii) That the person must have, at that time, no other habitual residence because one habitual residence must be lost before another can be obtained.

21. It is clear that the decision in *Marinos* establishes the adult's 'centre of interests' test when considering their 'habitual residence' in the context of divorce proceedings; whereas, in matters of parental responsibility, habitual residence is "the place which reflects some degree of integration by the child in a social and family environment" (see *A v A (Children: Habitual Residence)* [2013] UKSC 60; [2014] AC 1 at [48]/[54] ('*A v A*') and *Re B* (supra) at [38]). The test of habitual residence in relation to parental responsibility focusses on the situation of the child, with the purposes and intentions of the relevant adults/parents being merely one of the relevant factors (see *A v A* at [54(v)]).

22. In the circumstances, it is perfectly possible that the court with jurisdiction to deal with divorce, or spousal provision following divorce, may be different from the court dealing with parental responsibility; this was illustrated (in a slightly different context) in *A v B* (Case *C-184/14*), a Judgment of the Court (Third Chamber) on a preliminary ruling from the Corte Suprema di Cassazione (Italy)), and followed in *LM v KD* [2018] EWHC 3057 (Fam), a decision of Baker LJ (note his judgment at [107/108]) concerning simultaneous proceedings on different post-separation issues in Italy and England.

23. I emphasise the distinction in §21 and §22 above because, by making herein a decision in relation to the habitual residence of NP and its relevance in establishing the English Court's jurisdiction in relation to divorce matters, I specifically and expressly leave open the possibility that the Bulgarian Court may reach a different conclusion as to the habitual residence of Maria; it is thus perfectly possible that two different jurisdictions

may be engaged in resolving these post-separation proceedings concerning the same parties. I accept that conclusions reached in this judgment as to NP's habitual residence may be relevant to the Bulgarian Court's decision ("[t]he social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned": *A v A* at [54]) but they are by no means determinative, particularly if TP (Maria's acknowledged primary carer[4]) had only ever been habitually resident in Bulgaria, or had become habitually resident there in late-2019/early-2020 (as NP now alleges, though she disputes).

24. Assuming therefore that the jurisdiction of the English Court can be established (I consider the facts relevant to this issue below) I turn next to consider whether it should be exercised; this engages the provisions of *Article 16*, namely 'Seising of a Court' which provides that:

> "A court shall be deemed to be seised:
>
> (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent;
>
> or
>
> (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court."

25. On these facts, *Article 16* must be read with *Article 19* ('Lis pendens and dependent actions') which provides that:

> "1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> 2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

[4] In his 16 April 2020 statement he refers to the fact that TP "will keep custody over our daughter" (Emphasis by underlining added).

> 3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.
>
> In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised."

26. These *Articles* of *BIIR* operate as an autonomous and uniform code; this was confirmed in the decision of the sixth chamber of the CJEU in *MH v MH* (Case C-173/16) [2017] ILPr 23, 503 it was said at [25] and [26]:

> "The EU legislature adopted a uniform concept of the time when a court is seised, which is determined by the performance of a single act, namely, depending on the procedural system under consideration, the lodging of the document instituting the proceedings or the service of that document, but which nevertheless takes into consideration whether the second act was in fact subsequently performed. Thus, pursuant to *Article 16(1)(a)* of *Regulation No 2201/2003*, the time when the court is seised is the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent (order of 16 July 2015 in P, C-507/14, not published, EU:C:2015:512, paragraph 32).
>
> The Court stated that, for the court to be deemed seised, *Article 16(1)(a)* of *Regulation No 2201/2003* requires the satisfaction not of two conditions, namely that the document instituting the proceedings or an equivalent document must have been lodged and service thereof must have been effected on the respondent, but merely of one — that of lodging the document instituting proceedings or an equivalent document. Pursuant to that provision, the lodging of the document of itself renders the court seised, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent (order of 16 July 2015 in P, C-507/14, not published, EU:C:2015:512, paragraph 37)" (Emphasis by underlining added).

27. The ruling of the CJEU in *MH v MH* was expressed to be:

> "*Article 16(1)(a)* of *Council Regulation (EC) No 2201/2003* of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, must be interpreted to the effect that the 'time when the document instituting the proceedings or an equivalent document is lodged with the

> court', within the meaning of that provision, is the time when that document is lodged with the court concerned, even if under national law lodging that document does not of itself immediately initiate proceedings."

28. *MH v MH* was a forum dispute between England and the Republic of Ireland, where the *lis pendens* issues hung on the precise time when the petitions were 'lodged' in each country. When the case (*MH v MH*) was reconsidered by the Court of Appeal in the Republic of Ireland ([2017] IECA 18) (having been remitted back there by the CJEU), it was held that the petition was lodged as soon as the document had been opened in the court office and date stamped ("The High Court found as a fact that the English divorce petition was opened and stamped prior to 10.30 am on the 7th September, 2015" at [7]), and the judgment went on at [17]:

> "…the English divorce petition was "lodged" with the English court at latest by 10.30 am on the 7th September, 2015. By that time it was recorded as received and on any ordinary meaning of the word "lodged" as used in *Article 16(1)(a)* of *Regulation 2201/2003* and having regard to the decision of the CJEU it was at latest by then lodged with the English Family Court Office. Further the Court was satisfied that the wife as the applicant in the English divorce proceedings had not subsequently failed to comply with any condition relating to service of the divorce petition on the respondent. Accordingly, the Court concluded that the English court was seised within the meaning of *Article 16(1)(a)* of *Regulation 2201/2003* at latest by 10.30 am on the 7th September, 2015".

29. The case of *MH v MH* was cited with approval in *Thum v Thum* [2018] EWCA Civ 624, in which it was said at [55]:

> "It can be clearly seen from *MH v MH* that a court is seised once the petition is lodged with the court and that the overarching purpose of the proviso is protection from abuse of process. This case and the other authorities referred to above also establish, in my view, that in order for the proviso to apply there has to be a failure to comply with a *specific* step required by the domestic law in order "to have service effected", not a more general failure to effect service, and that the failure must be due to the *applicant* having failed to act diligently by not taking the required step".

The divorce proceedings: the Bulgarian Court's position

30. In a careful judgment delivered on 15 July 2021 in the Plovdiv District Court, Bulgaria, Judge Kostadinova considered that the Bulgarian Court has jurisdiction to consider NP's divorce petition on the basis of the parties' domicile. Judge Kostadinova went on to say this:

> "The question before the present Chamber is therefore whether this is the first court seised and, in that sense, whether it has jurisdiction to hear the divorce proceedings. The parties in the present proceedings dispute which court was seised first - the Bulgarian or the English, by submitting numerous documents in support of their claims. The present panel, assessing all submitted documents in the case, finds the following: The proceedings in the present case were instituted by the claimant [NP] on 04.02.2020, filed with the District Court of Varna, and the case was sent to the jurisdiction of this court in October 2020 following an objection made by the defendant in the proceedings [TP], made before the transcript of the statement of claim and the appendices served on her. At the same time, the defendant [TP] filed proceedings for a divorce, settlement of property relations between the spouses and a request for maintenance for herself and for the child [Maria] born in marriage in England under № ZZ20D05011. It is debatable between the parties when exactly the divorce case was filed in England. From the documents submitted by the present defendant [TP] it is evident that on 12.01.2020 she filed for divorce at the Court and Tribunal Service Centre. A temporary reference number was given, explaining that she would be given a full case number once the application was accepted and issued. It is evident from the following submitted document that the present defendant on 12.01.2020 has paid £550 for the divorce case. It is evident from the document submitted by the Judicial Service Divorce Case that 12.01.2020 was recorded as the date of creation and date of issue of the divorce claim. At the same time, the document issued by Her Majesty's Judicial Service (sic.) shows that the application for divorce was issued on January 29, 2020 and is given the case number in England, namely the above-cited ZZ20D05011. All documents are attached to the response to the Order submitted by [TP] on 05.07.2021. For reasons unclear to the present panel, as well as to the English courts, [TP]'s petition for the issue of a case number in England was issued several times - on 29 January 2020 and subsequently on 20.02.2020, but both times with the same case number - mentioned above. At the same time, the current claimant [NP] claims that [TP] filed for divorce in England on 21.02.2020, referring to a document … from which it is evident that with regards to the development of the proceedings before the English court that on 21.02.2020 an application has been issued by the Judicial Service; with an order from 24.07.2020 the proceedings in the case were suspended after [NP] informed the court that on 04.02.2020 has filed for divorce in Bulgaria. On 28.10.2020 [TP] submitted a request for revocation of the suspension order dated 24.07.2020….

Having set out the arguments more fully, Judge Kostadinova concluded:

> "In view of the above, the current panel of the court finds that it is not the first court seized in the divorce case. Such is the court in England, where [TP] initiated a divorce case on January 12, 2020. In this sense, the present proceedings between the parties concerned in the claim for divorce, requesting judging in relation to the blame for the deep and irreparable breakdown of the marriage, and requests the husband's surname after dissolution of the marriage to be suspended pursuant to Article 19 Item 1 of Regulation 2201/2003 of the Council until the jurisdiction of the first court seized, namely the court in England, is established.
>
> For the purpose of completeness, the court should point out that so far it has never accepted international jurisdiction, despite the requests for declarations by [NP] to help him before the English court in which it is explicitly stated that the Bulgarian court has accepted international competence. Declarations are issued with the explicit note that the Bulgarian court has not accepted international jurisdiction" (Emphasis by underlining in the original).

31. These passages illustrate, to my mind, the very careful, thorough, and legally impeccable analysis of the current situation, which has been applied by the Bulgarian Court.

The divorce proceedings: the date 'first seised'

32. In order to determine whether the English Court could or should assume jurisdiction, if established by one of the grounds in *Article 3*, it is necessary for me to decide first on what date the divorce process was initiated here.

33. The mother's case is that her petition was successfully lodged (on-line) in England on 12 January 2020. The undisputed material documentary evidence which relates to this is as follows:

    i) TP has produced an e-mail receipt in respect of her on-line submission for divorce at 8:53:38pm on 12 January 2020; at that stage, the receipt recorded the following information: "Petition awaiting payment";

    ii) At 11:03pm on 12 January 2020 (i.e., a couple of hours later on the same day), TP received a further receipt by e-mail confirming that "Your payment of £550 to Divorce was successful", and a payment reference was given;

    iii) Simultaneously to the message above (at (ii)) (11:03pm on 12 January 2020), TP received an e-mail in these terms: "Your divorce application has been submitted to the Courts and Tribunals Service Centre". A temporary reference number was given, and this was followed by the words "You'll be given a full case number when your application has been accepted and issued".

34. As I earlier indicated (see the extract from my earlier judgment quoted at §16 above), it appears that the English petition was confusingly actually issued more than once, on 29 January 2021, on 20 February 2021 and/or on 21 February 2021. On each occasion, the petition was given the same case-number.

35. It is recorded, and is not disputed, that NP issued his divorce proceedings in Varna Bulgaria on 4 February 2021. NP's primary case is that the court should treat the latest date in the sequence above (§33/34) i.e., 20/21 February (when final confirmation was received of the issuing of TP's petition) as the date when the English Court was 'seised'. However, I am concerned not when the petition was *issued*, but when it was *lodged*. When pressed, Mr Birch accepted that there was no evidential uncertainty about the date on which the English petition was submitted online, or 'lodged', and that was 12 January 2020 (he conceded in submissions that "it is difficult to say that it was not lodged then").

36. When is a petition ("the document instituting the proceedings or an equivalent document") "lodged with the court" (per *Article 16*)? The answer to this question is located in the judgment in *MH* (see above at §27): it "is the time when that document is lodged with the court concerned, even if under national law lodging that document does not of itself immediately initiate proceedings".

37. In my judgment, it is clear that TP's divorce petition was successfully "lodged" in the English Court on the evening of the 12 January 2021. While it is not material for me to decide whether this was at 8.53pm when TP received the receipt for her on-line submission, or when she received the later confirmation of her effective submission (11.03pm) once payment had been made, in my judgement it is likely to be the earlier time, and that would have been effective to establish seisin, provided that she went on to pay the requisite fee (a step which she would have been required to take prior to service on the Respondent: see *Article 16(1)(a)*), and that she did indeed serve NP (which I am satisfied she did). On any view, she lodged her petition in England many days before NP lodged his petition with the Bulgarian Court. I am, for the avoidance of doubt, satisfied on the authorities that it was not necessary for the court to issue the proceedings, nor for actual service to be effected on the respondent, in order to establish seisin under *Article 16*.

38. I realise, as I have indicated above, that this particular issue in this contentious family dispute has been so hard-fought because both parties perceive an advantage in litigating in one country rather than another. As Mostyn J observed in *CC v NC* [2014] EWHC 703 (Fam) at [14]:

> "…. [BIIR] does not contain, in relation to a suit for divorce, a provision to transfer the suit to a court better placed to hear the case, unlike proceedings in relation to children, where such a provision exists under Article 15; nor has it been amended to provide for a transfer on the basis of *forum conveniens*, as the Brussels 1 regulation in civil matters has been prospectively amended. So, as things stand, it is perfectly within the rights of a prospective applicant to issue, provided they satisfy a jurisdictional criterion, in any country in the Union, on the basis that the court of that country will

> be more favourable to them when it comes to the allocation of the money."

The divorce proceedings: founding the English jurisdiction; the Respondent's Habitual Residence

39. In submitting her petition, it appears that TP asserted the English court's jurisdiction to entertain the divorce petition on the basis that:

    i) The Petitioner (TP) and the Respondent (NP) are habitually resident in England and Wales;

    ii) The Petitioner (TP) and Respondent (NP) were last habitually resident in England and Wales and one of them still resides there;

    And/or

    iii) The Respondent (NP) is habitually resident in England and Wales.

    These three grounds appear on the draft submitted on-line but the third ground ((iii) above) appears to be omitted from the issued petition. This omission is a mystery. It may be a simple failure in the reproduction of the electronic bundle; there may be another explanation. If it is necessary for TP to amend the petition formally to include this specific jurisdictional ground, then she must do so using the *Part 18 FPR 2010* procedure (Form D11); permission of the court will be required (*rule 7.13(5)(b)* of the *FPR 2010*). Given that both parties have proceeded at this hearing on the basis that this ground ((iii) above) is indeed in the petition, in the event of an application to amend, I can indicate now that I shall grant permission. As it happens, in his filed Answer to the Petition, NP did not specifically dispute the jurisdiction of the English court on the basis of the lack of 'habitual residence' relating to himself or his wife, but asserted that the court in Varna, Bulgaria, was 'first seised', and that adopting *Article 19 BIIR* and the rationale of *Mittal v Mittal* [2013] EWCA Civ 1255, the Bulgarian court should take precedence as the *forum conveniens.*

40. For the purposes of this hearing, and acknowledging that determination of (i) or (ii) in §39 above may trespass too far into the territory which is being considered by the Bulgarian Court, TP sought to demonstrate that at the material time when the English petition was lodged it was the Respondent (NP) alone who was habitually resident in England and Wales ((iii) above).

41. Mr Birch's submission was that even if were to consider the issue in (iii), I would be trespassing into territory which it was agreed I should not enter.

42. For my part, I am satisfied that I can and should proceed to determine NP's habitual residence as of 12 January 2020, and can do so without materially cutting across the Bulgarian Court's consideration of Maria's habitual residence for the purposes of its consideration of *Article 3 1980 Hague Convention* on or about 7 January 2020. I so conclude for the following reasons:

    i) I shall be considering *NP's* habitual residence; the Bulgarian Court will be considering *Maria's* habitual residence;

ii) The test for considering the habitual residence of a party to divorce proceedings is reframed when considering the habitual residence of a child in proceedings parental responsibility (see §22 and 23 above);

iii) The assessment of Maria's habitual residence may be informed by my findings on NP's habitual residence but will not be conclusively determined by it.

43. Having reviewed the evidence in the case, I am able to make the following findings which are relevant to this issue:

i) NP has lived in England for over 10 years;

ii) Some years ago, he acquired British Citizenship;

iii) In 2016, he purchased a property in London; he has retained this property; he has evidenced no intention to sell it;

iv) NP has been employed throughout the period in question, and continues to be employed (albeit working remotely), for the NHS at a London hospital in a senior role;

v) There is no dispute but that during 2019 (and indeed in the decade or so before that), he was living in England. He travelled to Bulgaria for two weeks in the late-summer 2019. On 18 December 2019 he travelled again to Bulgaria; I am satisfied that he journeyed there for a Christmas holiday; in fact, given the state of their relationship, TP chose not to travel with him;

vi) NP returned from Bulgaria to London on 5 January 2020. He travelled back to Bulgaria briefly (for about a week) for Maria's birthday in February 2020.

44. Mr Birch submitted that it was NP's intention to relocate to Bulgaria from a date prior to his return to England from his Christmas break, and that NP only remained in this country after February 2020 because the court had seized his passport, which was held by the Court's Tipstaff (from 16 March 2020) until November 2020. In this regard, Mr Birch placed very significant reliance upon a document which had been generated by the authorities in Bulgaria (from the "Population Register of Bulgaria") entitled "Certificate of Changed Current Address". This certificate showed that NP's "address" had been in "Great Britain" between 22 December 2011 and 3 January 2020, but that on 3 January 2020 it had changed to an address in Varna, Bulgaria. Mr Birch separately advised me that NP was planning to return to Bulgaria (in fulfilment of his plan to relocate there) on 20 March 2020, and he produced a budget flight ticket for that date to evidence this; notably there was no provision on the ticket for checked-in luggage in the hold, which one might have expected if he was planning a permanent relocation.

45. I am wholly unpersuaded that the evidence referred to in §44 above reveals that NP had shifted his habitual residence to Bulgaria in early 2020, or that he was habitually resident there at or about that time. I say so for the following reasons:

i) In his principal statement of evidence (16 April 2020) NP himself made the following points:

a) He described TP's suggestion that he may then wish to reside in Bulgaria as "false" and added (specifically in relation to the document now relied upon): "The sole reason why the Population Register of Bulgaria depicts my residence in Varna, Bulgaria as of this year is because I was advised that to allow the divorce, parental and custody disputes to be administered in Bulgaria, where the applicant lives with the child, I will need to temporarily be granted a residence address where court documents could be served. As my lawyer in Bulgaria is based in Varna, her address was registered to ensure all documents are fully and timely handled…" (Emphasis by underlining added);

b) He referred to the same document (the Population Register of Bulgaria) as "clearly depicting my long-term residence in the UK for 9 years now";

c) He referred to the fact that he filed for divorce and 'parental rights' in Bulgaria because this was "the country where the Applicant and the child reside, i.e., Bulgaria"; if by 4 February 2020 (the date of the Bulgarian petition) he was habitually resident in Bulgaria, or intending to be so resident, he would surely have said so;

d) He himself referred to a discussion with TP in September 2019, and his alleged "refusal" to sell his London apartment or give up his job with the NHS;

e) He said that he has initiated the divorce and custody proceedings in Bulgaria, because (a) it is the 'forum of convenience' for TP to resolve the matter; (b) the marriage took place in Bulgaria; (c) TP is a Bulgarian citizen and resident, and (d) NP holds double citizenship. Notably, he does *not* say that it is because he regards himself as habitually resident there;

f) He made it clear that he had no intentions of moving to Germany (as TP contented) "and have never said anything even close to this effect"; in disputing this assertion, he referred to the fact that he was employed at a London Teaching Hospital, and owns his own flat in London, in respect of which he was paying the mortgage. He confirmed his "permanent employment contract with long term notice period which is currently not subject to a termination"; he said that leaving his position in the London Teaching Hospital "is not an option";

g) He asserted that he has issued divorce and related proceedings in Bulgaria because the cost of proceedings and legal services in Bulgaria is lower than in England;

h) He asserted that the Passport Order was being used as a coercive measure and was unfounded "considering my strong connections and commitments in the UK".

ii) His position statement dated 1 September 2020 (which he prepared himself, and which appends a statement of truth and NP's signature) contained the following further relevant information (the statement is written in the third person):

a) Confirmation that he works "permanently in London" and at that stage was contemplating travelling to Bulgaria "to exercise parental rights" with Maria (i.e., not to live);

b) He described his "willingness and readiness to explore possible working arrangements" so that he could work (in London) "from distance" (Bulgaria);

c) "The Respondent (NP) underlines the fact that Bulgaria is also the country where not only the Child, but also the Applicant (TP) has her primary home and habitual residency" (N.B. he does not assert his own habitual residency there); this is a point which he repeated in a further statement on 21 September 2020;

d) "Bulgaria, therefore, is the country with which the Applicant has the closest long-term connection and where her centre of interests is" (N.B. he did not assert his own 'centre of interests' there).

46. Ms Guha further drew my attention to the following additional evidence:

i) On 9 January 2020, in conversation with the Bulgarian Social Services Directorate (according to a report published in Bulgaria), NP indicated that the "family lives" in England;

ii) In a personal statement to the Bulgarian Social Services Directorate on 10 January 2020, NP is reported to have said this:

a) "I have been living and working in England for 10 years…."

b) "We live in England in my personal place of residence, acquired before the marriage";

iii) The Plovdiv social services agency confirms: "[NP] has provided the information that he lives with his wife [TP] and his daughter in England."

47. It is highly material in my judgement that NP filed with the English Court in the wardship proceedings altogether no less than four statements/position statements between March 2020 and November 2020. In none of those statements did he indicate that he was planning to return to Bulgaria to live, and/or that he was being frustrated in this endeavour by the Court's intervention and the removal of his passport. It would plainly have been highly material to his application for the restoration of his passport to advise the court that he needed it in order to return to his native country to live. He did not do so. Instead, his statement sought to play down that he would be a 'flight risk' and – as indicated above – emphasised his connections with, indeed his 'centre of interests' in, London.

48. Having considered all of the above, I am wholly satisfied that as of 12 January 2020, NP was habitually resident in England; London was where NP had permanent connections, stability, and where he had established, on a fixed basis, his habitual centre of interests.

Attendance of the Bulgarian consul

49. I have been very pleased to welcome Ms Natasha Blajeva of the Bulgarian consulate who has observed this hearing. She has separately (by e-mail) invited me to consider a number of specific questions. The questions posed are focused specifically on Maria's circumstances, and would be relevant to a determination of her habitual residence, which I have (for the reasons set out above) resolved not to determine at this stage, if at all. In the circumstances, I do not propose to answer them in this judgment, but shall re-consider them if relevant when the wardship is restored before me for further consideration.

Conclusion

50. Drawing the issues together, I direct that an order should be drawn to this effect:

    i) The applications within the wardship shall be adjourned to await the Bulgarian Court's ruling on TP's application under the *1980 Hague Convention* after the hearing on 27 September 2021. A further Case Management hearing will be listed before me in October 2021; the parties are to file a translated copy of the ruling from the Bulgarian Court, together with position statements, for that hearing, but no other evidence;

    ii) There shall be leave, if required (see §39 above), to TP to amend her petition for divorce specifically to rely, for the purposes of establishing jurisdiction, on NP's habitual residence in England;

    iii) The stay on TP's petition shall be lifted, on the basis that:

        a) England is the court first seised of divorce process; the divorce petition was lodged with the court on 12 January 2020. This conclusion has separately been reached by the Bulgarian Court, who will be invited in the circumstances to decline jurisdiction now in accordance with *Article 19(3) BIIR*;

        b) Jurisdiction of the English court is 'established' by reason of NP's habitual residence in London at the relevant date.

51. That is my judgment.