Neutral Citation Number: [2021] EWHC 2898 (Fam)

Case No: FD20P00536

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 3 November 2021

Before :

MR JUSTICE MOSTYN

- -

Between :

SS **App**

- and -

MCP **Respo**

- -

- -

Ann Tayo (instructed by **IEC Solicitors**) for the **Applicant**

Anthony Metzer QC and Dr Charlotte Proudman (instructed by **Middlesex Law Chambers**) for the **Respondent**

Hearing date: 27 October 2021

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Approved Judgment

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MR JUSTICE MOSTYN

The court gives permission for this anonymised version of the judgment to be published. In no publication of this judgment may the identity of the child, or of her parents, be revealed. Breach of this prohibition will amount to a contempt of court.

In any report this judgment should be referred to as SS v MCP (No. 2)

Mr Justice Mostyn:

1.
The background to this matter is set out in my judgment dated 6 November 2020 ([2020] EWHC 2971 (Fam)). I then had before me the father's application dated 4 August 2020, which concerned the parties' daughter, a British citizen, then aged 3 years and 4 months who had been living in India with her maternal grandmother since October 2018.

2.
In Part 3 of his application the father sought the following orders:

“1. To bring back the child to the UK from India who is a British citizen or any other country where the child is confirmed to be in.

2. For the applicant (the father) to know whereabouts of the child and to have contact with the child.

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

3.
Thus, the father not only sought a return order but also sought an order for contact.

4.
In my judgment I held that the only possible ground of jurisdiction of this court over the child was Article 10 of the Brussels 2 bis Regulation.

5.
I referred the following question to the Court of Justice of the European Union:

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

Pending receipt of the answer to the question, I stayed the proceedings.

6.
The Court of Justice dealt with my question under the urgent preliminary ruling procedure. On 4 February 2021 the Court held an oral hearing, conducted remotely. On 23 February 2021 Advocate General Rantos delivered his opinion [1]. He answered the question positively. On 24 March 2021 the Court gave its judgment in which it answered the question negatively, disagreeing with the Advocate General [2].

7.
Specifically, the Court ruled, consistently with what I had provisionally decided in my judgment, that:

“Article 10 of [Brussels 2 bis] must be interpreted as meaning that it is not applicable to a situation where a finding is made that a child has, at the time when an application relating to parental responsibility is brought, acquired his or her habitual residence in a third State following abduction to that State. In that situation, the jurisdiction of the court seised will have to be determined in accordance with the applicable international conventions, or, in the absence of any such international convention, in accordance with Article 14 of that regulation.”

8.
It is not necessary for the purposes of this judgment for me to analyse the reasoning of the Court of Justice. I cannot improve on the summary in [2021] Fam Law 771 by Rebecca Bailey-Harris:

“The CJEU concluded that the special jurisdiction in Art 10 is confined to cases of abduction of the child from one Member State to another Member State. There was no justification for the provision's application to a case of abduction to a third State, not in the wording of the article, nor in its context, nor in the travaux préparatoires, nor in the overall objectives of Brussels IIA. Art 10 consists of a

single sentence and uses the expression 'Member State' and not the words 'State' or 'third State', implying that that it deals solely with jurisdiction in cases of child abductions from one Member State to another. Article 10 is a special ground derogating from the general rule of jurisdiction founded by Art 8 in the habitual residence of the child, and a special ground of jurisdiction must be interpreted restrictively. The EU legislature wanted to establish strict rules with respect to child abductions within the European Union, but did not intend those rules to apply to child abductions to a third State. In a case of child abduction the legislature wanted to strike a balance between the need to prevent the perpetrator of the abduction from reaping the benefit of his or her wrongful act and the value of allowing the court closest to the child to hear actions relating to parental responsibility. Furthermore, the extension of Art 10's operation to third states would run contrary to the objectives of the Hague Conventions of 1980 and 1996."

9.
There is no applicable bilateral treaty governing jurisdiction and recognition and enforcement of judgments in parental responsibility matters between United Kingdom and India. India is not a party to the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children. Article 7 of that convention, which is the counterpart of article 10 of Brussels 2 bis, does not retain jurisdiction in England and Wales as it only applies where the wrongful removal is to another contracting state – see article 7(3). It is my opinion that the reasoning of the Court of Justice must apply equally to article 7 of the 1996 Hague Convention.

10.
Therefore, the question whether England and Wales has jurisdiction is to be determined in accordance with article 14 of Brussels 2 bis. For the purposes of this case it provides merely that jurisdiction shall be determined in accordance with the laws of England and Wales.

11.
In my previous judgment I explained how there was no jurisdiction in this case under article 8 or article 12 of Brussels 2 bis. My view was that there was no jurisdiction under article 10; and that has now been confirmed by the Court of Justice. I explained that sections 1 – 3 Family Law Act 1986 did not, on the facts of this case add any possible additional jurisdictional grounds. At [43] – [48] I held that there was no scope for jurisdiction to be established, and relief granted, pursuant to the court's inherent powers in wardship. I had stayed all aspects of the proceedings pending the ruling from the Court of Justice; for that reason I did not then and there dismiss the wardship proceedings and de-ward the child.

12.
The question having been answered, and I having previously decided there was no other basis for founding jurisdiction, the case was listed for the father to be given a final opportunity to show cause as to why his application dated 4 August 2020 (seeking that the child be made a ward of court and an order for her return be made) should not be dismissed. Regrettably, it has taken an unduly long period of time for that application to be listed and heard.

Parens patriae

13.
Ms Tayo for the father makes a strong and eloquent plea that I should exercise the parens patriae jurisdiction, which the High Court retains as one of its inherent powers, to require the mother and the grandmother to return the child to this country. She did not stop there but went on to submit that, on

the return of the child, she should either live with the father or have substantial contact with him. In effect she is asking me to reconsider and to reverse my decision as to the inapplicability of the court's inherent powers in this case.

14.
In my judgment in GC v AS [2021] EWHC 14 (Fam) I sought to analyse this exceptional and anomalous residual jurisdiction at paras [56] –[74]. I will not repeat at any length what I said there particularly as the Court of Appeal in Re S (Children)(Inherent Jurisdiction: Setting Aside Return Order) [2021] EWCA Civ 1223 has considered that in some respects I fell into error.

15.
In GC v AS I ventured the opinion that a certain amount of confusion had crept into the parens patriae jurisprudence in consequence of the obiter opinions of the Supreme Court justices in Re B (A child) [2016] UKSC 4, [2016] AC 606. Those opinions were obiter dicta because in that case the majority decision was that the English court had jurisdiction based on habitual residence. There were however subtle differences of emphasis between the justices' opinions about the scope of the parens patriae jurisdiction.

16.
However, I noted that the later decision of the Court of Appeal in of Re M (A Child) [2020] EWCA Civ 922, [2020] 3 WLR 1175 was directly on the point. In that case the British child had been taken to Algeria when she was only one year of age and had lived there continuously with her father and her father's family for 12 years. The first instance Judge had exercised the parens patriae jurisdiction (there being no other ground of jurisdiction) and made a return order. The Court of Appeal set aside that order. At [140] Moylan LJ summarised his decision thus:

"…this was not a case in which, despite inevitable concerns which would remain as to A's situation in Algeria, it was appropriate for the English court to exercise its inherent jurisdiction. In summary, this is because the substantive threshold required to justify the exercise of the inherent nationality jurisdiction was not crossed in this case in that the circumstances did not require this court to act to protect A. In addition, I consider that the judge's order was wrong because, in effect, it conflicted with the limitations on the court's powers imposed by the 1986 Act and because the judge was not able properly to determine that his order was one which accorded with A's welfare needs." (original emphasis)

17.
That decision fully bound me in GC v AS. I noted there at [65], and I restate here, the following clear and compelling principles enunciated in the judgment of Moylan LJ:

i)
The use of the jurisdiction must be approached with great caution and circumspection (Re M at [104]).

ii)
There must be circumstances shown which are sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction [105]. This requirement constitutes a substantive threshold.

iii)

This substantive threshold is needed because a lower one based only on a welfare analysis of what is in the child's best interests would conflict with principle that the use of the jurisdiction must be approached with great caution and circumspection [106].

iv)
The statutory limitations in sections 1(1)(d), 2(3) and 3(1) of the Family Law Act 1986 support the conclusion that the inherent jurisdiction, while not being wholly excluded, has been confined to a supporting, residual role [107].

The last point echoes the observation of the Court of Appeal in Re B (A Child) (Habitual Residence) (Inherent Jurisdiction) [2015] EWCA Civ 886, [2016] AC 606, [2016] 2 WLR 487 at [38]: "the focus nowadays must be on the protective rather than the custodial aspect of the inherent jurisdiction".

18.
The central ratio of Re M is that the jurisdiction can only be used very cautiously and circumspectly. Moylan LJ spells out with pitiless clarity that its purpose is not simply to promote what the English court thinks is in the child's best interests; rather, there is an initial substantive threshold which must be surmounted. That threshold requires the applicant to prove the existence of sufficiently compelling circumstances to require or make it necessary for the court to exercise its protective jurisdiction. If, and only if, this threshold is surmounted can the court go on to consider broader questions of welfare.

19.
Re S (Children)(Inherent Jurisdiction: Setting Aside Return Order) [2021] EWCA Civ 1223 is the decision on the appeal against my decision in GC v AS. Moylan LJ was a member of the Court but the only judgment was given by Baker LJ. That judgment stated at [47] that I had "failed to deal adequately with the mother's additional application, advanced independently of the set aside application, asking the court to exercise its parens patriae jurisdiction." In developing that criticism Baker LJ makes a number of observations that taken alone might suggest that when dealing with such an application the court is "first and foremost" concerned with determining whether the exercise of the jurisdiction will promote the welfare of the children. See, for example [51], where Baker LJ refers to the court's function when exercising this jurisdiction as being to:

"decide what orders are required to secure the children's welfare"

and that:

"the 'first and foremost' assessment which the court [is] required to carry out is not the enforceability of its order but the welfare of the children."

And at [52] where he referred to:

"[the children's] welfare [which] is, as I have noted above, the first and foremost consideration."

20.
Further, in this part of his judgment there is no reference to Moylan LJ's substantive threshold which, as explained above, sets the bar much higher than a standard welfare enquiry.

21.
I cannot believe that Baker LJ was intending to water down, let alone abandon, the crucial importance of this substantive threshold which is set appreciably higher than a standard welfare analysis. Indeed, in [54] Baker LJ implicitly acknowledges the threshold, saying:

“…it is right that the court must guard against the inherent jurisdiction being improperly used to circumvent statutory limitations on the court's jurisdiction to make orders relating to the care of and contact with children, and that as a result the jurisdiction must be limited to compelling circumstances, this does not obviate the need for an assessment of the circumstances to establish whether, as the mother contends in this case, they are sufficiently compelling to require the court to exercise its protective jurisdiction.”

22.
As noted above, Lord Sumption described the jurisdiction as “exceptional and exorbitant.” At [51] Baker LJ disagreed with Lord Sumption’s use of language, saying:

“I observe that the pejorative word ‘exorbitant’ (used originally, I believe, by Thorpe LJ in Al Habtoor v Fotheringham, supra, and then by Lord Sumption in his dissenting judgment in In re B) does not represent the prevailing view about the jurisdiction held by the Supreme Court and this Court.”

23.
I doubt that Lord Sumption was using the word in a pejorative sense but rather in its literal, etymological, sense as meaning ‘off-track’. On any view the jurisdiction is off-track. He was surely just emphasising its exceptionality. The various judicial descriptions of its exceptionality are, I suggest, no more than semantics. Lord Sumption describes the jurisdiction as “exceptional and exorbitant”; Moylan LJ speaks of the jurisdiction being exercisable only where circumstances are “sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction”; Baker LJ says “the jurisdiction must be limited to compelling circumstances.” It all comes to the same thing.

24.
In my judgment I am duty-bound to apply Moylan LJ’s principles. It would be a major error for me to read Baker LJ’s judgment as directing a trial judge straight to a lower welfare analysis which may have the consequence of reducing to insignificance the exceptionality of the jurisdiction and the significance of the statutory prohibitions.

25.
I put it to Ms Tayo that the cases only reveal the exercise of this exceptional jurisdiction in a crisis where a child is at risk of harm of the type that would engage articles 2 or 3 of the European Convention on Human Rights. Thus, in Re M (Wardship: Jurisdiction and Powers) at [32] Sir James Munby P stated:

“Recognising that for all the reasons articulated in Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FLR 951, para 42, and, more recently, in Re N and in A v A, there is need for "extreme circumspection in deciding to exercise the jurisdiction", I have no doubt that the jurisdiction was properly exercised in both Re KR and Re B, just as I have no doubt that it can properly be exercised in the circumstances with which I am here faced. This is not the occasion, and there is no need for me, to explore the range of circumstances in which it may be appropriate to make a child who is outside the jurisdiction a ward of court. I merely observe that cases such as this demonstrate the continuing need for a remedy which, despite its antiquity, has shown, is showing and must continue to show a remarkable adaptability to meet the ever emerging needs of an ever changing world. I add that the use of the jurisdiction in cases where the risk to a child is of harm of the type that would engage Articles 2 or 3 of the Convention – risk to life or risk of degrading or inhuman treatment – is surely unproblematic. So wardship is surely an appropriate remedy, even if the child has already left the jurisdiction, in cases where the fear is that a child has been taken abroad for the purposes of a forced

marriage (as in Re KR and Re B) or so that she can be subjected to female genital mutilation or (as here) where the fear is that a child has been taken abroad to travel to a dangerous war-zone. There is no need for me to go any further, so I need not consider whether there are other kinds of situation where a child who is already abroad should be made a ward of court or whether wardship is an appropriate remedy where the risk to the child is of harm falling short of harm of the type that would engage Articles 2 or 3 of the Convention."

26.
It is noteworthy that in that case such caution was being exercised in respect of children over whom the court had primary jurisdiction based on habitual residence. Be that as it may, is clear that the President had in mind that a crisis must be underway before the jurisdiction should be exercised.

27.
To exercise the jurisdiction routinely, applying a simple welfare test, would be patronising and disrespectful of the court which has primary jurisdiction based on habitual residence. Such an approach assumes that the other place does not have a good enough legal system to protect and promote the welfare of children under its wing. It assumes that this country's system is superior and that the welfare of children can only be truly promoted if this country's laws and procedures are applied to them. It is a fundamentally chauvinistic approach. It is for this reason that I adhere to the concept of a substantive threshold, and I cannot accept that Re S says otherwise, whatever Baker LJ's comments might suggest.

28.
In this case there is little evidence about the child's circumstances, but none to suggest that she is in any way in such peril that one could say that the substantive threshold is surmounted. On the contrary there is no evidence by or on behalf of the father that there are circumstances here which are sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction. The mother has stated that she speaks to the child daily on WhatsApp and that she is thriving.

29.
Ms Tayo has painted a picture of India ravaged by Covid-19, which she likens to a war zone. She points to the fact that the grandmother is in her 70s and that her life may well yet be claimed by the pandemic, leaving the child effectively orphaned. There is no evidence of any of this. On the contrary the evidence, such as it is, suggests that the child has been brought up in entirely unremarkable circumstances. If the father wishes to make any application in relation to the child either for custody, or access, or that the child should be relocated to England, then he should litigate in the court of primary jurisdiction. I can take judicial notice, supported by the illuminating description of the Indian legal system by Mr Justice Cobb in J v J (Return to Non-Hague Convention Country) [2021] EWHC 2412 (Fam), that India has a fully functioning family justice system which is accessible by the father to make such applications concerning the welfare of the child as he considers appropriate.

30.
I agree with the submissions of Mr Metzer QC and Dr Proudman that this is an unremarkable domestic case which does not come near to surmounting the threshold.

31.
As I have explained above, Ms Tayo made it clear that her client's objective in seeking to invoke the parens patriae jurisdiction was not merely to have the child relocated back to England but also to seek orders providing for the child to live with him or otherwise to spend appreciable periods with him. I

therefore put it to Ms Tayo that the father was invoking the parens patriae jurisdiction as a preparatory step to obtain orders which are explicitly prohibited by the Family Law Act 1986. This was exactly the situation described by Lord Sumption in his judgment at [85] where he said:

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

32.
The statutory limitations are, needless to say, of the greatest importance. In Re B the Court of Appeal pointed out that the parens patriae jurisdiction cannot be exercised where the claim is for “care of… or… contact with” the child within the meaning of sections 1(1)(d)(i), and 2(3), that is to say a child who is neither under the jurisdiction of the courts of England and Wales pursuant to the 1996 Convention, nor habitually resident in England and Wales, nor present here. [3] It approved the decision of Ward J, as he then was, in F v S (Wardship: Jurisdiction) [1991] 2 FLR 349, where he considered whether it was nonetheless open to him to make a return order in respect of such a child. He held at 356:

“If proceedings in wardship were instituted, but … no application was made for care or control or for access, and where, by definition, no custody order was being sought, it could be argued that the habitual residence basis of jurisdiction did not apply. That would leave the court in wardship free to order the minor's return to the jurisdiction; once returned to the jurisdiction, the plaintiff could then apply for a custody order. Arguably, in that event, jurisdiction could arise on the ground provided by s. 2(2)(b), namely that the ward is present in England or Wales on the relevant date – the date of the new application – and the court considers that the immediate exercise of its powers is necessary for his protection. By this procedural device, the court might then make the custody order. But should that be permitted? Whilst this ancient prerogative jurisdiction survives, I shall scrupulously and rigorously enforce it where I can. Nevertheless, despite this reluctance to curtail my jurisdiction, I consider that to exercise these powers would be wrong, and that I cannot justify what could be a

devious entry to the court by the back door where Parliament has so firmly shut the front door to custody orders being made in these circumstances."

33.
It is clear from the judgment of Moylan LJ in Re M that the burden of surmounting the substantive threshold falls on the applicant. He has to show that there are circumstances here which are sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction. The burden is to demonstrate that a crisis has erupted and that in consequence the child has suffered, or is at risk of suffering, serious harm, of the type, as Sir James Munby P suggested, that would engage articles 2 or 3 (i.e. a threat to life or of inhuman or degrading treatment). In Re M (Wardship: Jurisdiction and Powers) the President stated that he did not need to consider whether the jurisdiction would be exercisable where the risk to the child is of harm falling short of harm of the type that would engage Articles 2 or 3 of the Convention. In my judgment, if Moylan LJ's substantive threshold is not to be robbed of meaningful content, the bar must be set at that level of harm. That level is not positioned at the "very extreme end of the spectrum" (see Re M at [105]) but rather at a point which rightly reflects the criteria of caution, circumspection and necessity. It also gives effect to the key underlying principle that the jurisdiction is protective in nature to be exercised in a supporting, residual role (ibid at [107]). I entirely agree with Baker LJ's comment in Re S at [52] that these observations by Moylan LJ are a general reflection on the (extremely limited) scope of the jurisdiction rather than a technical point about the need for some kind of alternative cause of action. I also agree with Baker LJ's observation, also at [52], that the function of the court is to make:

" … an assessment of the circumstances to establish whether, as the mother contends in this case, they are sufficiently compelling to require the court to exercise its protective jurisdiction."

This, too, suggests that the risk of harm must be set high before the jurisdiction can be lawfully exercised.

34.
The applicant has failed to discharge that burden. There is no evidence that a crisis has erupted and that the child is in such peril. In the absence of such evidence a return order would plainly amount to what Ward J described as a devious entry to the court by the back door where Parliament has firmly shut the front door, and to what Lord Sumption described as an improper exercise of the court's discretion. Indeed, inasmuch as the father seeks an order for contact in para 2 of his application he is not seeking a devious entry to the court via the back door. Rather, he is seeking to break down a very firmly locked front door.

35.
Even were I to apply a routine, and much lower, welfare test I cannot say that it has been shown that the interests of the child require her to be uprooted from her home where she has lived for the last three years. She is now aged four years and four months and so has spent virtually her entire sentient life living in her grandmother's home in India. The mother has advanced some strong allegations of domestic violence at the hands of the father which would need to be investigated very carefully before a return order based on welfare grounds could even be contemplated.

36.
If a return order were to be made, the risk of a later inconsistent judgment from an Indian court becomes very real. This is a vice which almost at all costs should be avoided.

37.

For all these reasons the father’s application dated 4 August 2020 is dismissed and the child shall cease to be a ward of court. The mother is granted permission to withdraw her application dated 26 June 2019, which I found to be completely misconceived in my previous judgment at para 32.

38.
That is my judgment.

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[1] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62020CC0603&from=en

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62020CJ0603&from=en

[3] There seems to be a drafting inconsistency in the inter-relationship of these provisions. Sec 2(3) says that the court shall not make a sec 1(1)(d) order unless either it has jurisdiction under the 1996 Hague Convention or, if it does not, where either the child is present in England and Wales or "the condition in section 3 is satisfied" (sec 2(3)(b)(i)). However, while sec 3(1) mentions the condition referred to in sec 2(1)(b)(ii), it does not mention any condition referred to in sec 2(3)(b)(i). Sec 2(3)(b)(i) appears to refer to a non-existent condition.