Neutral Citation Number: [2021] EWHC 3240 (Fam)
Case No: CRR 2021/04 and LV19P02410

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 03/12/2021

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

G **Appl**

- and –

K **Respo**

- -

- -

Mr Teertha Gupta QC and Ms Margaret Parr (instructed by **MSB Solicitors**) for the **Applicant**

Mr Henry Setright QC and Ms Emma Spruce (instructed by **Access Law**) for the **Respondent**

Hearing date: 2 November 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice MacDonald:

INTRODUCTION

1.
In this matter I am concerned with proceedings with respect to A, born in 2016 and now aged 5. A's mother is G (hereafter, "the mother"), the applicant and appellant in these proceedings. She is represented by Mr Teertha Gupta of Queen's Counsel and Ms Margaret Parr of counsel. A's father is K (hereafter, "the father"), the respondent in these proceedings. The father is represented by Mr Henry Setright of Queen's Counsel and Ms Emma Spruce of counsel. The following applications are before the court:

i)
The mother's appeal against the order registering the judgment of the Court of Appeal, St Denis, La Réunion dated 21 October 2020 made by made by District Judge Alun Jenkins on 6 July 2021.

ii)
The mother's application for orders in this jurisdiction under the Children Act 1989 issued on 14 March 2019.

iii)
The father's application for orders facilitating the enforcement of the registered French order of 21 October 2020, which provides for A to reside with him.

2.
The court has had the benefit of a court bundle containing the papers relevant to the father's application to enforce the order of the Court of Appeal on Réunion dated 21 October 2020 and the mother's application for orders under the Children Act 1989. A separate appeal bundle pertaining to the mother's appeal against the registration order dated 6 July 2021.

3.
Given the nature of the issues raised in the applications before the court, having heard submissions from leading and junior counsel I reserved judgment.

BACKGROUND

4.
The background to this matter is as follows. The parties commenced their relationship in 2010. At that time, the father lived in Belgium and the mother in England. The father obtained employment in La Réunion and the parties cohabited in Réunion from 2012. Réunion is an oversees département of France and is governed by French law. Then parties entered into a civil partnership in 2014. Neither the mother nor the father holds French nationality. As I have noted, A was born in Réunion, in October 2016. The parties' relationship broke down in August 2018.

5.
On 15 November 2018 the mother left Réunion with A without the consent of the father. The mother was refused entry into the United Kingdom in circumstances where the father had obtained orders from the court in Réunion preventing the mother removing A from that territory. On 28 November 2018, the father made an application to the court in Réunion for a determination in respect of parental rights. The mother made a cross-application in the same terms. On 21 December 2018 the High Court of Saint-Denis in Réunion made a order establishing joint custody and directed a welfare report.

6.
On 6 February 2019 the Family Court Judge of the High Court of Saint-Denis gave judgment. The court has before it a translation of the decision of the court. The court awarded residence of A to the mother and lifted the prohibition on the mother removing A from Réunion. The latter decision was made on the basis of the High Court's conclusion that the mother "must be free to settle where she wishes, insofar as her actions are not contrary to the child's welfare and are not intended to deprive the father of his rights." Within that context, the High Court concluded that there was nothing to prevent the mother from settling in England, her country of origin, if she wished to.

7.

As I have noted, the decision of the High Court of Saint-Denis rested its conclusion on the determination that the mother must be free to settle where she wishes provided, inter alia, her actions were not intended to deprive the father of his rights. Within this context, with respect to contact between the father and A, the order of the High Court provided that A was to spend two weeks every two months with the father until she commenced education, plus one month in July to August, and thereafter all half term holidays and half of school holidays. The order further permitted the father to have contact with A in England “freely” subject to him giving 15 days notice.

8.
The order of the High Court of Saint-Denis further noted that Art 373-2(3) of the French Civil Code required any change of residence by one of the parents that modified the terms of the exercise of parental responsibility must be the subject of notice to the other parent and, in case of disagreement, determination by the court. In addition, the order noted that all important decisions regarding residence were to be taken by the parents jointly and that any request to amend the provisions of the order was subject to a prior attempt at mandatory family mediation pursuant to Art 7 of the French Law of 18 November 2016, failing which an application to vary would be declared inadmissible.

9.
On 9 February 2019, the mother left Réunion for the jurisdiction of England and Wales. The father contends he was given little notice of this move. The mother and A have remained in England and Wales since that date. Some five weeks later, on 19 March 2019 and notwithstanding the terms of the order of the High Court of Saint-Denis dated 6 February 2021 regarding the requirement for mandatory family mediation prior to any application to vary the terms of that order, the mother made a without notice application to the Family Court sitting in Liverpool to vary the order made by the High Court and for a prohibited steps order under the Children Act 1989 to prevent the father from removing A from the jurisdiction of England and Wales. The application form alleged that there was a risk of abduction. However, the application also states that the father wished to take A for 15 days, which action was on the face of it consistent with the contact order made by the High Court of Saint-Denis on 6 February 2021 that A was to spend two weeks every two months with the father. In her first statement, the mother says she had changed her mind regarding the appropriateness of the level of contact she had agreed before the High Court and which that court had ordered.

10.
In the Form C1A that accompanied her application, the mother alleged domestic abuse against the father by way of him “trapping” her in Réunion in November 2018 and being verbally abusive to her. Exhibited to the mother’s statement is an email from the mother’s lawyer confirming that in December 2020 the Disciplinary Chamber of the Medical Board of La Réunion sanctioned two doctors for wrongly representing the position in respect of the mother’s mental health. The mother contends that the father, who is also a doctor, was the instigator of this conduct.

11.
The mother’s application came before District Judge Doyle on 15 March 2019 who, properly, declined to deal with it and re-allocated the matter to HHJ De Haas QC, then the Designated Family Judge for Cheshire and Merseyside. In doing so, District Judge Doyle rightly reminded the mother of the duty on a litigant making an application without notice to make known all matters relevant to the application, whether or not those matters support the making of the order sought. On 22 March 2019 HHJ De Haas QC declined to make an order on the grounds that the court had no jurisdiction to vary an order made by the High Court in Réunion having regard to the provisions of Art 9 of Counsel Regulation (EC) 2201/2003 (hereafter BIIa). Within this context, the contact between A and her father went

ahead for two weeks in March 2019 in London, the mother stating in her written evidence that she told the father that she had lost A's passport. A further period of two weeks contact took place in June 2019 in Réunion.

12.
On 17 July 2019, the day on which the father was due to collect A for summer contact pursuant to the terms of the order of the High Court of Saint-Denis of 6 February 2019, the mother issued a further application in the Family Court sitting at Liverpool, again seeking to vary that order. That application was again made without notice to the father, although the justification for this course taken by the mother is unclear. The mother's application dated 17 July 2019 asserted, in contrast to the earlier without notice application in March 2019, that there had not been any form of domestic violence and that there was no risk of child abduction. The grounds of the mother's application were that the order of 6 February 2021 was not working, was too vague and was having an emotional and physical impact on A's welfare based on her alleged response to contact with her father in March 2019.

13.
The statement of the mother in support of her application argued for a wholesale revision of the arrangements for contact put in place by the High Court in Saint-Dennis in the order of 6 February 2019. On 17 July 2019 HHJ De Haas QC made a prohibited steps order to maintain the status quo and listed a return date on 18 July 2019 to enable the father to be given notice. In the event, the father was served with the application with insufficient time for him to attend the hearing but was able to speak briefly with the mother's counsel. The father indicated that he wished to secure legal representation and requested an adjournment. Within this context, HHJ De Haas QC adjourned the matter until 16 August 2019 and continued the prohibited steps order preventing the father from removing A from the jurisdiction pending the further hearing. HHJ De Haas QC further directed that each party file and serve Skeleton Arguments addressing the question of whether the English Court had jurisdiction to vary the order made by the High Court of Saint-Denis dated 6 February 2019.

14.
The mother did not facilitate the contact between A and the father in July and August 2019 required by the terms of the order made by the High Court of Saint Denis. Within this context, beyond a short contact on 25 June 2021, the father has now had no substantive direct contact with A since October 2019, a period of over 2 years. In these circumstances, on 2 August 2019 the father lodged an application in the Family Division of the Court of Appeal of Saint-Denis in Réunion appealing the order of the court in La Reunion made on 6 February 2019. The father contends that this was done in response to the mother's refusal to comply with the contact provisions of that order.

15.
The mother's second application came before HHJ De Haas QC on 14 August 2019. On that date, the parties lodged a consent order which provided for the proceedings in this jurisdiction to be stayed for a period of 3 months to permit the parties to engage in mediation. Mr Gupta produced at this hearing the letter from the solicitors for the mother dated 12 August 2021 which enclosed the consent order. That letter informed the court that "the parties have agreed to engage in mediation in an attempt to resolve the issues outside the court arena". Within this context, the letter asked for the English proceedings to be adjourned with liberty to restore were mediation to be unsuccessful.

16.
This court has a copy of the consent order approved by HHJ De Haas QC dated 16 August 2019. The prohibited steps order was continued and that continuation was expressed to be "until agreement is

reached between the parties or further order". In the circumstances, the question of the jurisdiction or otherwise of the English court, on which HHJ De Haas QC had directed Skeleton Arguments on 17 July 2019, was left in abeyance. Within this context, I note again at this point that, as recorded in the order of 6 February 2019, it was a requirement of the Art 7 of the French Law of 18 November 2016 that the parties mediate as a condition of any application to vary the terms of that order.

17.
The matter returned to court on 25 November 2019 following mediation being unsuccessful. The mother sought to reinstate the proceedings in England and Wales. The father sought to for the proceedings in England and Wales to be adjourned or stayed pending the outcome of his appeal to the Court of Appeal in Réunion. Her Honour Judge De Haas QC again directed the parties to file and serve Skeleton Arguments as to the jurisdiction of the English court to vary the order of the High Court in Saint-Denis dated 6 February 2019. Within this context, on 7 January 2020 the mother submitted that her application was first in time (when compared to the father's appeal to the Court of Appeal in Réunion), that A was now habitually resident in England, that the father had engaged in the English proceedings and that his appeal to the Court of Appeal in Réunion was out of time. Against this, the father contended that the court was required to stay the proceedings pursuant to Art 19 of BIIa as his appeal remained extant before the court first seised on the original proceedings relating to parental responsibility in respect of the same child and involving the same cause of action.

18.
Having heard the parties, on 7 January 2020 Her Honour Judge De Haas QC adjourned the English proceedings to await the result of the outcome of the appeal to the Court of Appeal in Réunion. The order of the English court of 7 January 2020 records that the Court of Appeal in Réunion would consider the issue of competing jurisdictions. The English proceedings were adjourned again on 27 February 2020, on 6 May 2020, on 1 July 2020 and on 24 September 2020 pending the outcome of the appeal to the Court of Appeal in Réunion. The order of Cohen J dated 27 February 2020 recorded that the father disputed the jurisdiction of the English court having regard to the terms of Art 19 of BIIa. The orders of 6 May 2020 and 1 July 2020 contained the same recital.

19.
It is apparent from the papers before the court that, in addition to seeking to prosecute proceedings in this jurisdiction, the mother engaged fully in the appellate proceedings in Réunion and was represented in those proceedings. During the appellate proceedings the mother argued that the father had accepted the jurisdiction of England and Wales and, thus, that the Court of Appeal in Réunion should declare itself to lack jurisdiction. As a result of administrative delay, the father's appeal was not heard and determined until 21 October 2020. The father's appeal was successful and the order of 6 February 2019 was overturned. In its place, the Court of Appeal in Réunion made an order stipulating that A's main residence be with her father. This court has before it a translation of the French appellate decision. The following aspects of the decision fall to be noted within the context of the applications now before this court.

20.
The Court of Appeal in Réunion was expressly invited to deal with the mother's assertion that it lacked jurisdiction on the basis that the father had accepted the jurisdiction of the courts of England and Wales. Within this context, the Court of Appeal held that an objection based on jurisdiction must be raised in limine litis but that it had not in this case been raised before the court of first instance; that the mother was not assisted by the provisions of Art 9 of BIIa in circumstances where that provision concerned access rights and the issue on appeal was residence; that there was nothing on

the face of the order made by HHJ De Haas QC on 18 July 2019 that indicated the father had accepted the jurisdiction of the English court for the purposes of Art 12 of BIIa; and that the filing of the appeal by the father on 13 August 2019, before any hearing on the merits in the English court, supported the contention the father had not conceded jurisdiction. In these circumstances, the Court of Appeal in Réunion declared the mother's objection to the jurisdiction of the Court of Appeal to be inadmissible.

21.
By way of his appeal, the father further invited the Court of Appeal in Réunion to determine that the mother was, due to her obstruction of contact, interfering with the father's parental authority and, within that context, that it was in the best interests of A to establish A's main residence as being with the father. The father further sought to persuade the court that the provisions for contact between A and her mother should mirror those to which he was subject under the first instance order of 6 February 2019.

22.
It would appear that the father's appeal to the Court of Appeal in Réunion was by way of a re-hearing, the judgment being expressed as setting aside the judgment of the High Court of Saint-Denis and the Court of Appeal recording itself in its decision to be "ruling again". The appeal appears to have proceeded on submissions only. Within this context, the central reasoning of the Court of Appeal for granting the father's appeal is expressed as follows in the translation of the judgment before the court:

"Whereas it will be recalled that [the mother] had, in her submissions to the trial court, proposed the right of access and right to receive visits, which the trial court had accepted; whereas after several months she seems to have discovered that A was young and that that might cause her difficulties in adapting;

Whereas the mother's conduct reveals a real plan to be able to return to Great Britain under the best conditions for her; she thus proposed to the trial court that the separation be organized in the most balanced manner possible bearing in mind the distance, eliminating any risk of an unfavourable decision; after being able to leave (the prohibition from leaving the territory being lifted) without any difficulty, she has hastened to apply to the British Court for the father's rights to be restricted; the argument of disturbing the child appears to be fallacious since, as from 25 April 2019, she has refused to allow the father to exercise his right of access and right to receive visits, not on account of mental disturbance but under the pretext that the child's crèche wants the right of access and right to receive visits to be exercised during school holidays and that the child is having dancing lessons (at 2½ years of age) (email exchange: exhibit 25); for the October holidays, she claims as justification the failure to hand over the child's passport, which the latter had played with and lost (page 17 of the respondent's submissions), which, regarding a 3-year-old child, can only cause surprise, as it is somewhat unusual to leave such valuable identity documents within their reach apart from providing evidence of a negligent lack of supervision;

Whereas it would thus appear to be in the child's interests to have her residence established with her father who is more able to assume his parental duties and to respect the rights of the other parent;"

23.
On the foregoing basis, the Court of Appeal made the following order on 21 October 2020, which is the order that the mother now appeals against the registration of and the father now seeks to enforce:

"Consequently:

Sets aside the judgment pronounced in all its provisions;

Ruling again,

Establishes the main residence with the father;

ORDERS [the mother] to hand over the child's British passport and health record to [the father], subject to a provisional fine of €100 per day of delay, beyond a period of one month following service of this judgment, for a period of 90 days;

DECLARES that the mother shall exercise her right of access and right to receive visits by agreement between the parties and, failing that, according to the following procedure:

- Until the child starts compulsory schooling: 15 days every two months and one month in July and August;

- As from the time the child begins her schooling in Réunion Island, depending on the child's school calendar, half the short holidays and half the long school holidays, it being stipulated that the mother shall also benefit from a free right of access and right to receive visits when she goes to Réunion Island, provided she gives 15 days' notice;

DECLARES that the mother shall be responsible for collecting the child and for accompanying her up to 5 years of age, the age at which the airlines accept children traveling alone ([the father] will accompany the child to the departure flight from Réunion Island and will ensure that she boards the flight, and will then return to collect her on arrival;

DECLARES that [the father] will bear the cost of the child's travel connected with the mother's right of access and right to receive visits;

DECLARES that the holiday dates to be taken into consideration are those of the academy in Réunion Island;

DECLARES that there is no need to apply article 700 of the Code of Civil Procedure;

DECLARES that each party shall bear his or her own costs."

24.
Within the foregoing context, on 18 January 2021 His Honour Judge Sharpe reallocated the English proceedings to a Judge of the Family Division. HHJ Sharpe's order of that date again records that the father contested the jurisdiction of the English court to make welfare orders in respect of A, the operative order being that made by the Court of Appeal in Réunion on 21 October 2020.

25.
The mother lodged an appeal against the decision of the Court of Appeal in Réunion with the French Supreme Court, the Cour de Cassation, in January 2021. Within this context the proceedings in this jurisdiction came before Russell J on 1 February 2021 and were listed for a further hearing to be fixed following the decision of the French Cour de Cassation. The order of Russell J again makes clear that the father contested the jurisdiction of the English court to make welfare orders in respect of A. The matter was further adjourned by the order of Keehan J on 11 May 2021 as the outcome of the mother's appeal to the Cour de Cassation was still awaited.

26.

On 14 May 2021 the Cour de Cassation handed down judgment refusing the mother's application to appeal and upholding the decision of the Court of Appeal in Réunion of 21 October 2021. Once again, the court has before it a translation of the judgment of the Cour De Cassation. The mother argued before the Cour de Cassation that the English court had exclusive jurisdiction in respect of A having regard to Art 9 of BIIa; that the Court of Appeal in Réunion breached the requirement for impartiality in Art 6(1) of the ECHR in the manner in which it expressed itself regarding the mother in its judgment; that in determining that the mother was seeking to frustrate contact the Court of Appeal failed to consider the alternative contention that the mother was acting in A's best interests by limiting instances of long-haul travel; and that the Court of Appeal had failed to consult the social investigator's conclusions and the impact on A of separating her from her primary carer. However, the Cour de Cassation declared the mother's grounds of appeal "clearly not such as to allow the decision to be quashed" and stipulated that, pursuant to Art 1014 of the Civil Code no ruling on the specific grounds of appeal was required.

27.
Within the foregoing context, the French order of 21 October 2020 providing that A live with her father remains operative and in force. On 6 July 2021 District Judge Alun Jenkins registered the judgment of the Court of Appeal in Réunion and the order of 21 October 2020 (as pointed out by Mr Gupta on behalf of the mother, the accompanying Annex II Certificate misstates the date of the judgment and the order as 21 October 2021). The father now seeks enforcement of the same. By a Notice of Appeal issued on 16 August 2021 the mother appeals the registration order of 6 July 2021 on the grounds that (a) the decision taken by the Court of Appeal in Réunion on 21 October 2021, over 18 months after the mother lawfully relocated with A to the jurisdiction of England and Wales and without any further welfare enquiry, is manifestly contrary public policy and (b) the judgment was made without the opportunity for the child to be heard. As I have noted, the mother further seeks for welfare orders in respect of A to be made by this court on the grounds that A is now habitually resident in this jurisdiction and that the French courts are no longer seised.

28.
The court has before it a report from an expert in French Law on the question of lis alibi pendens authored by Alice Meier-Bourdeau, a lawyer at the Council of State and Court of Cassation, directed by order of Keehan J dated 2 July 2021. That report is dated 15 July 2021 and concludes, with admirable brevity, as follows:

i)
There has been no period between the commencement of the first instance hearing before the High Court of Saint-Denis, which led to the order of 6 February 2019, and the making of the order following the decision of the Cour de Cassation in which the French Court was not seised of proceedings.

ii)
The filing of an appeal does not have a suspensive effect on the order being appealed where that order constitutes a measure relating to the exercise of parental responsibility having regard to Art 1074-1 of the French Civil Code, meaning that the order can be enforced notwithstanding the appeal.

iii)
The appellate order of the Court of Appeal in Réunion did not have retrospective effect but was effective from the date it was delivered.

iv)

Upon the appeals process being exhausted following the making of the order following the decision of the Cour de Cassation, the French Court ceased to be seised, the order being made by the Cour de Cassation on 14 May 2021.

SUBMISSIONS

The Mother

29.
The mother's case is advanced on two fronts. First, the mother seeks to establish that at the time the Court of Appeal in Réunion made its order on 21 October 2020 it did not have substantive jurisdiction in respect of A but, rather, the English court had jurisdiction. Second, and as I have noted, the mother appeals against the order of 6 July 2021 registering the order of the Court of Appeal in Réunion. Within this latter context, the mother seeks for this court to make welfare orders in respect of A.

30.
With respect to the jurisdiction of the Court of Appeal in Réunion the mother submits that at the time she issued her application in the English court on 19 July 2019 A was habitually resident in this jurisdiction. In this respect, the mother relies on the fact that the High Court of Saint-Denis gave her permission to remove A to Réunion and, therefore, that removal was lawful. In this regard, Mr Gupta and Ms Parr pray in aid the decision of the House of Lords in In Re KL (A child) [2013] UKSC 75. Whilst conceding that Art 9 of BIIa would have maintained jurisdiction with the court in Réunion with respect to access rights for a period of 3 months, Mr Gupta and Ms Parr point to the fact that this period had expired by the time the mother made her application.

31.
The mother further submits that in circumstances where, on the mother's submission, A gained habitual residence in England and Wales upon her lawful arrival in this jurisdiction, the operation of Art 8 of BIIa 'trumps' the operation of the lis pendens provisions of Art 19(2) with respect to proceedings relating to parental responsibility, again depriving the Court of Appeal in Réunion of jurisdiction in respect of A as at 21 October 2020. In support of this submission, Mr Gupta and Ms Parr point to the fact that Art 19 is not one of provisions of BIIa to which the operation of Art 8(1) is expressly subject under the provisions of Art 8(2). In the alternative, they submit that it is unclear how Art 8 and Art 19 interact when child's habitual residence for the purposes of Art 8 changes during the currency of the lis under Art 19. Within this context, Mr Gupta raised the possibility of a referral being made to the CJEU on this question. I am satisfied this is not necessary for reasons I will come to.

32.
The mother in any event seeks to persuade this court that the Court of Appeal in Réunion did not have jurisdiction to make the order it did on 21 October 2020 by reason of the fact that the parents had prorogued jurisdiction pursuant to Art 12 of BIIa. The mother submits that the parents prorogued by way of entering into the consent order approved by HHJ De Haas QC on 14 August 2021 providing that the English proceedings would be adjourned for three months to permit mediation and a prohibited steps order would continue in force during that period.

33.
With respect to the appeal of the registration order of 6 July 2021, Mr Gupta and Mr Parr submit that (a) the decision taken by the Court of Appeal in Réunion on 21 October 2021, over 18 months after lawfully relocated to the jurisdiction of England and Wales and without any further welfare enquiry, is

manifestly contrary public policy and (b) the judgment was made without the opportunity for A to be heard. Within this context, the mother submits that the grounds of non-recognition for judgments relating to parental responsibility in Art 23 of BIIa are made out, specifically those in Art 23(a) and Art 23(b).

34.
In their oral submissions, but not in their Skeleton Argument, Mr Gupta and Ms Parr further contended that to enforce the French order would represent a disproportionate interference with A's Art 8 rights in circumstances where she is a five year old child who has been in the care of her mother in England for nearly three years. Within this context, Mr Gupta and Ms Parr submit the court is under a positive duty to ensure the efficacy of A's Art 8 rights, which can be achieved in this case only by ensuring she is not subjected to the upheaval that would come from now enforcing a French order made, on the mother's submission, without any or any sufficient welfare analysis or account of A's wishes and feelings.

35.
Finally, and within the foregoing context, Mr Gupta and Ms Parr invite the court to take the approach to a case involving an enforcement application alongside a welfare application outlined by the Court of Appeal in Re E (BIIa: Recognition and Enforcement) [2020] EWCA Civ 1030 where the foreign court is no longer seised of proceedings in respect of the subject child. In this regard Mr Gupta and Ms Parr rely on the conclusion of the expert in French law that, upon the appeals process being exhausted following the making of the order following the decision of the Cour de Cassation, the French Court ceased to be seised, the order being made by the Cour de Cassation on 14 May 2021. I will consider the approach taken in Re E (BIIa: Recognition and Enforcement) in more detail below.

The Father

36.
The father submits that the French courts retained jurisdiction in respect of A at all material times and that, accordingly, as at 21 October 2020, the Court of Appeal in Réunion had jurisdiction to make the welfare orders that it did.

37.
Within this context, the father does not accept that by 17 July 2019, when the mother issued proceedings in the English court, A was habitually resident in this jurisdiction. The father contends that the decision of the House of Lords in In Re KL (A child) can be readily distinguished from the present case in circumstances where it concerned a return to this jurisdiction pursuant to an incorrectly made return order under the 1980 Hague Convention and not a substantive welfare decision engaging BIIa. Within this context, Mr Setright and Ms Spruce submit that In Re KL (A child) cannot provide a valid analogy in this case in circumstances where, had BIIa been operative in that case the resulting lis under Art 19 would have led to a very different jurisdictional outcome.

38.
With respect to the effect of Art 19 of BIIa and its inter-relationship with Art 8 of that Regulation, on behalf of the mother it is submitted that Art 19 is engaged in circumstances where the proceedings in Réunion both relate to A and to the same cause of action, namely her residence. Within this context, Mr Setright and Ms Spruce submit that the English court was obligated to defer to the French court during the currency of the lis and that the former should have stayed its proceedings.

39.

Mr Setright and Ms Spruce further submit that even had A's habitual residence changed following her arrival in this jurisdiction (which is not accepted by the father), pursuant to Art 19 a lis continued to operate notwithstanding that position for the currency of the French proceedings. In this respect, they note that, unlike the 1996 Hague Convention, BIIa operates the principle of perpetuatio fori and that, as such, the jurisdiction of the court continues during the currency of the lis notwithstanding a change of habitual residence. Within this context, the father once again relies on the fact that, following the making of the French order in her favour, and with the French lis continuing to run, the mother affirmed her participation in the proceedings in Réunion, having engaged in the first appeal and, in due course, herself launching a second appeal to the Cour de Cassation.

40.
With respect to the mother's assertion that the father prorogued jurisdiction by his agreement to the making of the consent order dated 16 August 2019, Mr Setright and Ms Spruce remind the court that the consent order was made at a hearing without the parties or their legal representatives in attendance. Further, they submit that the 'consent' evidenced in that order was simply in respect of an agreement to mediate. In particular, Mr Setright and Ms Spruce submit that there is nothing on the face of that order, as would be required, that indicates that jurisdiction had been 'expressly' or 'unequivocally' accepted by the father, still less is there any reference to Art 12 of BIIa, and that had the mother wished for prorogation she should have sought the same from the father expressly. Finally, it is submitted on behalf of the father that the Court of Appeal in Réunion was invited to, and did, deal expressly with the mother's assertion that the father had accepted the jurisdiction of England and Wales and determined that he had not. Within this context, Mr Setright and Ms Spruce submit that this conclusion, made in inter partes appellate proceedings in which the mother fully participated in the Member State of jurisdiction, and preceding in time any assertions made by the mother to this court, is conclusive of the question of prorogation.

41.
In response to the mother's submissions in support of her appeal against the registration order of 6 July 2021, Mr Setright and Ms Spruce submit that, in respect of Art 23(a) of BIIa, the public policy ground is expressly exceptional in its nature, with a specific threshold. Within this context, they submit that the registration of the order (which order has been considered by both the Court of Appeal and the Supreme Court in France in inter partes hearings with the full engagement of the mother to be the correct order) cannot fit within the narrow confines of Art 23(a) as being manifestly contrary to the public policy of this jurisdiction. Further, Mr Setright and Ms Spruce submit that the same conclusion is reached when cast in terms of A's welfare, in circumstances where it is, they submit, clear from the French judgment in the Court of Appeal that the court heard arguments and reached a decision primarily motivated by considerations of welfare. Within this context, it is submitted on behalf of the father that the mother was able to advance any welfare arguments that she considered appropriate at both levels of appellate court in the French proceedings, that A and her father already enjoy a relationship and that the father has presented the court with details as to his plan for A were she to return with him to Réunion.

42.
With respect to the impact of the delay in the appellate process in France reaching its conclusion, Mr Setright and Ms Spruce rely on the decision of Holman J in Re N (A Minor) [2014] EWHC 749 (Fam) as authority for the proposition that delay caused by an appeal process will not establish the high threshold set by Art 23(a).

43.

With respect to Art 23(b) of BIIa, Mr Setright and Ms Spruce submit on behalf of the mother that, in circumstances where A was aged 2 years and 3 months at the first instance decision of the High Court of Saint- Denis and aged 3 at the appeal hearing in Réunion which produced the French order dated 21 October 2020 that the father seeks to register and enforce, A was too young for her wishes and feelings to have been ascertained directly. Further and in any event, if she was denied the opportunity to be heard, Mr Setright and Ms Spruce submit that in the context of her age and concomitant degree of her maturity and communication skills, this situation cannot be said to have been a violation of fundamental principles of procedure of the Member State in which recognition is sought, namely England and Wales.

44.
Mr Setright and Ms Spruce submit that the tension that the mother seeks to set up between the consequence of the French appellate process and the Art 8 rights of A is an entirely illusory one in circumstances where the French court was seised at all times with A's welfare in the jurisdiction of the child's habitual residence and the mother participated fully in those proceedings, deploying such arguments with respect to A's welfare as she considered appropriate.

45.
In the foregoing circumstances, on behalf of the father, Mr Setright and Ms Spruce submit that the French court was responsible for making welfare decisions in respect of A, the French court has determined that A should be living in Réunion with the father, the mother has engaged with that process throughout, has unsuccessfully challenged it both as to jurisdiction and substance and has thus far failed to comply with the resulting order, making the father's application necessary.

46.
With respect to the decision of the Court of Appeal in Re E (BIIa: Recognition and Enforcement) [2020] EWCA Civ 1030 relied on by the mother, Mr Setright and Ms Spruce seek to distinguish that decision from the present case on the grounds that in Re E (BIIa: Recognition and Enforcement) the foreign court was no longer seised of proceedings in respect of the child. Within this context, Mr Setright and Ms Spruce note that the mother has never sought to advance her appeal on Arts 23(e) or 23(f) of BIIa.

47.
Finally, with respect to the enforcement of the order, Mr Setright and Ms Spruce submit that it is open to the court to put in place, on making orders with a view to enforcing the French order, provisions that ensure a 'soft landing' for A in Réunion, the father proposing that A returns to that jurisdiction during the December school holidays with the mother, with transition to the father's care pursuant to the French order taking place over the course of that holiday, and with the father being faithful to the contact provisions of the original order of the High Court of Saint-Denis that previously regulated contact between himself and A.

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48.
In circumstances where the sets of proceedings with which this court is concerned were each commenced prior to 11pm on 20 December 2020, BIIa continues to be engaged in this matter notwithstanding the departure of the United Kingdom from the European Union. The relevant general jurisdictional provisions of Chapter II section 1 of BIIa for the purposes of the mother's submissions with respect to the jurisdiction of Court of Appeal in Réunion are as follows:

“**Article 8**

General jurisdiction

1. The courts of a Member State 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.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.

Article 9

Continuing jurisdiction of the child's former habitual residence

1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.

2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.

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.

Article 12

Prorogation of jurisdiction

1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

2. The jurisdiction conferred in paragraph 1 shall cease as soon as:

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;

(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;

(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

4. Where the child has his or her habitual residence in the territory of a third State which is not a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question.”

49.
Finally, within the foregoing context, paragraph [12] of the preamble to BIIa provides as follows with respect to the jurisdictional provisions of the Regulation:

“(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.”

50.
The habitual residence of a child is a question of fact, being the place which reflects some degree of integration by the child in a social and family environment (see A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening) [2014] AC 1). With respect to the question of habitual residence following a lawful move from one jurisdiction to another, in Re LC [2014] UKSC 1, Lord Wilson noted that where a child of any age goes lawfully to reside with a parent in a state in which that parent is habitually resident, it will be highly unusual for that child not to acquire habitual residence there. In the case of Mercredi v Chaffe (Case C497/10PPU) [2012] Fam 22, relied on by Lord Wilson in Re LC, the CJEU noted that, as a general rule, the environment of a young child is essentially a family environment determined by the reference person or persons with whom the child lives, by whom the child is in fact looked after and taken care of and that this is even more true where the child concerned is an infant as an infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Finally in J (A Child) (Finland) (Habitual Residence) [2017] EWCA Civ 80 the Court of appeal held that assessment of a child's habitual residence after permanent relocation under BIIa requires consideration of the child's circumstances both prior to and following relocation. Within this context, in J (A Child) (Finland) (Habitual Residence) Black LJ (as she then was) noted that a lawful basis for a child going to live in another jurisdiction is one factor that may remove the sort of insecurity that might attend an unauthorised move, and which might interfere with integration in the new country, albeit all cases fall to be decided on their own facts.

51.
In order for there to have been a prorogation of jurisdiction, Art 12 requires the jurisdiction of the relevant court to have been “accepted expressly or otherwise in an unequivocal manner…by the holders of parental responsibility”. The domestic authorities with respect to Art 12 of BIIa make clear need for an unequivocal acceptance of jurisdiction by the holders of parental responsibility. Within this context, I note that in Re A (Removal Outside Jurisdiction: Habitual Residence) [2011] 1 FLR 2025 the Court of Appeal held that the fact that the question of the residence of the child remained in issue between the parties acted to prevent there being an “unequivocal” acceptance of jurisdiction. In this regard, Munby LJ (as he then was) held as follows at [46]:

“The acceptance need not be 'express' – it may be 'otherwise' – but it must be 'unequivocal'. How can it be said that the father was unequivocally accepting the jurisdiction, when the entire debate before the President was on the question – the jurisdictional question – of whether or not the twins were habitually resident here? On this simple ground, as it seems to me, the attempt to bring this case within Art 12(3) necessarily founders.”

52.
The “Common provisions” from Chapter II, Section 3 of BIIa that are relevant to the mother’s submissions as to the jurisdiction of the Court of Appeal in Réunion are as follows:

“**Article 16**

Seising of a Court

1. 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.

Article 17

Examination as to jurisdiction

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.

…/

Article 19

Lis pendens and dependent actions

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.

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."

53.
During the course of submissions, Mr Gupta and Ms Parr sought to establish that a change of residence of the subject child acted, in circumstances where Art 8 is not expressed to be subject to the operation of Art 19, to 'trump' the operation of the lis pendens provisions of Art 19(2) with respect to proceedings relating to parental responsibility. Within this context, and as I have noted, Mr Gupta and Ms Parr relied on the decision of the Supreme Court in In Re KL (A child).

54.
That case concerned a child brought to the jurisdiction of England and Wales pursuant to a return order made in the United States under the 1980 Hague Convention that was subsequently overturned on appeal and an order made for the child's return to the US. In circumstances where the Supreme Court declined to criticise the decision of the first instance judge that the child was now habitually resident in England, the court held that it was open for the domestic court to decide whether it was in the child's best interests to remain in this jurisdiction notwithstanding the order made following the

successful appeal in the US. In determining to return the child to the US, Baroness Hale concluded as follows at [36]:

“[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.

[37] Despite the passage of time, there is not the slightest reason to consider that K would suffer any significant harm by returning to Texas on the basis proposed by the father. Indeed, the mother did not defend the Convention proceedings on the basis either of his objections or of a risk of harm should he be returned (although she did suggest that he had been settled here so long that to return would place him in an intolerable situation). Had it not been for our decision on habitual residence – which I accept that courts in some jurisdictions might consider debateable, it would have been our duty to return K to Texas under the Convention.”

55.
The case of In Re KL (A child) is however, distinguishable from the instant cases on a number of grounds. In particular, the case did not concern the operation of the provisions of BIIa as between Member States. Within this context, and most importantly, the question of the existence of, and the effect of a lis under BIIa did not arise in In Re KL (A child).

56.
Whilst habitual residence is a question of fact, whether that fact of habitual residence grounds the jurisdiction of the court is a question of law. Just because, as a matter of fact, a child is habitually resident in a country jurisdiction does not automatically mean that that country has a jurisdiction it can exercise. Rather, the conclusion as to jurisdiction will depend on the application of the relevant legal principles to the fact of habitual residence. Within this context, and as is plain on their face, Art 8 and Art 19 are concerned with different things. Art 8 provides one of a number of bases (set out in Arts 8, 9, 10, 13 and 14 of BIIa) on which a court may establish jurisdiction under BIIa, namely the fact of habitual residence. Art 19 however, is concerned with which court is first seised of proceedings and which court, therefore, should first have the opportunity to establish its jurisdiction on one of the bases provided for in BIIa, during which time a court second seised is mandated to stay its proceedings.

57.
Within the foregoing context, in Re G (A Child) [2014] EWCA Civ 680 at [32] Black LJ (as she then was) made clear that the operation of Art 19 of BIIa does not depend on the question of which court has jurisdiction (whether under Art 8 or otherwise) but rather which court is first seised:

“[32] The obligation of the court second seised to stay its proceedings under Article 19(2) is not dependent on the court first seised actually having jurisdiction. What matters for Article 19(2) is the sequence in which the courts were seised. The question of whether the court first seised has jurisdiction is then addressed in that court and if it is established, the court second seised declines jurisdiction in favour of that court (Article 19(3)).”

58.
In the foregoing circumstances, on the question of the extent to which the various bases of jurisdiction set out in BIIa, including that of habitual residence under Art 8, are subject to the provisions of Art 19, in Dicey, Morris & Collins, Conflict of Laws, 15th ed. the following analysis is provided at 19-038:

“In keeping with European practice, the bases of jurisdiction in the Brussels IIa Regulation are subject to a lis pendens clause which provides that where proceedings relating to the same child and involving the same cause of action are brought before the courts of different Member States, then 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.”

59.
Also of relevance with respect to the question of the interrelationship between Art 8 and Art 9, Dicey, Morris & Collins make the following observation at 19-040 regarding the impact of the principle of perpetuatio fori operated by BIIa on the subsistence of the jurisdiction when established by the court first seised:

“As is the case in domestic practice, the Regulation abided by the principle of perpetuatio fori, that is to say, once validly seised a court will retain its jurisdiction until proceedings are completed. Consequently a child may relocate from a Regulation State, but proceedings will nevertheless continue in the former state of habitual residence until they are completed or a transfer made under Art 15.”

60.
With respect to the effect of an appeal on the foregoing position, in Case C-296/10 Purrucker v Vallés Pérez (No 2) [2011] Fam 312 at [72] and [73] the Court of Justice of the European Union held as follows with respect to Art 19(2) of BIIa:

“[72] Lis pendens within the meaning of article 19(2) of Regulation No 2201/2003 can therefore exist only where two or more sets of proceedings with the same cause of action are pending before different courts, and where the claims of the applicants, in those different sets of proceedings, are directed to obtaining a judgment capable of recognition in a member state other than that of a court seised as the court with jurisdiction as to the substance of the matter.

[73] In that regard, no distinction can be drawn on the basis of the nature of the proceedings brought before those courts, that is, according to whether they are proceedings for interim relief or substantive proceedings. Neither the concept of “judgment”, defined in article 2(4) of Regulation 2201/2003, nor articles 16 and 19 of the Regulation relating, respectively, to the seising of a court and lis pendens, indicate that the Regulation makes such a distinction. The same is true of the provisions of Regulation No 2201/2003 relating to recognition and enforcement of judgments, such as articles 21 and 23 thereof.”

61.
Within this context, I further note that in Moore v Moore [2007] EWCA Civ 361 the Court of Appeal held at [103], in the context of the similarly worded Art 27 of Brussels I and with respect to the effect of an appeal against a decision to decline jurisdiction, that:

“The effect of an appeal from a decision by the court first seised that it has no jurisdiction does not appear to be settled by authority: cf Dicey, Morris & Collins, Conflict of Laws, 14th ed. 2006, paras

12-047, 12-062; Briggs and Rees, Civil Jurisdiction and Judgments, 4th ed 2005, para 2.205. It is true that a judgment for the purposes of Brussels I is final even if an appeal is pending: e.g. Articles 37 and 46. But the object of Article 27 is to prevent irreconcilable judgments, and as a matter of policy it would be very odd if proceedings in the court second seised could continue even if on appeal the jurisdiction of the court first seised is established. Consequently, we consider (contrary to the view of the judge) that Article 27 applies until the proceedings in the court first seised are finally determined in relation to its jurisdiction. That would mean that the expression in Article 27.1 "until such time as the jurisdiction of the court first seised is established" should be interpreted to include the case where the court first seised has declared that it has no jurisdiction, but an appeal is pending against that decision, and that it would be unsatisfactory for the matter to be dealt with through a discretionary stay in the court seised second."

62.
Within this context, the authorities suggest that a loss of jurisdiction by the court first seised will only occur when the court first seised brings proceedings under a properly established jurisdiction to an end, including any appellate process, at which time the court second seised can correctly assume jurisdiction (see C v S (Divorce: Jurisdiction) [2011] 2 FLR 19 and A v B [2016] 1 FLR 31). I discuss the consequences of this situation further below when considering the decision of the court of appeal in Re E (BIIa: Recognition and Enforcement).

63.
With respect to law applicable to the mother's appeal against the order registering the judgment of the Court of Appeal in, the recognition and enforcement provisions from Chapter III, Sections 1 and 2 of BIIa that are relevant to the issues before this court are as follows:

"**Article 21**

Recognition of a judgment

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. In particular, and without prejudice to paragraph 3, no special procedure shall be required for updating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State.

3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised. The local jurisdiction of the court appearing in the list notified by each Member State to the Commission pursuant to Article 68 shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.

4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.

…/

Article 23

Grounds of non-recognition for judgments relating to parental responsibility

A judgment relating to parental responsibility shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

or

(g) if the procedure laid down in Article 56 has not been complied with.

Article 24

Prohibition of review of jurisdiction of the court of origin

The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.”

…/

Article 26

Non-review as to substance

Under no circumstances may a judgment be reviewed as to its substance.

Article 28

Enforceable judgments

1. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland only when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

64.
Within the foregoing context, paragraph 21 of the preamble to BIIa provides as follows with respect to the application of the provisions relating to recognition and enforcement:

“(21) The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.”

65.
The exception contained in Art 23(a) of BIIa should only operate in exceptional circumstances. In Case C-7/98 Bamberski v Krombach [2001] QB 709 the CJEU held in relation to the similar provision in Brussels I that:

“[37] Recourse to the public policy clause in article 27(1) of the convention can be envisaged only where recognition or enforcement of the judgment delivered in another contracting state would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought in as much as it infringes a fundamental principle.”

66.
In Re L (Brussels II Revised: Appeal) [2013] 2 FLR 430 the Court of Appeal again emphasised at [46] that Art 23(a) of BIIa “contains a very narrow exception and, consistently with the entire scheme of [BIIa] and with the underlying philosophy spelt out in Recital (21), sets the bar very high”. In Re P [2016] 1 FLR 337 the CJEU held that the court is not entitled under Art 23(a) to refuse to recognise the judgment in the absence of a manifest breach (having regard to the best interests of the child) of a rule of law regard as essential in the legal order of a Member State or of a right recognised as being fundamental within that legal order. A mere error of law will not suffice to establish that a judgment is contrary to public policy. Within this context, the test is public policy not welfare as such, still less the paramountcy of welfare itself (see Re N (Abduction: Brussels II Revised) [2015] 1 FLR 227).

67.
Within the foregoing context, in LAB v KB (Abduction: Brussels II Revised) [2010] 2 FLR 1664 Roderic Wood J held as follows at [32] with respect to the question of the extent to which welfare factors might be capable of meeting the very narrow public policy exception contained in Art 23(a) of BIIa:

“Further, I would venture the comment that whilst Holman J accepted that there might be circumstances where the 'order of a foreign court is so strongly contrary to the welfare of the child that its recognition was manifestly contrary to the public policy of our state' I consider that such cases would be extremely rare, and that the consequences for the children of recognition and enforcement, though these are separate stages from each other, would have to be of the utmost seriousness. I do not consider it necessary, appropriate or wise to attempt to give examples.”

And at [36]

“In Re S (Brussels II Revised: Enforcement of Contact Order) [2008] 2 FLR 1358 I was considering issues of recognition and enforcement under the Regulation of a Polish court order in circumstances vastly different from those operating in the case I am now considering. Without going into elaborate detail, the differences between the two may be illustrated by just one reference to the order that was

there being sought to be enforced, I having decided that it should be registered. It was a consent order made by a Polish court on the basis of what they were told was the full consent of the mother and the father to the arrangements therein proved by that court. In fact, the mother was entertaining a grotesque fraud on the father and the court and was only ostensibly consenting to the order decreeing, amongst other things, extensive contact between father and daughter on the basis that it would give her opportunity, which she quickly availed herself of, of fleeing the country with the child and disappearing for as long as she could. I shall, despite the factual differences, nevertheless take the liberty of citing a brief passage from it to illustrate the all too obvious point that there may come a time when an order of a Member State is so stale (Miss Meyer's submission here) that, coupled with a variety of other powerful factors, a court would have to take a view in the light of welfare considerations as to whether or not that order should be recognised and/or enforced. Yet such a court would, in my judgment, remain powerfully constrained in so considering such an order by the necessary consideration of those matters set out in Art 23 of the Regulation, and would not readily or easily depart from the underlying principles of the Regulation."

68.
In Re L (Brussels II Revised: Appeal) the Court of Appeal also considered the type of circumstances that might meet the very high hurdle set by Art 23(a) of BIIa:

"[55] Although the circumstances said to bring Art 23(a) into play have to be evaluated 'taking into account the best interests of the child', one can envisage circumstances in which Art 23(a) could apply if, for example, there had been a manifest failure to comply with some fundamental principle of procedure resulting in an egregiously unfair trial. In that sense there can in principle be an overlap between Art 23(a) on the one hand and Arts 23(b) and (d) on the other. So far so good. Let it also be assumed, as I am content to assume, that Macur J's factual findings in relation to the mother as I have set them out above were securely founded in evidence she was entitled to accept.

[56] None of that, however, begins to make good the proposition that Macur J was justified on the basis of those findings in concluding that the case fell within Art 23(a). With all respect to Macur J I simply fail to see how, in the circumstances as she has found them, it could be manifestly contrary to public policy to recognise the judgment of the Portuguese court. On the contrary, to take this course is, in truth, to embark, impermissibly and in breach of Art 26, upon a review as to its substance. Accepting, as I do, that manifest breaches of fundamental principles of procedural fairness can in principle engage Art 23(a), the fact is that this case, insofar as it is based on the mother's complaints about the process in Portugal or on the state of her emotional and mental health, falls far short of what is required to bring Art 23(a) into play."

69.
In Re D (Recognition and Enforcement of Romanian Order) [2015] 1 FLR 1272 Peter Jackson J (as he then was) held as follows with respect to the question of whether the adverse impact on the child of a change of residence would meet the imperative of Art 23(a):

"[73] I agree with Ms Renton that this case does not engage Art 23(a) of BIIR. It is of course possible to envisage a decision so ridiculous in child welfare terms that it would offend public policy. For example, this might arise if the beneficiary of the order was a gangster, a drug addict or a paedophile. Such a decision would be so offensive to the court's conscience that the Article would most likely be engaged. Here, however, even though a change in custody and country would be painful and might be damaging, D has a substantial relationship with his father and the mother has not raised any concerns about the father's abilities. Romania is the country of origin of both parents and the country of

residence of both sets of grandparents. If the mother were unable to care for D for any reason, he would almost certainly pass into his father's care.”

70.
With respect to the question of delay in the context of the application of Art 23(a), in Re N (Abduction: Brussels II Revised) Holman J observed as follows at [52]:

“[52] Of course, all these cases must depend on their own facts. But in the present case, too, I am quite unable to say that the delay, whether viewed as 15 months or even as 22 months, is such that it would now be manifestly contrary to the public policy of this state to refuse recognition, nor (although a separate and discrete matter) enforcement. Further, it is relevant that the father strove to enforce at an early stage the orders he obtained in Spain in April and May 2013 which the mother has flatly disobeyed.”

71.
With respect to Art 23(b) in BIIa in Re D (A Child) (International Recognition) [2016] EWCA Civ 12 at [44], having considered he decision of the House of Lords in In Re D (A Child) [2007] 1 AC 619, Ryder LJ (as he then was) held as follows with respect to providing the child with the opportunity to be heard for the purposes of Art 23(b) of BIIa:

“[41] A principle that is of "universal application" consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child is on its face a fundamental principle. I regard this court as bound by their Lordship's decision In re D and in any event, it is high time that this court laid to rest the canard that summary and/or autonomously interpreted processes, whether Hague or BIIR, can in some way avoid the application of a fundamental procedural protection. In every case, the court is required to ensure that the child is given the opportunity to be heard. That means asking the questions, 'whether and if so how is the child to be heard'. There are a range of answers, many of which were foreshadowed in In re D. It is not the answer that is key to the question before this court but the fact that the question must be asked. The asking of the question does not in any way detract from other principles that are in play, for example, the convention policy under the Hague Convention for the return of the child to the jurisdiction of habitual residence or the no delay principle in domestic children legislation. Furthermore, the provisions of article 24 of the Charter of Fundamental Rights and Freedoms are directly applicable (see above) with the consequence that the court is required to ask the question I have identified.

[42] I accept that for reasons of comity or mutual respect, there is a high threshold to the identification of a fundamental principle. There should be no tendency in the enforcement process under BIIR to fail to recognise and hence enforce orders made by Member States. To the extent that there are different approaches to how a child is to be heard both domestically and among Member States this court and indeed any court of enforcement should be astute to identify the principle and not just one of the procedural options that may or may not be available in any particular Member State.”

And Briggs LJ (as he then was) held:

“[108] Article 23 contains exceptions to the core principle of mutual recognition which lies at the heart of BIIR. It must therefore be narrowly construed. But I do regard the failure even to consider whether to give David an opportunity to be heard as fully deserving being described as a violation of a fundamental principle of the procedure of our courts. Although some might regard the age of seven as lying near the borderline above which the giving of such an opportunity might be regarded as routine,

the very large implications for him of the decision sought by his father, namely a complete change in his main carer and a move to a country in which he had not lived since very soon after his birth, cried out for consideration of the question whether he should be heard, all the more so since the mother, who might have been supposed to be likely to put the case for preserving the status quo, appeared to be taking no part in the appeal."

72.
Within the foregoing context, Art 26 of BIIa makes clear that under no circumstances may this court review substance of decision of the French Court, i.e. whether that decision was right or wrong. Rather, the task for this court under Art 23 is to ask whether the judgment of the French court was procedurally deficient on one of a number of narrow grounds, has been superseded by the decision of another court of competent jurisdiction or is objectionable on public policy grounds, taking into account the best interests of the child. Reaching one or more of these conclusions does not constitute jurisdictional overreach on the part of the State requested to recognise and enforce the judgment in circumstances where all signatories to the instrument have agreed the matters to which regard must be had, namely those set out in Art 23, and that the bench mark is the principles of the enforcing State with respect to those matters.

73.
With respect to the legal principles relevant to question of enforcement under Art 28, as made clear by Black J (as she then was) in Re D (Brussels II Revised: Contact) [2008] 1 FLR 516 at [50], having regard to the terms of Art 28 of BIIa, an application in the United Kingdom for registration of a judgment for enforcement is the same as an application in any other Member State for a declaration of enforcement. Within this context, the application for registration is the mechanism in the United Kingdom by which the party benefiting from the order seeks enforcement under BIIa and the appeal against registration is the mechanism by which the party against whom the order has been made resists enforcement under BIIa:

"The procedures in s 2 to which reference is made are the procedures relating to an application for a declaration of enforceability. Those procedures comprise the application by the person who wants to have the judgment recognised and the appeal by the person against whom enforcement is sought. Accordingly, it seems to me that applying for a declaration of enforceability (in the rest of Europe) or for registration of the judgment (in the UK) and applying for a decision that the judgment be recognised are one and the same thing - the means by which you seek a decision that the judgment be recognised is by applying for registration. Similarly, an appeal against the registration of the judgment is the means by which a person applies for the judgment not to be recognised."

74.
Within this context, and subject to the outcome of any appeal, if validly registered for enforcement then, in accordance with Art 28(2) of BIIa, the order "shall be enforced". In approaching the enforcement, Black J (as she then was) held in Re D (Brussels II Revised: Contact) offered the provisional view at [57] that:

"[57] I am far from convinced that welfare is necessarily paramount in enforcement proceedings in England and Wales. If it is not, Mr Nicholls' argument falls away on that basis. Even if it is, I am far from convinced that the phrase to which he draws attention is to be construed in such a way as to enable the English court to defeat the purpose of the European court order on the basis of 'welfare considerations'. If that were to be the case, it would run completely contrary to the very clear

statements in the Regulations that the substance of the foreign judgment must not be reviewed and to the purpose, as I understand it, of the Regulations."

75.
Finally, with respect to the law, alongside the mother's appeal against the registration order and the father's application for enforcement, the mother seeks welfare orders in the Family Court in respect of A based on her habitual residence in this jurisdiction. With respect to the effect of a change of residence prior to the application for recognition and enforcement of a foreign order made by a court of competent jurisdiction, as contended for by the mother in this case, the authors of Rayden & Jackson on Relationship Breakdown, Finances and Children note as follows at [47.71]:

"BIIa, Art 21(1) obliges a Member State to recognise a judgment relating to parental responsibility (even those not involving cross-border issues) given in other Member States. Recognition is automatic by operation of law and the order remains valid notwithstanding a change in the habitual residence of the child. However, when a child's habitual residence changes, jurisdiction will shift to the new state of habitual residence and that court will, if seised of an application concerning the child, have a theoretically unfettered discretion to make orders under domestic law. However, the court in such a case is bound to recognise an existing order and, in the same way as it would not disregard an earlier order made by another domestic court, it must recognise an order made by another Member State. However, in appropriate cases it can make an order which makes different provisions to those made by the earlier order – although it cannot 'vary' the order itself. It should only do so (as it would in a purely domestic case) where there has been a change in circumstances which warrant making different provision. To do otherwise would permit the English court to act differently in an EU case as compared to a domestic case. If it does make different provision, the earlier order will not be susceptible to registration and enforcement, and there will exist a ground for non-recognition under Art 23(e). A 'later judgment' to which Art 23(e) may apply is a judgment of a court with general jurisdiction that is given after the judgment which it is sought to enforce, see E (Children)."

76.
In Re E (BIIa: Recognition and Enforcement) [2020] EWCA Civ 1030 the English court at first instance refused recognition of Spanish orders made in favour of a father (both at first instance in Spain and following the dismissal of the mother's appeal in that jurisdiction) on the basis that they were irreconcilable with a welfare order that the English made on the same occasion, which provided for the children to live with the mother. Dismissing the subsequent appeal, the Court of Appeal held as follows where the English court is faced with an application for recognition and enforcement alongside an application for welfare orders:

"[65] The second question concerns the proper approach to be taken where an English court is required to deal with concurrent applications for recognition/enforcement and welfare orders. Where this arises, the power to make welfare orders may, as noted by Rayden, be theoretically unfettered, but in practice it is subject to important constraints.

[66] In the first place, the court is required to comply with the recognition and enforcement provisions of BIIa and must recognise and enforce the order unless a ground for non-recognition is established. In approaching the grounds for non-recognition, the court must always recall the principle of mutual trust, or comity, contained in Recital 21, and remain mindful that the recognition and enforcement process is not a welfare process."

77.

In dismissing the father's appeal in Re E (BIIa: Recognition and Enforcement), Lord Justice Peter Jackson set out the following discipline where the court is faced with a an appeal against registration and an application for welfare orders:

"[73] There can undoubtedly, as Ms Renton submits, be a tension between applications for recognition/enforcement and welfare applications. They are applications of a different character that will arise in a wide range of circumstances. BIIa itself does not purport to eliminate that tension, arising from its provisions in relation to Jurisdiction (Chapter 2) and Recognition and Enforcement (Chapter 3). It cannot be denied that in some cases the resolution of proceedings involving both forms of application will present the court with a challenge, both of substance and case management, but in all cases, the court is required to observe the mandatory obligations arising under BIIa unless it finds that one or more of the grounds for non-recognition have been established.

[72] This situation may arise in circumstances where, as here, the application for recognition/ enforcement comes before the High Court by way of an appeal against registration. It may also arise where the welfare application is before the Family Court at any level and the court becomes aware that there is a relevant foreign order, whether or not that order has already been registered.

[73] Drawing these matters together, where a court is faced with an application for a welfare order in a case where there is an earlier order in another Member State (whether or not that order has been registered in this jurisdiction), it should ask itself these questions:

(1) Does the court have the power to make welfare orders on the basis that (a) the child is habitually resident in England and Wales or general jurisdiction arises on some other basis, and (b) the court of the other Member State is no longer seised?

(2) If there is a power to make welfare orders, to what extent is it appropriate on the facts of the individual case to embark upon a welfare assessment of matters that were decided by the court of the other Member State, taking an earlier domestic order as an analogy?

(3) If a welfare assessment is to be carried out, how can it be case managed to ensure that the issues for decision are clearly set out and that the requirement to determine an enforcement application without delay is observed?

(4) If the welfare assessment suggests that an order might be made that is irreconcilable with a foreign order, would it be right to make such an order, taking a cautious approach and giving full weight to the conclusions and findings of the foreign court and to the principle of mutual trust that informs BIIa?

I leave aside the possibility, irrelevant to this analysis, of the court exercising its power under Article 20 to take urgent provisional measures."

DISCUSSION

78.
I have found this a very difficult case indeed to decide. By reason of the time that has passed since the original order made by the High Court of Saint-Denis, nearly three years ago, and the opposite order made on appeal by the Court of Appeal in Réunion over one year ago, this court is faced with the choice of enforcing that latter order, with the result that A will now move from her primary carer and a jurisdiction in which she has been settled for nearly three years to a jurisdiction she has not seen since she was two years old and a parent with whom she has had (through no fault of the father) had

no contact in the manner ordered by the French court; or exercising the welfare jurisdiction I am satisfied that this court now has to make an order that is entirely inconsistent with the order made by a court of competent jurisdiction in another BIIa Member State in favour of a father with whom A has been denied the contact mandated by the order of the French Court. On balance, I am satisfied that the order of the Court of Appeal on Réunion dated 20 October 2021 should be enforced. My reasons for so deciding are as follows.

79.
I am not able to accept the submissions of Mr Gupta and Ms Parr that the Court of Appeal on Réunion did not have jurisdiction in respect of A at the time it made the order it did on 21 October 2020. In this context, I am prepared to proceed on the basis that, at the time the mother issued her application in the English court on 19 July 2019, A was habitually resident in this jurisdiction, A having been brought lawfully to this jurisdiction pursuant to the order of the High Court of Saint-Denis. However, I am satisfied that neither that state of affairs, nor the actions of the father in the context of the domestic proceedings acted to confer jurisdiction on the English court at that time or at any time prior to the judgment of the French Cour de Cassation on 14 May 2021, at which time, having regard to the expert report on French law, the French courts ceased to be seised on the matter.

80.
I am satisfied that a change of a child's habitual residence for the purposes of Art 8 of BIIa during the currency of a lis under Art 19 of BIIa does not act to confer jurisdiction on the courts of the child's new habitual residence. As I have noted above, just because, as a matter of fact, a child is habitually resident in a country does not result automatically in that country having jurisdiction it can exercise. The conclusion as to jurisdiction will depend on the totality of the relevant legal principles against which the claim of jurisdiction falls to be evaluated. In the context of the competing contentions in this case, as made clear by Black LJ (as she then was) in Re G (A Child), the operation of Art 19 of BIIa does not depend on the question of which court has jurisdiction, whether under Art 8 or otherwise, but rather on which court is first seised, in this case the French court. Within this context it is further clear, as confirmed in Dicey, Collins & Morris, that the bases of jurisdiction under BIIa operate subject to any lis under Art 19. This is, as again recognised in Dicey, Collins & Morris, consistent with the fact that, unlike the 1996 Hague Convention on which BIIa is substantially modelled, BIIa does operate the principle of perpetuatio fori. In circumstances where BIIa abides by this principle, a child may relocate from a Member State, but proceedings will nevertheless properly continue in the former Member State of habitual residence until they are completed or a transfer made under Art 15 of BIIa.

81.
In the foregoing circumstances, it is in my judgment clear on the face of BIIa that where a court is first seised for the purposes of Art 19, and has thereafter established jurisdiction one of the other bases of jurisdiction provided for by BIIa, a subsequent change of the subject child's habitual residence will not, because of the operation by BIIa of the principle of perpetuatio fori, result in the court first seised losing jurisdiction during the period for which the lis subsists. In this case, on the basis of the unchallenged expert report on French law, the lis under Art 19 of BIIa continued until the Cour de Cassation handed down judgment on 14 May 2021.

82.
I am likewise satisfied that it cannot be said that the parties prorogued jurisdiction in favour of the English court for the purposes of Art 12 of BIIa. As I have set out above, Art 12 requires the jurisdiction of the relevant court to have been "accepted expressly or otherwise in an unequivocal manner…by the holders of parental responsibility". Whilst the acceptance of jurisdiction can be

express or otherwise, it must be unequivocal for the purposes of Art 12, there is no indication of unequivocal acceptance by the father of the jurisdiction of the English court on the face of the orders made by the English court. Further, it is plain from each of the orders made by the English court that the father continued to seek to argue the question of jurisdiction and sought to do so both in the English proceedings and the French proceedings. Indeed, both parents argued the point fully in the French proceedings and the Court of Appeal in Réunion concluded that the father had not accepted the jurisdiction of the English court, which decision was left undisturbed by the French Cour de Cassation. There is no evidence before this court that would justify this court now going behind that conclusion.

83.
Within the foregoing context, I am satisfied that the Court of Appeal on Réunion had substantive jurisdiction in respect of A when it made its order of 21 October 2020. It follows that I am satisfied that, subject to the outcome of the mother's appeal against registration on one or more of the grounds set out in Art 23 of BIIa, the order of the Court of Appeal on Réunion was amenable to registration and falls to be enforced pursuant to Art 28(2) of BIIa. Within this context, it is to mother's appeal to which I now turn.

84.
The mother relies on two grounds of appeal, the first of which is that, pursuant to Art 23(a) of BIIa, recognition of the judgment of the Court of Appeal on Réunion would be manifestly contrary to the public policy of the United Kingdom taking into account the best interests of A. When considering this ground, it is important to recall that under no circumstances may this court review the substance of decision of the French Court i.e. whether it was right or wrong. It is further important to recall that the Preamble to BIIa makes clear that recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required. Within this context, the authorities make clear that non-recognition on the grounds of public policy is only envisaged where recognition or enforcement of the judgment delivered in another contracting state would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought in as much as it infringes a fundamental principle. Within this context, there should be no tendency in the enforcement process under BIIa to fail to recognise, and hence enforce orders, made by Member States. I reject the tentative suggestion of Mr Gupta, made during his oral submissions, that the departure of the United Kingdom from the European Union has changed this position. In cases begun prior to 11pm on 31 December 2020, BIIa will continue to apply in full, as will each of the principles governing its application set out in the authorities.

85.
The mother advances her appeal under Art 23(a) primarily on the basis of an asserted failure by the Court of Appeal on Réunion to consider A's welfare at the time of the judgment of 21 October 2020. The mother submits that this approach is contrary to the clear public policy of this jurisdiction. I am not able to accept this submission. The Court of Appeal in Réunion began its judgment as to parental responsibility with respect to welfare by expressing recognising the welfare provisions of the French Civil Code as follows:

"Whereas Article 373-2-6 of the Civil Code provides that the Family Court Judge settles the questions submitted to them taking special care to safeguard the interests of minor children; whereas they may take measures to guarantee the continuity and effectiveness of the maintenance of the child's links

with each parent; whereas they may, in particular, order that the child be prohibited from leaving French territory without both parents' authorisation;

Whereas Article 373-2-ti- of the Civil Code provides that when the Court rules on the manner in which parental authority is exercised, it shall take into consideration in particular:

1. The practice the parents previously followed or the agreements they may have previously made;

2. The feelings expressed by the minor child under the conditions laid down in Article 388-1;

3. The ability of each parent to assume their duties and respect the rights of the other;

4. The results of any expert opinions made, taking into account the age of the child;

5. The information gathered in any social investigations and counter-investigations provided for in Article 373 2-12,

6. Pressure or violence, of a physical or psychological nature, exerted by one of the parents on the other.”

86.
Both parents were represented before the Court of Appeal in Réunion and had the opportunity fully to advance their respective arguments as to welfare. Within this context, whilst a brief analysis, it is plain that the Court of Appeal in Réunion evaluated the competing welfare submissions of the parents:

“Whereas [G] still invokes the fact that the child only speals English, as well as her young age; whereas, however, it will be observed that [the father] speaks English, as can be seen from the e-mail exchanged between the parties; whereas it seems unlikely that, had the couple not separated, the child would not have learned French and had lived exclusively in the parental home; whereas there is no essential obstacle in this respect; whereas, lastly, many young children see their parents separate and even live at a great distance from each other; whereas this has no bearing on depriving the father of his visiting and accommodation rights, especially as [the father's] educational qualities are not seriously called into question. Moreover, the father's profession as a surgeon should not be an obstacle: he is perfectly capable, and has the material means, to organise himself;”

87.
Within this context, I am not satisfied that the mother’s primary submission under Art 23(a) comes close to demonstrating that recognition or enforcement of the judgment delivered by the Court of Appeal in Réunion on 21 October 2020 would be at variance to an unacceptable degree with the legal order of this jurisdiction in as much as it infringes a fundamental principle. There is likewise nothing in the welfare outcome endorsed by the Court of Appeal in Réunion that makes it manifestly contrary to the fundamental principles applied in this jurisdiction. Orders that seek to enforce contact between a child and their non-resident parent in the context of the resident parent refusing to promote such contact are well known in this jurisdiction and the enforcement of contact orders following a failure to comply with the same is consistent with the public policy of this jurisdiction.

88.
During the course of their submissions, Mr Gupta and Ms Parr also sought to suggest that enforcing the order after a period of over a year would, having regarding to the adverse the impact on A of a move from the care of her mother to the care of her father, also be manifestly contrary to the public policy of this jurisdiction for the purposes of Art 23(a). However, the authorities make clear that this argument is difficult to make good in the context of recognition and enforcement as between Member

States of BIIa. It is correct that the avoidance of delay in proceedings concerning children is central to the legal order in this jurisdiction. However, I am not satisfied that delay engendered by a lawful appellate process in a foreign jurisdiction can amount, particularly in circumstances where similar delays arise in this jurisdiction, to a manifest breach (having regard to the best interests of the child) of a rule of law regard as essential in the legal order of this jurisdiction or of a right recognised as being fundamental within that legal order. This much was recognised by Holman J in Re N (Abduction: Brussels II Revised). Whilst I accept that the impact on of enforcing the order a significant time after it was made A may be adverse, at least in the short term, in the context of recognition and enforcement this has also previously been held not to be objectionable on public policy grounds where child has a substantial relationship with the parent seeking enforcement, the other parent has not raised any substantial concerns regarding parenting capacity and the child is returning to the country in which he or she was born, per Peter Jackson J (as he then was) in Re D (Recognition and Enforcement of Romanian Order). Within this context, I am unable to accept that the short term adverse impact on A resulting from the enforcement of the French order would result in recognition or enforcement being at variance to an unacceptable degree with the legal order of the state in which enforcement is sought in as much as it infringes a fundamental principle of domestic public policy.

89.
I am also not persuaded that the mother has made good her ground of appeal under Art 23(b) of BIIa. Art 23(b) becomes operative where a child has not been given the opportunity to be heard, in violation of the fundamental principles of procedure of this jurisdiction. A was three at the time the order of 21 October 2020 was made by the Court of Appeal on Réunion. That is not an age that, in the context of the public policy of this jurisdiction, falls near the borderline above which giving the child an opportunity to be heard in private law proceedings through the direct gathering of his or her wishes and feelings might be regarded as routine. Rather, the wishes and feelings of a child of A's age in October 2020, in so far as they might be capable of being established, would ordinarily be communicated to the court by the respective parties. Within this context, at the time of the order of 21 October 2021 A was of an age where, had the proceedings been in this jurisdiction, she would have been considered too young for her wishes and feelings to have been ascertained directly and both parents would have had the opportunity to make such representations as were open to them on the subject of her ascertainable wishes and feelings. Such opportunity was open to the parents in the French proceedings, who were each represented in those proceedings. Within this context, I am satisfied that it cannot be said that the enforcement of the French order would result in recognition or enforcement being at variance to an unacceptable degree with the legal order of the state in which enforcement is sought in as much as it infringes a fundamental principle concerning the participation of the child in private law proceedings.

90.
In the circumstances, I am satisfied that neither of the grounds for non-recognition under Art 23 of BIIa relied on by the mother are made out. However, whilst not raised expressly as a ground, by reason of her reliance on the principles set out by the Court of Appeal Re E (BIIa: Recognition and Enforcement) a third ground of non-recognition will necessarily fall, ultimately, to be considered in this case if the court accedes to the mother's application for welfare orders in respect of A. Namely, pursuant to Art 23(e) of BIIa, that the judgment of the Court of Appeal in Réunion of 21 October 2021 is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought, being the welfare judgment that the mother now seeks from this court that it is not in A's best interests to move to the care of her father on Réunion and in her best interests to remain in the care of her mother and the order she invites the court to make accordingly.

91.
As set out above, the appellate courts of this jurisdiction have held in two contexts that, in appropriate circumstances, it is open to the domestic court to decide it is in the child's best interests to remain in this jurisdiction notwithstanding the existence of a foreign order made by a court of competent jurisdiction, whether that court be sitting at first instance or on appeal. The Supreme Court endorsed such an approach in Re KL in context of proceedings under the 1980 Hague Convention. I agree with Mr Setright and Ms Spruce that Re KL can be distinguished from this case, not least of which is that Re KL did not concern the operation of BIIa. However, a similar approach was also endorsed in the context of BIIa by the Court of Appeal in Re E (BIIa: Recognition and Enforcement).

92.
As recognised in Re E (BIIa: Recognition and Enforcement), when a child's habitual residence changes, the new Member State of habitual residence will have jurisdiction and the courts of that Member State will, if seised of an application concerning the child for the purposes of Art 16 of BIIa, have jurisdiction to make welfare orders under domestic law with differing provisions to earlier orders made in the previous jurisdiction of the child's habitual residence provided, as is the case in respect of domestic orders, there has been a change in circumstances which warrant making different provision. If, in this context, court does make different provision on the grounds that the same is in the child's best interests, an earlier order made by a foreign court will not be susceptible to registration and enforcement as there will exist a ground for non-recognition under Art 23(e) of BIIa, the later domestic order being a judgment of a court with general jurisdiction that is given after the judgment which it is sought to enforce. In Re E (BIIa: Recognition and Enforcement), the Court of Appeal declined to criticise the judge at first instance for first considering on an enforcement application whether a welfare order was merited and then, having concluded that it was, determining that the resulting judgment met the imperatives of Art 23(e).

93.
As made clear in Re E (BIIa: Recognition and Enforcement), three questions arise when the domestic court is considering whether to make orders in the foregoing context different from those made by the foreign court and based on a change of circumstances, namely:

i)
Does the court have the power to make welfare orders on the basis that (a) the child is habitually resident in England and Wales or general jurisdiction arises on some other basis, and (b) the court of the other Member State is no longer seised?

ii)
If there is a power to make welfare orders, to what extent is it appropriate on the facts of the individual case to embark upon a welfare assessment of matters that were decided by the court of the other Member State, taking an earlier domestic order as an analogy?

iii)
If the welfare assessment suggests that an order might be made that is irreconcilable with a foreign order, would it be right to make such an order, taking a cautious approach and giving full weight to the conclusions and findings of the foreign court and to the principle of mutual trust that informs BIIa?

94.
I am satisfied that A is now habitually resident in the jurisdiction of England and Wales. As I have noted, the question of habitual residence under Art 8 and effect of a lis under Art 19 are separate

questions. The lis operates to prevent the English court from exercising jurisdiction in place or a court first seised. It does not prevent a child who has moved from one jurisdiction to another during the currency of the lis from achieving habitual residence in the latter jurisdiction, although the existence of proceedings in the former jurisdiction will be a matter to be taken into account when considering whether a new habitual residence has been established. Within this context, the question of whether A is now habitually resident in this jurisdiction falls to be considered by reference to her position in this jurisdiction since her arrival on 9 February 2019. In such circumstances, it cannot now seriously be disputed that a child who arrived in this jurisdiction nearly three years ago with her primary carer; with the intention of settling in this jurisdiction; pursuant to an order permitting relocation to England; and who has remained in this jurisdiction since in the care of the mother who is a native of this jurisdiction, now demonstrates some degree of integration in a social and family environment here sufficient to amount to habitual residence, notwithstanding that that A was born in Réunion and that her father remained there.

95.
I am further satisfied that, following the handing down of judgment by the Court de Cassation on 14 May 2021 that the French court is no longer seised. This is made clear in the unchallenged expert report on French law, which concludes that on the appeals process being exhausted following the making of the order upon the decision of the Cour de Cassation, the French Court ceased to be seised. Within this context, the domestic authorities establish also (as recognised by Dicey, Morris & Collins at 19-040) that when the court first seised brings proceedings to an end, the court second seised can correctly assume jurisdiction (see C v S (Divorce: Jurisdiction) [2011] 2 FLR 19 and A v B [2016] 1 FLR 31. Within this context, in addition to A now being habitually resident in the jurisdiction of England and Wales, I am satisfied that the French court is no longer seised of proceedings in respect of her.

96.
Within the foregoing context, considering the first question posed in Re E (BIIa: Recognition and Enforcement), I am satisfied that the court does have power to make welfare orders in respect of A. However, in accordance with Re E (BIIa: Recognition and Enforcement), the question remains whether it is appropriate on the facts of this case to embark upon a welfare assessment of matters that were decided by the Court of Appeal in Réunion based on a change of circumstances. On balance, I am satisfied that it is not appropriate to do so.

97.
The mother invites the court to embark on a reconsideration of the welfare assessment of the Court of Appeal in Réunion. That assessment was that it was in A's best interests to move to the care of her father in circumstances where her mother was not permitting A to have the contact with her father that had been assessed by the French court to be in her best interests and in circumstances where it was not accepted that the father was incapable of meeting A's needs. Within this context, and with the full participation of the mother in the proceedings, the court ordered that A should live with her father and have contact with her mother. Within this context, beyond the passage of time that has passed as the appellate process in the French courts has been completed, it is difficult to identify any change of circumstances that could ground a proper reconsideration by this court of the French order based on a change of circumstances. The father is still without the substantive contact with A ordered by the French court and, within that context, A continues to be deprived of a full relationship with her father in the manner contemplated by the terms of the original order made by the High Court of Saint-Denis. Whilst the mother contends that she has offered contact to the father which has not been taken up,

those offers do not reflect the level or nature of contact which the French court considered to be in A's best interests. Beyond her own statements relating matters that would have been substantially within her knowledge at the time of the hearing before the Court of Appeal in Réunion, the mother has adduced no additional welfare evidence before this court to suggest that the conclusion of the Court of Appeal in Réunion that the father could meet A's needs requires revisiting by this court due to a change of circumstances.

98.
The Court of Appeal in Re E (BIIa: Recognition and Enforcement) was clear that any revisitation of a foreign welfare order in circumstances where the English court now has jurisdiction must take place in a manner akin to that adopted when reconsidering a domestic welfare order, namely by asking whether there has been a change of circumstances sufficient to justify a different welfare conclusion to that reached by the foreign court. For the reasons set out in the foregoing paragraph, I am not satisfied that such a change of circumstances justifying reconsideration of the French welfare order has occurred in this case. In those circumstances, I decline to revisit the French order on welfare grounds.

99.
I accept that this conclusion means that A will now move from the care of her mother in this jurisdiction to the care of her father in Réunion. I likewise accept that this will have a significant, and potentially adverse, impact on A in the short term. However, I am further satisfied that it is possible to put in place so called 'soft landing' provisions in the context of A having a pre-existing relationship with her father that has been maintained to a degree by indirect contact and in circumstances where no substantive concerns have been made out regarding the father's parenting capacity. In particular, the parties will obviously wish to consider A being accompanied by her mother to Réunion, a period of gradual transition to the father's care whilst the mother is in Réunion and a clear agreement with respect to future direct contact between A and her mother following her move to the father's care pursuant to the French order which this court is enforcing.

100.
I am not satisfied that this course of action amounts to an unnecessary and disproportionate interference in the Art 8 rights of A. I accept that the court is under a positive duty to ensure the efficacy of A's Art 8 rights. As I have noted, I cannot accept the submission that the French order was made without any or any sufficient welfare analysis or without providing A an opportunity to be heard. Within this context, I am not able to accept the argument that enforcing the order constitutes a disproportionate breach of A's Art 8 rights. Indeed, it is eminently arguable, in light of the decision of the Court of Appeal in Réunion and the absence, as I have found, of any change of circumstances sufficient to justify revisiting that welfare decision, that not to enforce the French order would constitute a breach of A's Art 8 right to respect for private and family life.

CONCLUSION

101.
In conclusion, I am satisfied for the reasons I have given that it is not appropriate for this court to exercise a welfare jurisdiction in respect of A on the basis of a change of circumstances and that the mother's appeal against the registration order of 6 July 2021 must be dismissed for the reasons I have given. Further, I am satisfied for the reasons I have given that this court must now enforce the order of the French court pursuant to the application of the father.

102.

That latter course will involve this court making an order that the mother now return A to Réunion in accordance with the order of the Court of Appeal of Réunion dated 20 October 2021, with such ‘soft landing’ provisions as are appropriate to mitigate the short term impact on A of that course of action. I will invite leading and junior counsel to agree and submit an order for the court’s approval giving effect to the court’s decision.

103.
That is my judgment.