Judgment Approved by the court for handing down

(subject to editorial corrections)

GC v AS (No. 2)

Neutral Citation Number: [2022] EWHC 310 (Fam)

Case No: FD18P00811

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 9 February 2022

Before:

MR JUSTICE POOLE

- -

Between:

GC

App

- and -

AS

Respo

(No. 2)

- -

Teertha Gupta QC, Lisa Edmunds and Jenna Lucas (instructed by Expatriate Law) for the **Applicant**

Cliona Papazian (instructed by Freemans) for the **Respondent**

Hearing dates: 7-9 February 2022

- -

JUDGMENT

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

Mr Justice Poole:

Introduction

1.
The applicant GC is the British mother of three children, aged 7, 6 and 4, who currently live in Tripoli, Libya with the respondent father, AS. As set out in the Skeleton Argument on her behalf, the mother applies for an order pursuant to the court's parens patriae jurisdiction for the children to be returned to the jurisdiction of the court of England and Wales "for their immediate protection and in order that this court may conduct a welfare analysis and determine where the children should live and what time they spend with each parent."

2.
The parents have been involved in litigation since November 2018 when the mother started proceedings in the Family Division of the High Court seeking the summary return of the children to this jurisdiction, asserting that they had been "forcibly" retained in Libya by the father. On 25 October 2019 HHJ Hillier sitting as a Deputy High Court Judge handed down judgment dismissing the mother's application. The mother appealed unsuccessfully to the Court of Appeal, S (Children) [2020] EWCA Civ 515. In August 2020 the mother made her current application and applied to set aside the order of HHJ Hillier on the grounds that there had been a fundamental change in circumstances. On 11 January 2021 Mostyn J dismissed the mother's applications, GC v AS [2021] EWHC 14 (Fam). He held that the mother should have advanced an application under the parens patriae jurisdiction before HHJ Hillier, that her application was Henderson abuse, referring to the principle derived from Henderson v Henderson (1843) Hare 100, and that the mother had not met the high threshold for the making of a protective order under the parens patriae jurisdiction. Again the mother appealed but on this occasion she was successful, the Court finding that Mostyn J had taken the wrong approach to her set aside application and concluding that he had given insufficient consideration to her independent application to exercise the parens patriae jurisdiction, GC v AS [2021] EWCA Civ 1223. Concluding his judgment, Baker LJ, with whom the other members of the Court agreed, said at [55]:

In my view, what needs to be determined is not the application to set aside the earlier order but, rather, the mother's independent application under the parens patriae jurisdiction. It does not appear to me to be necessary at all for the previous order to be set aside. The real question in this case is whether the court should make an order for the return of the children under the parens patriae jurisdiction. The issue for the court will be whether the circumstances are sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction. That is a matter which can be determined without any reference to the question whether the earlier order should be set aside. It would, of course, be preferable, if possible, for this Court to determine whether the protective jurisdiction should be exercised, but for my part I do not think we are in a position to do so. It requires careful analysis by a judge at first instance applying the legal principles and approach summarised by Moylan LJ in Re M.

3.
The Court of Appeal ordered that "the case is to be remitted to a full-time Judge of the Family Division (other than Mr Justice Mostyn) on the issue of (a) whether there should be an exercise of the parens patriae jurisdiction and (b) if so whether there should be an order for the return of the children under the parens patriae jurisdiction."

4.
By that route the mother's application now comes before me. I have received a considerable amount of written evidence, in part because of the long history of this case. It includes witness statements from the parties, expert evidence on circumstances in Libya from Dr Cherstich from the School of Oriental and African Studies, London, and a report from Ms Jamila Al-Taher Beshin, described as a

Psychology specialist who works for the Ministry of the Interior, Libya. I heard oral evidence from the mother and from Ms Al-Taher Beshin but not from the father, there being no wish to cross-examine him. The parties were ably represented. I express particular gratitude to Mr Gupta QC, Ms Edmunds and Ms Lucas, and their instructing solicitors Expatriate Law who have all acted pro bono.

History of Events

To April 2021

5.
The history of events to April 2021 has been fully set out repeatedly in the previous judgments to which I have already referred. For the sake of economy, I shall provide a summary only:

a.
The mother was born in England, the father in Libya. They met in England in 2007 and went through an Islamic marriage in 2008. The father obtained a Master's Degree in Law from an English university. In 2013 the parties lived in Tripoli for a few months. The parties' first two children were born in England in 2014 and 2016. In September 2016 the father was granted British citizenship. Their third child was born in September 2017. In December 2017 the parties travelled to Libya via Turkey. HHJ Hillier found that they had agreed to move with the children to live permanently in Libya. The mother returned to England in early 2018 but travelled to and from Libya during the course of that year, spending about four months in Libya, until in November 2018 she started proceedings in the High Court seeking the children's summary return to this jurisdiction. Since then she has only had indirect contact with the children.

b.
HHJ Hillier found that there had been no wrongful removal or retention and the three children were each habitually resident in Libya at the time when the mother had made her application. The mother did not contend that, in the event of those findings, the court should nevertheless exercise its parens patriae jurisdiction to order return. The Court of Appeal upheld HHJ Hillier's findings. I note that HHJ Hillier found that the mother had told "obvious lies" and was prepared to "bolster her case by dishonesty". The judge found the father to be an unsatisfactory witness also – he had deliberately lied to the UK authorities when applying for asylum. Amongst other findings, the judge was satisfied that the mother had been an active participant in the arrangements to relocate to Libya, that the two older children were receiving pre-school and nursery education in Libya, that the father's apartment within an apartment block occupied by members of his family was separate and of a good standard, and that the oldest child was receiving medical treatment for her pre-existing asthma condition in Tripoli.

c.
In his judgment of January 2021, Mostyn J rejected the suggestion that there had been a fundamental change in circumstances since the order of HHJ Hillier. He noted the expert evidence received from Dr Cherstich instructed on behalf of the mother. No permission had been sought or given for expert evidence prior to it being attached as an exhibit to one of the mother's statements. Mostyn J nevertheless gave permission for the mother to rely on the expert evidence but concluded that, "It seems to me while the situation in Libya is concerning, that things have not got worse and that it could be said that things have slightly improved since that date." Mostyn J also noted WhatsApp messages as recent as August 2020 showing the mother negotiating with the father for him to pay travel costs and accommodation for her to visit Libya in order to see the children.

Since April 2021

6.
I have received evidence from both parties as to events since April 2021 when the Court of Appeal remitted the case to the High Court.

7.
The mother says that here has been no change in the time she has been able to spend with the three children – she sees one or more of them by a video link about once a week. She has not been to Libya to see the children and the children have not been brought to England to see her. She complains that the arrangements are loose and sometimes she is unable to speak to or see them for more than a week. She suspects that the father is hovering over the children during indirect contact so that they are guarded in what they say. The father disputes this and says that the children will speak to the mother when they are able and that if contact is missed then it is compensated for on another day. The mother notes the father's assertions that the children are safe, well looked after, attend school, and have their health needs met, but she has no trust in his assertions. Likewise, she is not impressed with other evidence such as photographs, a school report, or a doctor's letter apparently corroborating the father's assurances.

8.
During her cross-examination, the mother accepted that in 2020 she had started to think seriously about going to live in Libya, so desperate was she to spend time with her children. She is an only child and close to her mother. She contemplated taking her mother to Libya to stay with her.

9.
The mother relies on a further report from Dr Cherstich updating the evidence he gave to Mostyn J. Once again she did not seek permission to rely on the report before obtaining it but I did give permission at a case management hearing for her to adduce the supplementary report as being necessary for me to resolve the case justly. As he did in his first report, Dr Cherstich states that Libya is in a state of civil war and is "extremely unsafe" for "anyone, but particularly for the three children." He does not specify what circumstances make it "particularly" unsafe for the three children, but he was aware that they live in Tripoli. He has relied on general information about the country, and Tripoli, rather than information specific to the circumstances of the children. He advises that the "rule of law is practically absent and the justice system is neither operational nor accessible". There is extensive use of drones in the civil war. In 2021, Human Rights Watch reported that throughout 2020 and 2021, "Armed groups on all sides continued to kill unlawfully and shell indiscriminately, killing civilians and destroying vital infrastructure." Dr Cherstich also points to the "extreme shortage of electricity", affecting the water supply as well as communications, and to shortages of "water, milk, vegetables, bread, and fuel." In 2020 the Food and Agriculture Organisation of the United Nations indicated that many parts of the country were reporting availability problems for basic food items. Reliable sources, he says, suggest that in 2021 "children in Tripoli eat on average only one meal a day… the majority of children surveyed aged 6 to 23 months did not consume a minimum acceptable diet." Public hygiene is, he advises, poor giving rise to concerns about the spreading of not just Covid 19, but also cholera.

10.
The mother relies on the current Foreign, Commonwealth and Development Office travel advice regarding Libya:

The Foreign, Commonwealth & Development Office (FCDO) advise against all travel to Libya. This advice has been in place consistently since 2014. If you're in Libya against this advice, you should seek to leave immediately by any practical means.

All travel to, from and within Libya is at the traveller's risk. Local security situations are fragile and can quickly deteriorate into intense fighting and clashes without warning.

11.
What is known as the second civil war in Libya following the fall of Colonel Gaddafi in 2011, began in 2014. As is accepted by the parties a ceasefire agreement brokered by the United Nations was reached in October 2020. A unity government was formed in March 2021 and elections are planned for this year. However, Dr Cherstich's evidence is that there is still civil war in Libya.

12.
The father has produced internal and external photographs of where he lives with the three children and photographs of them at play, including some as recent as 4 February 2022. The housing appears to be comfortable and the children look happy and relaxed. He has produced a school report on the oldest child, describing her as an "active, organized and distinguished student", and a short, hand-written medical report from a Dr Doni, Paediatric Consultant, addressing the treatment the same child receives for her asthma. He assures the court that in the area of Tripoli where the children live and go to school (and pre-school) they are comfortable and safe. His work affords the family a good income and to a great extent they have been insulated from the effects of the civil war. The father points out that Libya is a very large country with a population of about seven million. Violent clashes in a rural area many thousands of miles away would not adversely affect the safety of the children. Whilst others in the population may have suffered the direct effects of conflict, or the indirect effects on their food and other basic supplies, the children have not. There are power cuts and other difficulties, but the portrayal of life in Libya by Dr Cherstich does not reflect the quality of his family's life there.

13.
The father has re-married and his wife looks after the children when he is at work. The wider family, several of whom live in adjacent apartments, also support the children. The children speak Arabic at home and at school. This has hampered the mother's communications with the younger two children, both boys. However, the father states that some English is still spoken at home and that the children will be taught English at school when they are older.

14.
The mother has not claimed that the children have been directly caught up in any violence in the four years or so they have lived in Libya. The father asserts that they have been kept safe throughout. He believes that the mother could travel to Libya to see the children but has instead poured her efforts and financial resources into the litigation.

15.
The father claims that his British passport has been revoked and that consequently he would be unable to travel to England with the children should their return be ordered. He goes further and states that he is unable to travel outside Libya.

The father relies on a report and the oral evidence of Ms Jamila Al-Taher Beshin, who works in the Child and Family Protection Office of the Ministry of the Interior in Libya. She has a Master's Degree in children's welfare and psychology. In her capacity as a civil servant within the Ministry she visited the children's schools and home in preparation of a report which the father, through his solicitors, had

requested of the Ministry. Her opinion evidence is given as an expert and I gave permission for the father to rely upon it, as necessary for me to resolve the proceedings, provided she attended to give oral evidence. Following her cross-examination I have some reservations about the reliability her evidence. She provides reassurance that the children attend school, that their schools provide good facilities and education, that the children are well nourished and clothed, that the home is comfortable, that the family are warm and loving, and that the children appeared well cared for and happy. I accept that these were her impressions and to that extent her evidence corroborates the father's assurances, but she has had limited involvement in the family and she appeared to me to accept assertions by the family in Libya at face value without adequate enquiry. For example, she reached the conclusion that the mother had abandoned the children and "did not exist" for them. Indeed, she was judgmental about the mother saying that her conduct was, in her eyes, a crime. She did not speak to the mother or ask any questions about the involvement of the mother in the lives of the children. Ms Al-Taher Beshin did not take the steps to inquire as thoroughly I would have expected of an independent expert witness. Accordingly, I disregard her opinion evidence about general conditions in Libya and about the mother's conduct and role in the children's lives. Nevertheless, her evidence is of some value as a witness who corroborates where the children live, that they attend school, that they appear to be well fed and clothed, and that they appear to be well cared for by a loving family in Libya.

Legal Principles

16.
When remitting this application to the High Court, the Court of Appeal enjoined the court to apply the legal principles and approach summarised by Moylan LJ in Re M (A Child) [2020] EWCA Civ 922. His judgment included a thorough review of previous case law which I do not need to repeat. I am not aware of any subsequent appellate judgments that revise or gloss those principles and approach.

17.
The parens patriae (parent of the nation) jurisdiction is one branch of the inherent jurisdiction of the High Court by which the court can seek to protect a British child, or a child travelling on a British passport, who is neither habitually resident nor present in this jurisdiction. Almost invariably the parens patriae jurisdiction is sought to be invoked to secure the return of a child from abroad.

18.
The exercise of the parens patriae jurisdiction is limited by the Family Law Act 1986 as analysed by Moylan LJ in Re M. In short, in the present case as in Re M, the court in England and Wales cannot not use the inherent jurisdiction to make an order giving care of the children to any person or which provides for contact. As Moylan LJ summarised at [53], except for the power to make s.8 orders in connection with matrimonial proceedings, the scheme of the 1986 Act is to give jurisdiction to make a child arrangements order under s.8 of the Children Act 1989 – regulating with whom and when a child is to live, spend time or otherwise have contact, prohibited steps orders, and specific issues orders – only when the child is either habitually resident or is present in England and Wales.

19.
There is no doubt that, otherwise, the parens patriae jurisdiction continues to exist. Moylan LJ made clear that,

Apart from the very significant limitations prescribed by [the 1986 Act], the courts in England and Wales have jurisdiction to make any other orders in respect of a child who is a British national even though they are neither habitually resident nor present in England. [88]

20.
As for guidance to the court when considering whether it is appropriate to exercise the parens patriae jurisdiction, Moylan LJ said that self-evidently the decision will depend on the circumstances of the case and on the nature of the order being sought, but,

There must be circumstances which are sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction. [105]

21.
This is a substantive threshold that gives effect to the need to “approach the use of the jurisdiction with great caution or circumspection” - [59] of In re B (A Child) (Reunite International Child Abduction Centre and others intervening) [2016] AC 606. Whilst the threshold was not described as being “high”, Moylan LJ warned that a lower threshold to the exercise of the inherent jurisdiction would “increase the prospect of the court making orders which would, in effect “cut across the statutory scheme” as suggested by Lord Sumption in In re B.

22.
When applying the legal principles in the case before the court, Moylan LJ noted that in the lower court in Re M, the “specific form in which the jurisdiction has been exercised is the order that A be brought to England “so that an assessment can be made in a place of safety as to her best interests and living arrangements.”” [135]. He considered that it was clear from the order under appeal that “the court was embarking on a welfare enquiry, which would include making orders dealing with arrangements for [the child’s] care.” [136]. As such,

… the clear purpose of the order was to enable the English court to undertake a welfare enquiry for the purposes of deciding who should care for A and … to seek to vest this court with jurisdiction to undertake this exercise by procuring A's presence in England. In my view, this would be using the inherent jurisdiction directly for the purpose of avoiding the effect of the 1986 Act and would, in the circumstances of this case, improperly have subverted Parliament's intention … I deliberately say, in the circumstances of this case, because I can see that there may well not be a bright line between an order which conflicts with the limitations imposed by the 1986 Act and one which does not. In my view, it would be doing so in this case because the judge's order was expressly for the purpose of enabling this court to decide who should care for A and whether here or in Algeria.

23.
I note that the Baker LJ in Court of Appeal in CG v AS [2021] EWCA Civ 1223 emphasised that considerations of the enforceability of any protective orders arise only after a decision that it is necessary for the court to exercise its protective jurisdiction. In those circumstances, the court’s assessment of the respondent’s willingness and ability to comply with any protective order, and, if relevant, the prospects of enforcement in the relevant other country, would be necessary.

Submissions

24.
For the mother, Mr Gupta QC, Ms Edmunds and Ms Lucas submit that it is necessary to protect the children by removing then from a “war zone”. Whilst the parens patriae jurisdiction has previously been described by Thorpe LJ in Al Habtoor v Fotheringham [2001] 1 FLR 951 as “exorbitant”, more recent case law demonstrates that it still has a place in the arsenal of the High Court when seeking to protect children. The court must apply the substantive threshold so as to give effect to the Convention rights of the children and the parties. The children are being kept separate from their mother. The

mother is being so comprehensively removed from the children's lives that Ms Al-Taher Beshin was under the impression that she "did not exist" for them. The children have a right to be heard but their voices have been silent. Only return to England will protect them. It would, further, allow for a welfare analysis upon their return. Mr Gupta QC suggested that separation from the mother in this case was sufficient of itself to justify the exercise of the parens patriae jurisdiction but there is a constellation of other factors which compel the court to so act, most especially the security situation in Libya, the danger the civil war creates for the children, and its impact on the availability of basic goods and services such as food and power.

25.
Ms Papazian, for the father, says that there is ample evidence that the children's needs are met in Libya. The court should examine the particular circumstances of these children not generalisations about the country. Notwithstanding security issues in Libya, these children are not directly affected. They are safe and well looked after. The mother's application also falls into the category of case identified by Moylan LJ that seeks orders that improperly subvert Parliament's intention – the clear purpose of the order sought is to enable the English court to undertake a welfare enquiry for the purpose of deciding who should care for the children. In fact, since the father could not travel to or live in England now, his British national status having been revoked, there would be adverse welfare consequences for the children on being removed from their home and brought to England.

Conclusions

26.
This court has to have regard to all the circumstances. I have received more extensive evidence that would usually be required on an application of this kind because of the route by which the application has reached this court. I have permitted oral evidence in this case but in many cases the court will be able to assess the relevant circumstances on the basis of an evaluation of the written evidence alone. Insofar as there are disputed facts in this case, I remind myself that the burden of proof rests on the party making the relevant allegation, and that the standard of proof is the civil standard on the balance of probabilities.

27.
Having regard to the evidence before the court and the legal approach required, in my judgement the important circumstances for me to take into account, and which I find exist in this case, are as follows:

a.
The children are British citizens.

b.
The children are neither habitually resident nor physically present in the jurisdiction of England and Wales.

c.
The children live with their father in Libya and have lived in that country since December 2017, over four years ago. All of them have spent the majority of their lives in Libya. The youngest was only three months old on arrival and only one year old when he last saw his mother in person.

d.

There is strong evidence that the children are well cared for by their father, his wife, and the extended family. The children are being appropriately educated and their health needs are met. The mother has understandable concerns due to the distance between her and her children, and the difficulties with communications and strained relationships, but she has produced no evidence to lead me to doubt the father's corroborated assurances to the court that the children's emotional, physical and educational needs are being met and are likely to be met in Libya in the future.

e.
Libya is a country that has been in civil war, where the structures of government and public services are under enormous strain, and where there is an ongoing threat of violence from armed militia and other forces. However:

i.
I am satisfied that the children have not been directly affected by any incidents of violence during the four years or so they have been living in the country. The mother has not suggested that they have.

ii.
The evidence from Dr Cherstich does not suggest a deterioration in the unrest and violence within Libya since 2017. Indeed, the weight of the evidence in this case is that there has, if anything, been some improvement since the UN brokered ceasefire in 2020.

iii.
The civil war has not prevented the children from being appropriately educated, being housed in comfort, being properly nourished and cared for, and having close family ties.

iv.
The civil war did not prevent the mother from actively participating in relocating the family to Libya in 2017 or from travelling to and from Libya and staying there for a number of months in 2018.

v.
The mother admits that in 2020 she thought seriously about moving with her own mother to Libya. I have no doubt that at that time her strong preference was for the children to be returned to England and that she had genuine concerns about their safety in Libya, but ultimately she did not think Libya to be so unsafe that she would not take her mother there and to live in Libya herself.

f.
Whilst I do not have any evidence directly from the children as to their wishes and feelings, the mother has had many sessions of indirect contact with them and she has not provided even one example of the children asking to come back to England or to leave Libya, or of them saying that they are frightened living there or that they are in danger. Evidence from the father persuasively demonstrates that the children are healthy and happy. The evidence of Ms Al-Taher Beshin supports the conclusion that the children are content with their lives in Libya.

g.
The father's evidence is that his British passport has been revoked and he says that he cannot travel outside Libya. I treat the latter claim with caution because it is not explained to my satisfaction by the evidence he has adduced. However, I do accept that he does not currently have permission to reside in the UK. Hence, an order for the children's return to this jurisdiction would not only uproot the children from their established home but would also be likely to separate them from their father who has been caring for them for the last four years.

28.
Whilst the Court of Appeal ordered that the case be remitted on the issue of (a) whether there should be an exercise of the parens patriae jurisdiction and (b) if so whether there should be an order for the return of the children under that jurisdiction, it seems to me that I cannot consider the first question in a vacuum. There is no dispute that the inherent parens patriae jurisdiction is potentially available in this case because the children are British nationals. As Moylan LJ noted in Re M at [43], it is a jurisdiction that might be potentially available in a very wide range of circumstances. The question is whether the jurisdiction should be exercised in the circumstances of the particular case:

Context is, therefore, very important for any analysis of the circumstance in which and the form or manner in which it is appropriate for the jurisdiction to be exercised.

It seems to me that I cannot determine whether it is necessary to exercise the jurisdiction without considering, at least in general terms, the form or manner in which it is to be exercised. Here, as appears to be almost invariably the case when an application is made for the court to exercise the parens patriae jurisdiction, the order sought is for the children to be returned to the jurisdiction of England and Wales. That is the means by which the children are to be protected. Thus, the question for the court to determine is whether there are circumstances sufficiently compelling to require or make it necessary that the court should order the return of the children to this jurisdiction. If a decision is made to exercise the parens patriae jurisdiction then at that stage the detailed terms of the order for return will need to be considered.

29.
The jurisdiction is protective. Whilst there may be many circumstances in which it might be said that children habitually resident and present abroad need protection, the exercise of the parens patriae jurisdiction is to be confined to those cases in which there are circumstances sufficiently compelling to make it necessary to protect the children, in this case by their being removed from Libya and returned to England. Other measures must be insufficient. If it is to be exercised “with great caution or circumspection”, then the jurisdiction cannot be exercised in every case where it would be in the best interests of a child habitually resident and physically present abroad to be returned to the jurisdiction of England and Wales.

30.
In my judgement, the fact that the children are separated from their mother, even given the added factors that the children are thereby deprived of a connection with part of their mixed heritage and that the mother finds contact with them difficult, is not sufficiently compelling of itself to make it necessary for them to be returned to England. It would be a factor in very many cases where families are separated by borders and the children are habitually resident and present overseas, yet the parens patriae jurisdiction should be exercised with great caution or circumspection and only when the circumstances are sufficiently compelling to require its use, not merely because there exists the much more common situation that its use might reunite a child with a parent. In any event, the use of the jurisdiction to make orders designed to bring children back to the jurisdiction to allow them to live with or spend time with a parent would in effect “cut across the statutory scheme” – Lord Sumption in In re B at [85]

31.
The legal principles articulated in Re M do not include a requirement that the child in question requires “immediate” protection. Nevertheless, for it to be necessary to exercise the parens patriae jurisdiction, in most cases it can be expected that there will be some ongoing or imminent danger to

the child, from which the proposed protection is required. In this case, in my judgement, there is no ongoing or imminent threat to the children such that they need to be removed from their home in Libya and returned to England.

32.
Having regard to all the circumstances, in my judgement the court should not exercise the parens patriae jurisdiction in this case. The evidence establishes that the children's needs are being met in Libya, they are not living in danger due to the security situation in that country, they are being educated, their health is looked after, and they are well cared for in a loving family. Their circumstances have not led the children to express or imply any wish to leave Libya. The evidence shows that they are apparently happy living there. They have lived in Libya for over four years, for the past three years five months without their mother. The youngest child was aged only two to three months on his arrival in Libya. It would be a major disruption in their lives to be suddenly removed from Libya and returned to England. The security situation in Libya is of considerable concern but the weight of the evidence is that it has not deteriorated since the children moved there in 2017 and, if anything, it has improved somewhat. Whilst the mother's own perception of the safety of living in Libya is not determinative of the need to protect the children, I do note that she helped to relocate the children to Libya in 2017 during the midst of the second civil war. She cannot have believed then that she was endangering the children. In fact, during the four years or so since then, the children have not come to harm as a result of the civil war. The mother has not adduced any evidence that the children have been harmed, only that they are in a country in which unrest and civil war has put them at risk of harm. I accept that unrest and violence continue to endanger people's lives in Libya, to disrupt the attempts to create a properly functioning state, and to adversely affect power and other basic supplies. To that extent the children are exposed to a risk of harm from conflict but I do not accept that the evidence shows that they are at a high risk of harm. In my judgment the evidence shows that the risk of harm to the children is low - it does not adversely affect their daily lives. The children are fortunate to live within a family of means, in an area which is not disrupted by conflict in the same way as other parts of the country. They have been, and continue to be, largely insulated from the risks of harm due to internal conflict in their country. Their position is not comparable with that of a British citizen contemplating travel to Libya.

33.
The Court of Appeal has now set out the legal principles to be applied when the High Court is asked to exercise its jurisdiction to order children habitually resident abroad to be removed from their homes in order to protect them as children of the nation. Those principles must be applied to circumstances in this and similar applications. In this case, the circumstances fall well short of compelling the conclusion that a protective order for the children to be returned to England is required. It is not the role of this court when determining jurisdiction to carry out a nuanced welfare assessment but in this case the balance might well favour the children remaining in Libya. Where it is not clearly in the best interests of the children to be removed from their country of habitual residence and returned to this jurisdiction, it can hardly be said that the circumstances are sufficiently compelling to require or to make it necessary for the court to exercise its parens patriae jurisdiction for that purpose.

34.
Moylan LJ observed in Re M that "there may well not be a bright line between an order which conflicts with the limitations imposed by the 1986 Act and one which does not." [137]. In very many cases where the jurisdiction is exercised and children are then returned to this jurisdiction, questions as to child arrangements upon or after arrival will arise. In some cases the primary or sole form of

relief sought is the return of the child. In others, the jurisdiction is being invoked to avoid the effect of the 1986 Act by securing the return of a child in order to give the English court jurisdiction to undertake a welfare enquiry and to decide who should care for the child. The applicant cannot otherwise secure that result whilst the child is habitually resident abroad, so they try to use the inherent jurisdiction to achieve the same outcome. The distinction is not always going to be clear, but in my judgement, the present case does manifestly fall within the second category. The fact that welfare decisions would have to be made after the children's return would not, of itself, dissuade me from exercising the parens patriae jurisdiction if the circumstances were sufficiently compelling to make it necessary to do so, but it is obvious that the mother's application is made in order to enable the English court to make orders for the children to live with her or to spend time with her. Naturally, she wants those outcomes and I am sure that she genuinely believes that they would be in her children's best interests, but that is not a legitimate use of the parens patriae jurisdiction.

35.
For these reasons I dismiss the mother's application.