



Neutral Citation Number: [2021] EWCA Civ 1171

Case No: B4/2021/0645

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT (FAMILY DIVISION)**  
**Ms Clare Ambrose (sitting as a Deputy High Court Judge)**  
**FD20P00625**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 28 July 2021

**Before :**

**LORD JUSTICE HENDERSON**  
**LORD JUSTICE PETER JACKSON**  
and  
**LORD JUSTICE ARNOLD**  
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**Re P (A Child) (Abduction / Inherent Jurisdiction)**

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**Sarah Lucy Cooper** (instructed by **A L Law Associates**) for the **Appellant Mother**  
**Paul Hepher** (instructed by **Thompson & Co Solicitors Ltd**) for the **Respondent Father**  
**Michael Gratton** (instructed by **CAFCASS Legal**) for the **Respondent Child by their**  
**Children's Guardian**

Hearing date : 22 June 2021  
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**Approved Judgment**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Wednesday, 28 July 2021.

## **Lord Justice Peter Jackson :**

### *Introduction*

1. This appeal concerns A, a boy aged 4. By orders of 26 March 2021 and 9 April 2021, Ms Clare Ambrose, sitting as Deputy High Court Judge, ('the Judge') exercised the inherent jurisdiction of the High Court to order the return of A to India, whence he had arrived on holiday with his father in October 2020. At the same time she refused an application by A's mother under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the Convention') for the return of A to the United States of America, from where he had been removed in disputed circumstances by the father in July 2017. In the intervening period of over three years, A had been living with his father and paternal grandparents in India. Although his mother and maternal family knew where he was, they had not attempted to have contact with him.
2. It is an unusual feature of the case that neither of the parents is currently in India and that India is not a signatory to the Convention. The mother remains in the United States, where she has claimed asylum and which she cannot leave. At the time of the hearing before the Judge, the father was in prison in London awaiting a decision on an extradition request made by the United States following an international arrest warrant arising from A's removal in 2017. He had contested his extradition and a decision on that question was imminent. He will therefore either be sent to the United States, or return voluntarily to India.
3. Meantime, A was in the care of a foster carer of the London Borough of Hillingdon with parental consent under section 20 of the Children Act 1989. Since the Judge's decision, he has been in the care of a paternal aunt, who lives in England.

### *The background*

4. The parents are Indian citizens who grew up 20 miles apart in villages in Gujarat. The mother's parents and two of her sisters live there, while another sister lives in New Jersey. She has another relation there, who she regards as an aunt. The father's parents live in Gujarat and his only sister, mentioned above, lives in London.
5. In 2008, the father went to the United States. He married a US citizen, divorced, remarried, and divorced again in 2016. He became a US citizen. Indian law does not generally allow for dual citizenship, but the father is registered as an Overseas Indian Citizen, which entitles him to enter India without a visa, and to live there with many of the benefits of Indian citizenship.
6. The mother entered the United States in 2015 without a visa. She was detained and imprisoned. Upon release, she was made subject to bail conditions, which continue. She later made an asylum application, which has not yet been determined.
7. The parents met and began to live together in the summer of 2015. They did not marry, although the mother wanted to. A was born at the end of 2016 and is a US citizen.
8. The circumstances in which the father took A to India in July 2017 were found by the Judge to be these:

“25. It is common ground that from around the end of February 2017 both parents were making arrangements for the father to travel to India with A. There is a dispute as to what was discussed and whether these arrangements were being made for what the mother believed was for a holiday for 1 month (the mother’s case) or whether she wanted the father to take responsibility for A and understood he would take him permanently to India (the father’s case).

26. A needed an Indian visa in order to visit India as he is a US citizen. He travelled to India on a visitors or tourist visa. The father later registered A as an Overseas Citizen of India on 26 June 2018.

27. It is common ground that both parents signed a custody agreement (“the custody agreement”) and this was witnessed at a travel agent in Edison New Jersey on 8 March 2017. The circumstances surrounding that agreement are disputed but it is common ground that the agreement was obtained with a view to obtaining a visa, and that the initial application for a visa for A to enter India with his father was refused. Under the custody agreement the parents agreed that:

*“The Father is permitted to move anywhere both within and outside of the United States, with A without the Mother’s consent....The parties acknowledge that due to their financial and other circumstances, this is the best decision for the welfare of A as the Mother is not able to take care of A. The Father shall be responsible for all expenses related to A, including healthcare, education and his day-to-day expenses.”*

28. It is also common ground that by consent the father obtained an order from the New Jersey Court for sole custody (“the custody order”) of A dated 2 May 2017 and the mother was aware of this application in advance. Both parents accept that:

a) following the rejection of the initial visa application, and towards the end of April 2017 the father proposed to the mother that he obtain an order for sole custody over A in order to obtain a visa for A to travel with him;

b) both parents went to court on 1 or 2 May 2017 when a hearing had been fixed for the father’s application for sole custody;

c) the parents had a meeting with a court appointed staff member (Ms Brinder Shrivastava) who arranged for a Gujarati interpreter, at which point there was a consultation, and the mother was asked why she was giving sole custody, she confirmed that the couple were separating and she could not take financial care of the baby, and also confirmed that the parents had a mutual understanding of when she would be seeing the

child, that she understood that she was giving up all her rights to A, and the court staff member confirmed to her that she could apply for joint custody if she wanted[. F]ollowing this consultation the judge approved the custody order;

d) both parents signed the order stating “I hereby declare that I understand all provisions of this Order”;

e) each of the parents were given a copy of the court order, and a sealed copy was sent to them by post.

29. The basis upon which the custody order was obtained is disputed. The mother says that the father deceived her by telling her that the order was needed to obtain a visa for A for the purpose of a one month holiday and they would then return to live together in the USA. The father says the mother had agreed that he would obtain sole custody in the knowledge that he was taking A permanently to India.

30. On 28 June 2017 the father informed the mother that he had purchased one way tickets for himself and A to travel to India on 27 July 2017. Around this time he gave one month’s notice on his lease on the apartment with a view to departing for India when the lease came to an end on 1 August 2017. The mother was planning to stay at [the aunt]’s house on the end of the lease. She knew he was making arrangements to put his furniture into storage. Indeed the storage agreement was taken out in her aunt’s name on around 24 July 2017. She also knew that he gave notice quitting his job. Until the father’s departure the mother lived with him in the apartment and they continued to have sexual relations. On 27 July 2017 the father travelled with A from the USA to India (A was aged 8 months at the time) and the mother travelled with him to the airport. All these matters were common ground. The dispute was as to the parties’ future intentions, and what had been communicated to the mother. The mother says that she was deceived to believe that the plan was that the father would return after a month’s holiday and the couple would find a new apartment on his return to the USA. The father says that the couple had decided to part, he was returning to India and she was going to stay with her aunt and planned to rent an apartment with her sister.

31. Shortly after the father’s arrival in India on 27 July there was a telephone conversation between the parties on 29 July 2017 but its contents are disputed. The mother says that this was the first time he told her that he would not be returning with A to the USA. The father says that the mother told him not to call or contact her again. It is common ground that the parents have not spoken to each other since then, or exchanged emails or text messages or contacted each other on social media.

32. The mother contacted the firm of New Jersey lawyers that were dealing with her immigration case, and set up a meeting on 3 August 2017 which the lawyers have said was about the abduction of A.”

9. At paragraph 31, the Judge does not detail a number of text messages sent by the mother to the father in the two days immediately after his departure from the United States in which she appears to be begging him to let her see and speak to A. Of these, the Judge’s only remark was that they were not a complete record of the relevant communications (paragraph 64). Similarly, at paragraph 32 the Judge records the mother’s meeting with lawyers on 3 August 2017, but does not address the mother’s case that this was significant evidence of the absence of consent, though she refers to it in the context of acquiescence at paragraph 86, cited below.

10. The Judge then summarised the subsequent history in this way:

“33. In November 2017 the mother secured a US work permit which enables her to work and she currently works at Dunkin Donuts as a cashier.

34. A and the father remained living with the paternal grandparents in India until coming to the UK for a short holiday on 1/2 October 2021.

35. On 12 July 2018 the mother commenced proceedings in the US for joint custody. No legal aid was available.

36. On 16 September 2018 the mother obtained an order for joint custody in the New Jersey courts, and Judge Daniel Brown made an order that the father return A to the US immediately. The father became aware of the proceedings and on around 17 and 24 September 2018 he made at least two telephone calls to find out what had happened. He was told by a member of staff that an order had been made giving the mother joint custody.

37. The mother made a criminal complaint against the father for kidnapping and in July 2019 criminal proceedings in the USA were instituted against the father. As a result, an international arrest warrant appears to have been issued against the father. The FBI also became involved in the case.

38. On 27 July 2020 the mother applied for a “U” visa in the USA on the basis that she is the victim of a “qualifying” criminal activity. The basis of that application is, in part at least, the alleged abduction of A.

39. On 1 October the father travelled from India to the UK with A. He had been offered free flights and a free hotel by a friend. On arrival he was promptly arrested on 2 October 2020 in execution of the international arrest warrant. He was taken from the airport to HMP Wandsworth where he remains. He is

contesting his extradition to the USA and his extradition proceedings are due to be heard in a 3 day case starting on 17 May 2021.

40. On 16 October 2020 the mother made an application for sole custody in the New Jersey courts.

41. A hearing took place in the family law proceedings in New Jersey on 24 March 2021 and the New Jersey court was aware of these proceedings. It made an order that the mother shall have temporary legal and physical custody of A pending further order.

42. Since arrival in London A has been re-introduced to his mother by video contact, and has had video contact with the paternal grandparents, and also the father's sister and brother-in-law who live in Harrow. He has had no direct contact with his father but has spoken to him over the phone."

11. Paragraph 39 does not capture the father's case, which was that the mother and the friend had caught him in a sting by luring him to bring A to England. The Judge did not address that allegation but she did make the more general finding that the mother had known that the father was travelling and that she had reported this to the FBI, leading to the warrant, and that she had initially untruthfully denied this.
12. At all events, the mother caused Convention proceedings to be taken, and the matter first came before the court without notice to the father on 1 October 2020, the day before he and A arrived here. At subsequent hearings, A was made a ward of court and a Guardian was appointed for him. Orders for contact have been made, with the effect noted by the Judge.
13. As noted there have also been proceedings about A in both this country and the United States. Of relevance is the order of 23 March 2021 of His Honour Judge Daniel Brown in the Superior Court of New Jersey granting sole custody to the mother, which clearly sets out the basis upon which it was made:

"23. It is further ORDERED: Defendant's application for legal and residential custody of the parties' child is GRANTED IN PART; DENIED IN PART. The May 1, 2017 Order, which was entered by consent of the parties, provided that the Plaintiff was to have sole legal custody of the child with Defendant's parenting time to be agreed upon by the parties. Apparently, Defendant agreed to Plaintiff taking the child to India for 2 weeks of vacation but Plaintiff never returned the child. According to Defendant, the child is currently in foster care in the UK. According to Defendant, the Plaintiff is currently in prison in the UK as a result of an international warrant issued by the FBI for kidnapping. It is the Court's understanding that the Defendant made application in the UK and that the UK Courts will decide on March 26, 2021 if the child should be returned to India or the U.S. It is not clear why Defendant has now petitioned two (2) different courts in two (2) different countries.

Regardless, this Court declines to permanently modify the custody and parenting time in the May 1, 2017 order insofar as Defendant fails to demonstrate that such an arrangement is in the child's best interests. However, NJSA 9:2-2 provides that when this Court has jurisdiction over the custody of a minor child, the child shall not be removed out of its jurisdiction absent the consent of both parents, unless the Court, upon cause shown, shall otherwise order. The parties implicitly acknowledged that this Court has jurisdiction by agreeing to the May 1, 2017 Consent Order. Thus, Plaintiff had no legal authority to permanently remove the child. While the Court declines to permanently modify custody or parenting time, Defendant shall have temporary legal and physical custody of the child pending further order of the Court. The intention of this Order is to ensure the return of the child to Defendant until such time as both parties can appear before the Court to address custody and parenting time on a prospective basis.”

14. The extradition proceedings concerning the father were heard on 17-19 May 2021. A decision was due to be handed down on 24 June, two days after the hearing in this court. We considered whether to postpone the hearing of the appeal until the outcome of those proceedings were known, but concluded that it was more appropriate for us to deal with matters on the same basis as the Judge, at least in the first instance. After hearing the submissions on the appeal, we adjourned to allow for the possibility of an application being made by either party to admit the extradition judgment as fresh evidence, and we set a timetable measured in days to allow for that and for any consequential written submissions. The date for the extradition decision was then delayed until 8 July and the timetable had to be extended correspondingly. In the event, no application was made by any party for the admission of further evidence and all parties have asked that we now give our decision on the appeal on basis of the evidence that was before the Judge. I note, but only for completeness, that we are informed that the District Judge decided on 8 July that under s. 87 Extradition Act 2003 the father’s extradition is not barred on human rights grounds, and that the case has accordingly been sent to the Secretary of State for a decision about whether the father should be extradited. He has a right to make representations to the Secretary of State and a possibility of appeal against an adverse decision.

*The hearing before the Judge*

15. At a 5-day remote hearing from 15-19 March 2021, the Judge heard evidence from the parents and the paternal grandparents (all through interpreters), from two of the mother’s relatives in the United States, and from the Guardian. On 26 March, she gave a reserved judgment, dismissing the mother’s Convention application and ordering A’s return to India. On 9 April, she made a further order discharging the wardship, specifying 16 April as the day for A’s return, ordering video contact with both the parents and the paternal grandparents in the meantime, and giving directions about other matters.
16. The position of the parties at trial was that:

- (i) The mother sought the summary return of A to the United States, alternatively his return under the inherent jurisdiction.
- (ii) The father sought the dismissal of the mother's application and A's return to India under the inherent jurisdiction.
- (iii) The Guardian supported the outcome sought by the mother if her account of A's removal from the United States was accepted, and the outcome sought by the father if his account was accepted.

17. In her judgment, the Judge set out the history and made these findings:

- (i) The mother had rights of custody in July 2017 so as to allow her to invoke the Convention, notwithstanding the custody agreement and consent order. This is no longer in issue.
- (ii) The father's account of events prior to his departure from the United States with A was consistent and to be preferred to the mother's. Her evidence on the disputed factual issues was unreliable. It was not supported by the contemporaneous evidence, was internally inconsistent, was inconsistent with the known facts and contemporaneous evidence, and was inherently improbable. These conclusions followed an extensive review of the evidence and in reaching them the Judge did not overlook the unusual aspects of the case:

“78. It is relatively unusual for a mother to give up all her rights to a child and agree that the father may permanently take a child to another country. In addition, it is common for a father to have greater financial control and independence and for a mother to be more vulnerable and dependent due to childcare obligations and lack of resources such as finances, education and language skills. In this context, at a superficial level the mother's case might appear inherently more probable than that of the father. However, based on the undisputed evidence here it would be very wrong to conclude that the mother's version of events is inherently more probable.

79. Although the mother has faced challenges (including the lack of immigration status), she is, on her own evidence, an educated, literate, determined and resourceful woman with family support. She is acutely aware of immigration issues. On the mother's own account, she was keen to secure her immigration status and get married to the father but he was not willing to marry after his divorce came through or after A was born, and there was clearly tension with the grandparents. His family had businesses and property while he had only found short term jobs in the US. The father's account of the parents deciding to separate at that stage, with him taking sole care of A so that she was not impeded in re-marrying was most consistent with the known facts at the time.”

- (iii) Accordingly, the mother had consented to A's permanent removal from the United States.



“82. I find that in their discussions prior to the custody agreement, the custody order and the departure of A to India on 27 July 2017 the mother had agreed that the father should be granted sole custody over A because she had agreed that the father should take full responsibility for A and he could take him to India permanently and care for him there. The mother agreed to the custody agreement and custody order as a means to enable the father to obtain a visa to take A to India permanently. She was fully aware of the contents of the custody agreement which were read out to her in Gujarati by Ms Toral Parekh, a New Jersey lawyer. Her agreement to A’s departure and the custody order was not induced by the father falsely assuring her that he was only going for a month for a holiday or for the purpose of a DNA test. The mother knew and agreed that the father and A were moving permanently. The agreement arose from the parents’ decision to separate and live their own lives, in circumstances where the father was unwilling to marry the mother.”

The Judge added that she found the mother to have deliberately lied throughout her evidence in an apparent attempt to support a case on abduction, most probably with a view to improving her prospects of securing a green card and also enabling her to have A in the United States. The Judge did not speculate about why the mother would seek this outcome now (and go to the lengths of having the father imprisoned as a means of achieving it) if she had agreed to it in 2017. This state of affairs might of course have arisen from the mother having repented of her decision to allow A to go, but that was not a possibility raised by any party and it is not considered in the judgment.

- (iv) The father would not have established the defence of acquiescence.

“86. Given my findings on consent I do not need to address acquiescence and it would be somewhat artificial to make findings on such a counterfactual position. However, if necessary I accept that the father would not have established acquiescence since there was some evidence that the mother had contacted lawyers about abduction on 3 August 2017. Although the mother delayed in making an application for custody, she was taking steps to obtain custody in the period up to the issue of her application on 10 August 2018. The father was aware of these steps from September 2018.

It is not clear why the Judge placed some reliance on the contact with lawyers in relation to acquiescence but not in relation to the question of consent.

- (v) A was settled in India. The Judge found that the father was his primary attachment figure but the grandmother also had a significant caring role. The Guardian’s evidence showed that A was a well-cared-for child whose adaptation to foster care indicated previous secure and positive attachments. Prior to coming to England, A was physically, emotionally and psychologically settled

with the father and the paternal grandparents in India. These conclusions are not in issue on this appeal.

18. In the final ten paragraphs of her judgment, the Judge considered how she should exercise her discretion under the Convention or, if the mother's Convention application failed, whether it was in A's best interests to be returned to the United States or to India under the inherent jurisdiction. She reasoned that it was common ground that A's future did not lie in this country and she referred extensively to the evidence of the Guardian, ending thus:

“105. The guardian considered that the appropriate options depended on the facts found and explored the options both ways. She considered that sending A to the USA would cause further disruption to A and could not be justified in circumstances where the mother had knowingly agreed to his removal, and had lied in alleging abduction. The guardian considered that this would mean that he would be placed in the care of a mother who has not been consistent in her commitment or her capacity to care for him. If she had not been truthful about the circumstances that gave rise to his life in India, and this action had led to the arrest and imprisonment of the father, and had led to A being placed in foster care then she had caused serious harm to A. The guardian said she would not have confidence in the mother's ability to prioritise A's needs. To send A to the USA in that scenario would present risks to his welfare. She acknowledged the risk that A would not have an on-going and meaningful relationship with his mother. However, greater harm would arise from the alternative of placing him with the mother in the USA since she is someone he is not familiar with and whose actions have caused him harm. The guardian accepted that while the father's family have not promoted contact with the mother, it could not be said they had deliberately obstructed it. The guardian was concerned that the mother had wilfully obstructed the father's relationship, whereas at worst the father's family had omitted to promote her relationship with A. This was very different to a deliberate separation and severing of A's relationship with her.

106. In forming the view that A should not be returned to the USA the guardian also took into account that the mother has not cared for A since he was 8 months old and the usual safeguarding precautions have not been taken regarding her or the family members she live with. She also had regard to the fact that the mother's immigration status is unclear.

107. Following the father's arrest A has experienced big changes that he needs to understand. The guardian was correct in her recommendation that A must continue to be supported to understand what is happening, and prepared in advance for further change.

108. I agree with the guardian's analysis which is firmly based in A's welfare, and I adopt it. I am satisfied that A should not be returned to the USA, and an order should be made for his return to India.

109. A has been through a difficult time and he needs to return to his home and he will be cared for by his paternal grandparents, and his father in due course. It is very fortunate that A has settled so well with the foster carer and learnt English. His well-being is thanks in large part to the skilled work of the foster carer, the local authority, the guardian and also the good parenting that A has received from his father and the grandparents. This enabled him to adapt better than might be expected.

110. These proceedings have shown that A now needs to have a relationship with his mother in his life. This was the firm view of the guardian and reflects his long term welfare, whether he stays in India or eventually returns to the USA. His father, grandfather and grandmother gave evidence on oath that they will support contact between A and his mother both in India and remotely. The father said he will promote the relationship. Having given such evidence they will be expected to keep their word.

### **Conclusions**

111. For reasons set out above I am satisfied that the mother's Hague Convention application for A's return to the USA should be dismissed, and no such order should be made under the inherent jurisdiction either. It is in A's best interest that he be returned to India to the care of his grandparents until his father can join him. It is also in his best interest that video contact with the mother continues and that he spends time with her if she goes to India."

19. It can be seen that the Judge considered it best for A to return to India, even though it was unclear when, and even if, the father would follow.
20. Accordingly, in her order dated 26 March, the Judge dismissed the mother's application under the Convention and ordered that A be returned to India. She fixed a further hearing on 9 April to consider travel plans, contact arrangements, and the discharge of wardship and tipstaff orders.
21. At the hearing on 9 April, the Judge ordered that A should be returned to India on 16 April or as soon as practicable thereafter. The order recorded that it was in A's best interests to stay with his foster carers until he returned to India, accompanied by the father's sister. Provision for ongoing contact for the mother, consisting of video contact four times a week, was limited to the period up to the point of departure and there is no provision for contact thereafter.

*The appeal*

22. On 12 April, the mother applied for permission to appeal. On 15 April, Moylan LJ granted a stay and on 16 April he gave permission to appeal. However, A had in the meantime been moved to his aunt in anticipation of travelling, and there he has remained.
23. There are three broad grounds of appeal:
  - (1) The Judge failed to respect international comity by ignoring orders from the courts of the USA that the father must return A to that jurisdiction.
  - (2) The Judge's welfare analysis was inadequate. She should have adjourned to await the extradition decision. She took no account of the inherent unlikelihood of contact between A and his mother if he returns to India.
  - (3) The Judge's finding of fact that the mother consented to A's permanent removal to India is challenged on 11 miscellaneous grounds.

*Findings of fact*

24. I will start with the third ground, as the Judge's findings of fact about the circumstances of A's departure from the United States inevitably underpin her overall approach. In developing this ground, Ms Cooper rightly described a challenge of this kind as facing an uphill struggle.
25. Ms Cooper lays particular stress on the record of a visit by the mother to her US immigration lawyers on 3 August 2017. The mother's evidence about this appears in a statement dated 19 January 2021.

“On 3 August 2017, I contacted the lawyers that I had engaged with on my Immigration matter. I met with the managing partner in relation to the family matter and subsequently met with the lawyer in September and November 2017. It was agreed that they would make an application to modify the sole custody order to a joint custody order. However, in order to make that application, they needed to obtain a copy of the order made in May 2017. ...

I met with my lawyers again in January 2018 and I regularly chased my lawyers during this time for updates. I exhibit hereto marked “PP4” emails that I sent to my lawyers chasing. I met with my lawyers again in April 2018 and an application at that time was made to obtain a copy of the May 2017 custody order. I understand that my lawyers received the order at some time in April 2018. Thereafter, my application was lodged with the court in July 2018.”

The consultation on 3 August 2017 was corroborated by an email of 15 January 2021 from the lawyers:

“[M] had her first consultation in regards to her Immigration case on May 4, 2017 with the managing partner. She had a previous immigration attorney prior to hiring our firm.

We received her immigration file from her previous attorney on or about August 2017.

On August 3, 2017, [M] had a consultation with the managing partner in regards to her child being abducted from the United States by the father.

On November 7, 2017 [M] came to our office to do the complaint for custody for her son.

Attached please find the receipt notice for [M]'s U—Visa application which reflects that USCIS received it on July 27, 2020. The processing time for that application to be approved is roughly 12-18 months. That would make her eligible to apply for Permanent Residency in the United States.

Attached please also find the proof of multiple attempts made to serve [F] as to the Order of Custody from the Superior Court of New Jersey.

Attached also find the proof of the modification for custody filing from October 16, 2020. We still do not have a hearing date for the request to modify the previous application in order for [M] to obtain Sole Legal and Residential Custody of her son.”

26. Ms Cooper accepted that this was a slender foundation for her challenge to the Judge’s central finding, but she describes it as significant evidence pointing away from the mother having consented to A’s permanent removal. The Judge only referred to it in the context of acquiescence, not consent. If it was worth anything in relation to one, it should have been taken into account for both. This amounted to a demonstrable failure to consider relevant evidence entitling an appeal court to interfere with a finding of fact: *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600 at [67]. Ms Cooper accepted that she could have asked the Judge to amplify her reasoning on this point, but she did present it as a draft ground of appeal at the hearing on 9 April and the Judge said that all her points about the fact-finding had been dealt with.
27. Ms Cooper’s other arguments in relation to the Judge’s treatment of individual aspects of the evidence were really a series of makeweights, and they did not feature significantly at the hearing of the appeal. She added that the Judge dealt inadequately with the significance of the text messages sent by the mother immediately after the child’s departure.
28. Replying on behalf of the father, Mr Hephher argues that the Judge had a substantial amount of evidence, including a day of evidence from each parent, oral evidence from five other witnesses and over 700 pages of evidence. She reached a conclusion and explained it. She assessed the parents’ credibility carefully. The challenge to her findings of fact is based upon a selective treatment of specific aspects of the evidence. The Judge had in mind the mother’s interaction with her American lawyers and she was entitled to take into account the history of inaction in relation to A and to find that the mother was centrally concerned with her immigration situation.

29. My conclusion is that the challenges to the findings of fact must fail. The Judge had a volume of evidence that entitled her to reach conclusions about the credibility of the parents, the known and disputed facts and the overall probabilities. She took full account of the unusual nature of the circumstances in which the mother relinquished A. There is no proper basis on which this court could interfere.
30. I accept that it would have been preferable if the judgment had addressed the significance or otherwise of the mother's texts and the visit to the lawyer. These were potential straws in the wind because they were closest in time to the child's departure. It is true that the text messages were incomplete, but what did they nonetheless mean? It is also true that the mother has not produced a record of what was said at the August 2017 meeting and that the words "in regards to her child being abducted" appear in an email years later, but what did the Judge make of that piece of evidence? These silences are puzzling when the judgment contains a section between paragraphs 62 and 65 entitled "Lack of contemporaneous evidence for mother's case", in which other matters are considered. Moreover, the reference to the visit to the lawyer in the context of acquiescence but not of consent seems inconsistent. Nor, as I have noted, did the Judge state any conclusion about the events leading to the father's arrest and A's removal into foster care, and it is unclear whether she considered that the mother had engineered the father's trip to England or merely taken advantage of it. That was a matter of some relevance for the welfare determination, as the Guardian had observed.
31. However, judges do not have to deal with every single piece of evidence, and although it may have been preferable if the Judge had addressed these matters head-on, they have to be placed in the context of a much broader picture, and that picture did not favour the mother. The real problem for her was the almost complete lack of any attempt at direct contact with the father and his family or with A over the course of some three years, during which legal proceedings were continuing at a pedestrian pace. Added to that, she was shown to have lied in some respects and the Judge simply did not believe her evidence on others. Any difficulty that the particular evidence relied on by Ms Cooper might have caused the father pales in comparison with the serious difficulties in the mother's case, and, even making allowances for the gaps in her analysis, I consider that the Judge's conclusions were sustainable on the evidence as a whole.
32. Before moving to the other grounds of appeal, I also note that it was a feature of the proceedings that the court was faced with two starkly irreconcilable accounts. Neither parent suggested that the evidence in this case might be explained in other ways, for example by the mother having initially agreed to the permanent removal of the child but having changed her mind days once the implications of what she had done had sunk in. Nor did she suggest that she had agreed to permanent removal on the basis that she would have ongoing involvement in A's life, as opposed to washing her hands of him. Neither alternative interpretation was canvassed by the Guardian, though Mr Gratton accepted that they might have been, and nor were they raised by the court. In the circumstances, these possibilities can be no more than speculation and the Judge's findings will remain undisturbed.

### *Comity*

33. Ms Cooper then submits that the Judge paid inadequate regard to considerations of international comity by ignoring the return orders from the New Jersey Court in September 2018 and March 2021. These were outstanding return orders made by

another Hague Convention 1980 state. The father had consciously ignored them. International comity is a deterrent to child abduction but there is no explanation in the judgment as to why no notice was paid to the orders and no weight given to the father's disengagement from proceedings he knew to be on foot. The case sets a dangerous precedent as it suggests that a parent can benefit from ignoring return orders made by a contracting state.

34. This ground of appeal must also fail. The court was not being asked to recognise or enforce the orders of the New Jersey court, indeed the United States has not ratified the 1996 Hague Convention on Jurisdiction, Applicable Law Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Nonetheless, our courts treat the decisions of courts in other jurisdictions with proper respect as a matter of course and in some cases those decisions may be highly influential on the outcome. In this case the Judge expressly acknowledged the previous orders:

“11. This court's findings below recognise that A is a US citizen and that the Superior Court of New Jersey (“the New Jersey court”) was seized in relation to custody of A in May 2017.”

However, there was, although the Judge did not explicitly say so, a very clear reason why the orders made in New Jersey could not prevail, namely because they were based on the mother's case that A had been abducted. Having had the opportunity, denied to His Honour Judge Daniel Brown, of investigating that allegation, and having firmly rejected it, the Judge was entitled not to give weight to the previous orders. She noted them, but she was obliged to make her own welfare assessment, and it is to this issue that I finally turn.

### *Welfare*

35. To my mind this is the real issue on this appeal. Before addressing the arguments, it is right to say that this was an unusual situation in which a non-British child, taken years ago from country A to country B had by chance come under the jurisdiction of our courts on the basis of presence. The return request emanated from country A, a Convention signatory, but the child was apparently habitually resident and settled in country B, which is not a signatory. This led to the court taking the unusual step of making the child a ward of court. Moreover, the applications before the court were made both under the Convention and the inherent jurisdiction and in consequence the Judge was called upon to carry out a hybrid hearing that required to consider the specific convention defences and also to make overlapping welfare decisions under both the Convention and the inherent jurisdiction.
36. The Judge directed herself at this stage in this way:

“101. The court's discretion under the Hague Convention and its inherent jurisdiction are not identical. It is generally difficult to justify an order to return where the exception of consent and also settlement have been established. The same considerations would be relevant under the inherent jurisdiction where welfare is more clearly the guiding consideration (and the policy of the Hague Convention is not in play). It was not suggested that the

exercise of discretion on the different bases (an exception under the Hague Convention or the court's inherent jurisdiction) would give rise to a different outcome in this case.”

37. In my view that was a sound a practical approach. The exercise of a discretion under the Convention is at large: *Re M (Children)* [2007] UKHL 55; [2008] 1 AC 1288. The approach to making a welfare decision under the inherent jurisdiction was considered by the House of Lords in *In re J (A Child)(Custody Rights: Jurisdiction)* [2005] UKHL 40, [2006] 1 AC and by the Supreme Court in *Re NY (A Child)* [2019] UKSC 49, [2020] AC 665.
38. In *Re J*, the House of Lords affirmed that the welfare principle applies to decisions under the inherent jurisdiction. However, the court does have power, in accordance with the principle, to order the immediate return of a child to a foreign jurisdiction without conducting a full investigation of the merits. As Baroness Hale put it at paragraph 28:

“It is plain, therefore, that there is always a choice to be made. Summary return should not be the automatic reaction to any and every unauthorised taking or keeping a child from his home country. On the other hand, summary return may very well be in the best interests of the individual child.”

In the following paragraphs, she considered how the choice should be made, with reference to a number of factors that would vary from case to case, including the degree of connection with each country and the length of time he has spent in each. She concluded at 38:

“Hence our law does not start from any *a priori* assumptions about what is best for any individual child. It looks at the child and weighs a number of factors in the balance, now set out in the well-known 'check-list' in section 1(3) of the Children Act 1989; ...”

39. In *Re NY* at paragraph 49, Lord Wilson similarly commended the used of the welfare checklist, although it is not expressly applicable to making orders under the inherent jurisdiction:

“... their utility in any analysis of a child's welfare has been recognised for nearly 30 years. In its determination of an application under the inherent jurisdiction governed by consideration of a child's welfare, the court is likely to find it appropriate to consider the first six aspects of welfare specified in section 1(3) ...; and, if it is considering whether to make a summary order, it will initially examine whether, in order sufficiently to identify what the child's welfare requires, it should conduct an inquiry into any or all of those aspects and, if so, how extensive that inquiry should be.”

What is therefore needed in all cases is an inquiry that sufficiently identifies what the child's welfare requires.



40. When considering the challenge to the expression of the Judge’s welfare determination in his case, the first thing to say is that unfortunately her attention was not drawn to these authorities. Nor did the advocates structure their submissions to her by reference to the checklist. Had they done so, she might have organised her reasons differently and may have given them more fully.
41. Ms Cooper first argues that the Judge erred in failing to adjourn the welfare decision to await the outcome of the father’s extradition hearing, when that might mean A returning to live in India with neither parent, with both parents being in the United States. She says that she applied for a split hearing at the outset of the trial. That submission is true to this extent. In her opening written submissions, dating from the eve of the hearing, Ms Cooper raised no fewer than seven preliminary issues. The sixth was:

“Whether there should be a split hearing – a fact finding hearing and then a further hearing to consider the outcome once F’s extradition proceedings have been concluded and the judgment in *G v G* has been delivered by the Supreme Court on 19th March 2021;”

The reference is to *G v G* [2021] UKSC 9, where the court considered the interaction between the Convention and asylum claims, but this was in the context of the duties of a state to which both forms of claim had been addressed, which is not the present case.

42. In her written submission to the Judge, Ms Cooper continued:

“(vi) Split Hearing

48. The Court may wish to consider a split hearing in this matter with a further hearing to be listed within a short time of the resolution of F’s extradition proceedings. This would have certain advantages including:

(i) The Guardian could properly consider the findings made and therefore comment further on any issues in relation to any “settlement” defence and A’s welfare, particularly in circumstances where M’s account is not accepted by the Court;

(ii) Expert evidence could be obtained in respect of whether M had rights of custody;

(iii) The Court would know whether F was going to be extradited to the USA or not;

(iv) The impact of *G v G* in the Supreme Court could be taken into account [see below];

49. F’s extradition hearing will not be completed until around 20th May in any event and so F will not be prejudiced by any delay as he has not been granted bail in any event.

50. It is of accepted that delay is of course prejudicial to A who has been in foster care since 2nd October 2020 and with whom M dearly wishes to be reunited.”

43. Accordingly, in saying at the outset of the final hearing that the court “may wish to consider” a split hearing, the mother tabled the issue without positively seeking an adjournment.
44. At the hearing on 9 April, having received the adverse judgment, Ms Cooper renewed her application for an adjournment of the welfare decision, and the application was refused. By that stage, the welfare decision had of course been taken.
45. I do not accept that the Judge was wrong to proceed to make her welfare decision without knowledge of the outcome of the extradition proceedings. The case concerned a child who had been removed from his father’s care and had been incongruously in foster care in a foreign country for almost six months. The matter had previously come before the court for case management on 13 and 20 October, 3 November and 16 December 2020 without the final decision being tied in with the extradition proceedings. The Judge cannot therefore be criticised for getting on with the case in the way that she did.
46. As to the substance of the decision, Ms Cooper contends that the Judge unduly focussed on the issue of settlement. This was a matter that had to be considered for the purpose of the Convention, but it was not the only factor relevant to A’s welfare and, she says, it clouded the Judge’s assessment. She failed to take account of the fact that if the father is returned to the United States, that is the only place that A could spend time with both parents. The Guardian had reported that the online contact with the parents was of better quality than that with the grandparents. Overall, there was no adequate welfare investigation to the standard required in *Re NY*, and in particular the Judge did not consider how A’s future relationship with his mother would be secured. She failed to take into account the unlikelihood of future contact with the mother or her family if A returned to India and the lack of a mechanism to enforce the contact that A needs. As an unmarried mother, the mother claims (but without any specific evidence to this effect) that she will be subject to cultural stigma and that any application to the Indian court will face serious delays.
47. In an unusual, difficult or finely balanced case it is always a valuable exercise to survey the main features of the welfare checklist, and I am sure that the Judge would have been helped by doing that in this case. However, we are concerned with the substance of her decision and not its form. Having given due consideration to the arguments, I do not accept that the Judge’s decision to return A to India was wrong. She was entitled to accept the recommendations of A’s Guardian. She might have expressed her conclusion more fully in her own words, but it is clear that the essential driver for her thinking was that the mother did not offer a viable placement for A at this time. She had in one way or another brought about a terrible situation in which A had been abruptly removed from his father, his primary carer, and placed with strangers, while the father has been imprisoned for an indefinite period. Like the Guardian, the Judge was entitled to view the mother as having seriously harmed A and to conclude that, as he could not stay in England, he would suffer lesser harm if returned to familiar surroundings in India rather than uncertain and unfamiliar ones in the United States.

48. It is true that this decision left unresolved the obvious unknowns concerning the father's whereabouts and the mother's contact. The Judge stated at paragraph 109 that A will be cared for by his paternal grandparents "and his father in due course". She did not confront the fact that the father might not be returning in the foreseeable future. Even so, the thrust of her decision is that the best course for A is to return to India, whatever else may happen. That outcome was in my view justified on the basis of her overall findings, which formed a sufficient basis for that welfare determination.
49. The only saving grace about the events of the past year is that A now knows his mother. My one reservation about the Judge's final order is that it makes no reference to contact after he returns to India. She found at paragraph 110 that A needs his mother in his life, that the father and his family had given evidence on oath that they would support contact in India and remotely, and that they would be expected to keep their word. At the conclusion of the appeal hearing, and without prejudice to the outcome of the appeal, we invited the parties to discuss how this position could be reinforced if A returned to India, and to lodge the terms of any agreement with the court. No agreement has been reached, but on 29 June the father's solicitor wrote to the mother's solicitor setting out proposals for direct and indirect contact in India for the mother and maternal family. We will therefore reflect those proposals in a recital to our order, which will bring these proceedings to an end.

### *Conclusion*

50. The Judge was entitled to dismiss the mother's Convention application. She was entitled to make, rather than defer, a welfare decision and then, in circumstances where A could not remain in England and where there was no satisfactory plan for him if he was sent to the United States, to conclude that it was in his best interests to return to India into the care of his grandparents. I would therefore dismiss the appeal.

### **Lord Justice Arnold**

51. I agree.

### **Lord Justice Henderson**

52. I also agree.

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