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Case No: FD21P00088

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2021

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

K	**Applicant**
- and -	
H	**Respondent**

- -
- -

Mr Brian Jubb (instructed by **Dawson Cornwell**) for the **Applicant**
Mr Nicholas Anderson (instructed by **Wilsons Solicitors LLP**) for the **Respondent**

Hearing dates: 7 and 8 July 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. Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 2.00pm on 8 July 2021.

MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter, I am concerned with the welfare of B, born in November 2014 and now aged 6, and E, born in March 2016 and now aged 5. The applicant mother, K (hereafter 'the mother'), is a Sudanese national with indefinite leave to remain in the United Kingdom. She is represented by Mr Brian Jubb of counsel. The respondent father, H (hereafter 'the father'), was born in Sudan and is now a British Citizen. He is represented by Mr Nicholas Anderson of counsel.

2. The mother applies for orders under the inherent jurisdiction of the High Court. Specifically, the mother applied on 10 February 2021 for the children to be made wards of court and for an order mandating the return of the children to the jurisdiction of England and Wales from the jurisdiction of Sudan. That application is resisted by the father.

3. In deciding this matter, I have read the bundle of documents prepared for this hearing. The parties agreed that it was not necessary for the court to hear oral evidence in respect of the issues before it. In the circumstances, I have also been assisted by the comprehensive and helpful written and oral submissions of Mr Jubb and Mr Anderson.

BACKGROUND

4. The background to this matter can be stated shortly. The parties had an arranged marriage in the Sudan on 3 June 2012, although the father contends that the parties married in Sudan in 2001 and that is the year mentioned in some of the documentation before the court concerning the parents' subsequent divorce. On 18 January 2014 the mother was given entry clearance to the United Kingdom on a spousal visa. The mother resided with the father at his home in London. As I have noted, in November 2014 B was born in the United Kingdom. E was born in March 2016 in the United Kingdom. Both children hold dual British-Sudanese citizenship.

5. The mother alleges that the marriage was characterised by domestic abuse. This is denied by the father. On 25 April 2017 the mother and the children travelled to Sudan. There is an issue between the parties as to the reason the mother and the children travelled to Sudan on that date.

6. The mother says that she and the children travelled for a holiday at the suggestion of the father and in the expectation that she and the children would return to the United Kingdom. The mother concedes that she knew the father had booked one way tickets, but states that this was because the family's return date was then uncertain. The mother claims that, within a day of their arrival in Sudan, the paternal grandfather requested the mother's passport and those belonging to the children on the pretence that the father required copies. The mother states that thereafter, despite the paternal grandfather undertaking to let her have the passports on request, she never saw the passports again.

7. The father denies this alleged course of events, contending that the mother travelled to Sudan with the children with the aim of settling permanently in that country, the father making all of the arrangements with the mother's full knowledge and agreement and having secured a loan to do so. In his statement, the father contends that the mother

wanted to go to Sudan, wanted the children to be educated in Sudan and to learn the Zaghawa language, wanted the children to meet and grow up around their extended family and wanted the children to learn the culture and traditional customs and to attend an Islamic school in order not lose their cultural identity. The father contends that, in this context, he booked one way tickets as there was no intention to return to England and that the mother took all of her belongings in some seven suitcases. The father further denies that the paternal grandfather removed the passports of the mother and the children and relies on a sworn affidavit from the paternal grandfather to that effect.

8. In May 2017, the mother moved to live with her parents in Sudan and reported the children's passports as "missing" at the local police station. The mother alleges that the father refused to facilitate her return and the return of the children to the United Kingdom in January 2018 for her brother's wedding and that in March 2018 the father came to Sudan and stated that he wished her to live with his parents in that jurisdiction. In her statement the mother accepts that she agreed to this course of action provided her passport was returned, which request was refused by the father. The mother contends that she did not seek the return of the children's passports as she knew the father would refuse. All of this is denied by the father, who contends that whilst he was in Sudan he became aware that the mother had commenced another relationship. The father returned to England.

9. On 30 May 2018, the father stated that he was divorcing the mother. Thereafter the mother managed to obtain a new Sudanese passport for herself but was unable to obtain passports for the children. She returned to the United Kingdom on 8 July 2018, with a view to requesting the return of the children's passports from the father. The father however had travelled back to Sudan. The father contends that he did so because he was concerned that the mother had left the children in Sudan without a parent. The mother sought to apply for new passports for the children from the UK Passport Office in August 2018. She was however informed that, as the children remained in Sudan, she would have to contact the British Embassy in Sudan. The mother returned to Sudan on 11 August 2018. Whilst in Sudan both the mother and the father each alleged domestic abuse perpetrated by the other. The mother contends that between 2018 and 2019 she attended the British Embassy in Khartoum nine or ten times and was given different advice on each occasion regarding the requirements for obtaining new passports for the children.

10. On 9 September 2018, the mother applied to the Sudanese court for an order evidencing the fact that she was divorced from the father. That order was made on 29 September 2018 by the Al-Fasher Sharia Court. On 29 November 2018 the father applied in the jurisdiction of Sudan for a custody order, but was granted an order for weekly contact by the Al-Fasher Sharia Court. The court also ordered the father to pay maintenance for the children with respect to subsistence, clothing, housing and medical expenses. It would also appear that the father applied to the Court in Al-Fasher for a prohibited steps order (as described in the Sudanese court documents) to prevent the mother from travelling outside of Sudan with the children. That application was dismissed by the Al-Fasher Sharia Court. The father appealed the decision to dismiss that application to the North Darfur State Court of Appeal, which in turn dismissed his appeal (although that latter dismissal was subsequently quashed on 20 October 2020 and the father's appeal remains under consideration). The father returned to the United Kingdom in March 2019

11. In May 2019 the mother herself made an application to the court in Sudan for custody orders in respect of the children and was granted custody in respect of both children on 29 September 2019 at hearing at which she says the father was present. The father denies he was present at the hearing. The children remained living with the mother and her parents.

12. The mother made a further application for new British passports for the children on 17 October 2019. On 20 November 2019, the mother received a letter from HM Passport Office requiring the mother to provide a letter from the father regarding the loss of the original passports. The mother contends that the father refused to provide such a letter. The mother returned to the United Kingdom on 29 January 2020, leaving the children in the care of the maternal grandparents, and reported the father to the UK police with respect to alleged domestic abuse and withholding the children's passports. The father returned to Sudan in February 2020, returning to the United Kingdom in October 2020. The father made a further application in Sudan for a custody order with respect to the children on the grounds that they had been left by the mother in the care of the maternal grandparents. That application was again refused by the Sudanese court.

13. The mother has now remarried and has a baby daughter by her second husband. Her second husband is at present in Sudan awaiting entry clearance into the United Kingdom.

14. On 10 February 2021, nearly four years after the children went to Sudan, the mother issued a without notice wardship application in respect of the children in this court. The application form issued by the mother made no mention of the fact that the matters on which she relied in support of a without notice application had taken place as long ago as 2017. It is unclear whether there was a statement in support of the application (the date of the mother's signature on her statement being 25 June 2021 but the date of the interpreter's signature being 10 February 2021). On 23 February 2021, Arbuthnot J made a passport order requiring the father to deliver up the passports of the children, and his passport, to the Tipstaff. The order was served on the father on 25 February 2021. The father denied that he was holding the children's passports. He was subsequently arrested with respect to allegations made by the mother of domestic abuse and currently holds the status of being released pending investigation.

15. With respect to the question of jurisdiction, when the matter came before Mr Damian Garrido QC sitting as a Deputy High Court judge, the father conceded that the court retained a residual *parens patriae* jurisdiction with respect to the children based on their dual British-Sudanese nationality and that the issue for the court to determine was whether that residual jurisdiction should be exercised in this case.

16. The mother asserts that she has repeatedly requested that the father return the children to the jurisdiction of England and Wales. The father denies that any such requests have been made. The parents continue to litigate in Sudan, the most recent order in that jurisdiction being made only some weeks ago on 22 June 2021 on the mother's application.

17. The matter now comes before the court for final hearing to determine the following issues:

i) Is this an appropriate case for the court to exercise its residual *parens patriae* jurisdiction based on the British nationality of the subject children?

ii) If so, should the children be made wards of court and a return order granted under the inherent jurisdiction in respect of the children?

iii) Should the passport order continue or be discharged?

PARTIES' POSITIONS

The Mother

18. The mother now concedes that the children are habitually resident in Sudan. However, the mother contends that the children require the protection of orders made by this court under its residual *parens patriae* jurisdiction, that jurisdiction being operational by virtue of the fact that the children hold British Citizenship.

19. The mother contends that such protection is required, and that the need for protection constitutes sufficiently compelling reason to exercise the residual *parens patriae* jurisdiction, because:

i) The children are at present without any person with parental responsibility for them in Sudan. The mother relies on the fact that both of the children's parents are at present in this jurisdiction, she asserting there never having been any plan on the part of either parent that the children would reside in Sudan, and that consequently there is no one with parental responsibility for the children living with them in Sudan. The mother alleges that the father has had no contact with the children since 2018 and does not show any interest in their medical or educational welfare.

ii) Once the children reach the age of 7 years old, Sharia law will apply to them in Sudan, resulting in the Sudanese courts automatically transferring custody to the father. The mother contends that the judges dealing with proceedings in Sudan have indicated to her that this will be the position. The mother further asserts that, in this context, it would be unfair for the father to obtain such a jurisdictional advantage by reason of what she asserts is his conduct in engineering the stranding of the children in Sudan. The mother further asserts that the paternal family plan to ostracise her from the children once the father has obtained custody on the basis of Sharia principles, with the father planning to leave the children in the care of his parents whilst he returns to live in England.

iii) The children require medical treatment that is not available in, or is not freely available, in Sudan. In this regard, the mother relies on undated medical documents that she contends have been provided by the children's doctors in Sudan.

20. If the court is prepared to exercise its residual *parens patriae* jurisdiction in respect of the children, the mother contends that it is in each child's best interests for the children to be made wards of court and for orders to be made returning them to the United Kingdom because:

i) The children are British citizens.

ii) Both parents reside in the United Kingdom.

iii) The mother has always been the primary carer for the children.

iv) The father has had no contact with the children since 2018.

v) The children's educational and socio-economic prospects are better in the United Kingdom than in Sudan.

vi) The children will benefit from contact with their half-sibling.

vii) E's medical needs will be better met in England.

21. The mother also seeks the continuance of the passport order in respect of the father's passport. The mother asserts that if the father is permitted his passport he will return to Sudan and remove the children to an undisclosed location, making the recovery of the children to this jurisdiction significantly more difficult. The mother further relies on the fact that the father is currently the subject of a police investigation and that the police have indicated that they did not seek a bail extension on the basis that the father's passport is held by the Tipstaff.

The Father

22. The father invites the court to dismiss the mother's application in respect of the children on the grounds that there is no basis on which the court can properly exercise its residual *parens patriae* jurisdiction in this case. The father contends that, in the context of the children being habitually resident in Sudan and Sudan being the convenient forum, there is simply no evidence before the court to demonstrate sufficiently compelling reasons that the children require the protection of this court even though the Sudanese courts have jurisdiction and are seised of the children's welfare.

23. With respect to the matters relied on by the mother, the father submits that the only reason that the children are currently without the care of a parent with parental responsibility is that the mother has chosen to return to the United Kingdom (the mother accepts that there is nothing preventing her from returning to Sudan) and that this court is holding the father's passport. The father denies that it is the case that the Sudanese court will automatically grant custody of the children to him once the children reach legal age, relying on the information supplied by the *mother's* lawyer to confirm this. The father further states that, in any event, it is not his intention to remove the children from the care of their mother, who will remain their main carer. The father hopes that both he and the mother will return to Sudan. If this is not to be the case, the father intends to seek custody of the children. The father denies that he has any intention of placing the children with his parents. The father contends that he has regular contact with both children by telephone and sends money to the children via his family in Sudan. In his statement, he says he intends to return to live in Sudan. Finally, the father raises concerns about the extent to which the children have, in fact, required or will require medical treatment in Sudan, relying on a document that suggests the medical evidence obtained by the mother from Sudan is unreliable (and implying that it is, in fact, forged).

24. The father also seeks the discharge of the passport order and the return of his passport. Mr Anderson submits, and Mr Jubb concedes, that this must be the inevitable result of the court declining to exercise its residual jurisdiction. In any event, the father seeks the return of his passport to enable him to travel to Sudan to see the children, and his mother, who the father asserts is now gravely ill in hospital with hypertension, diabetes and ischaemic heart disease, the father also producing a medical report to corroborate this. The father further contends that the only way his mother's medical treatment can be funded is if he is able to take cash to Sudan, it being extremely difficult to transfer funds between the United Kingdom and Sudan due to the existence of sanctions, Sudan being currently the subject to UK financial sanctions.

THE LAW

25. The primary connecting factors between a child and a country that result in jurisdiction in respect of that child being conferred on the courts of that country are those of habitual residence and physical presence. This is seen both in domestic statute, in this jurisdiction the Family Law Act 1986 s.3, and the private international law conventions, for example Chapter II of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures of Protection for Children.

26. It has however, long been recognised that in this jurisdiction there remains a residual *parens patriae* jurisdiction of the High Court over a child who is a British citizen but who outside the jurisdiction of England and Wales. That proposition is not disputed by either party in this case. In *Re P(GE)(An Infant)* [1965] Ch 568, Lord Denning observed as follows in this regard:

> "The court here always retains a jurisdiction over a British subject wherever he may be, though it will only exercise it abroad where the circumstances clearly warrant it: see *Hope v Hope* (1854) 4 De GM & G 328; *In Re Willoughby* (1885) 30 Ch D 324; *R v Sandbach Justices, ex p Smith* [1951] 1 KB 62."

27. In *Hope v Hope* (1854) 4 De GM & G 328 Lord Cranworth LC had explained the foundation of the jurisdiction as follows:

> "The jurisdiction of this Court, which is entrusted to the holder of the Great Seal as the representative of the Crown, with regard to the custody of infants rests upon this ground, that it is the interest of the State and of the Sovereign that children should be properly brought up and educated; and according to the principle of our law, the Sovereign, as *parens patriae,* is bound to look to the maintenance and education (as far as it has the means of judging) of all his subjects. The first question then is**,** whether this principle applies to children born out of the allegiance of the Crown; and I confess that I do not entertain any doubt upon the point, because the moment that it is established by statute that the children of a natural born father born out of the Queen's allegiance are to all intents and purposes to be treated as British born subjects, of course it is clear that one of the incidents of a British born subject is, that he or she is entitled to the protection of the Crown, as *parens patria.*"

28. The precise nature and extent of the residual *parens patriae* jurisdiction of the High Court over a child who is a British citizen, and the question of whether that jurisdiction should be exercised (which is the issue in this case) has been the subject of much detailed examination by the higher courts. In *Al Habtoor v Fotheringham* [2001] 1 FLR 951 at [42] Thorpe LJ gave the following warning about the perils of stepping outside the statutory connecting factors of habitual residence and physical presence and into the *parens patriae* jurisdiction when seeking to establish jurisdiction in respect of a child:

> "*Parens patriae* jurisdiction has a fine resounding history. However its practical significance has been much diminished domestically since the codification of much child law within the Children Act 1989. In order to achieve essential collaboration internationally it has been necessary to relax reliance upon concepts understood only in common law circles. Thus our historic emphasis on the somewhat artificial concept of domicile has had to cede to an acknowledgement that the simpler fact-based concept of habitual residence must be the currency of international exchange. The *parens patriae* concept must seem even more esoteric to other jurisdictions than the concept of domicile. If we are to look for reciprocal understanding and co-operation, so vital with the steady increase in mobility and mixed marriage together with an equal decrease in the significance of international frontiers, we must refrain from exorbitant jurisdictional claims founded on nationality. To make a declaration of unlawful detention in relation child of dual nationality cared for by a biological parent in a jurisdiction whose courts have sanctioned the arrangement by order is only to invite incomprehension, and perhaps even stronger reactions, in that other jurisdiction."

29. The question of the nature and extent of the residual *parens patriae* jurisdiction of the High Court over a child who is a British citizen but who is outside the jurisdiction of England and Wales, and the circumstances in which such jurisdiction can be exercised by the court, came before the Supreme Court in *In Re A* [2013] UKSC 60. Baroness Hale was in no doubt that the jurisdiction exists, subject to the provisions of the Family Law Act 1986, and addressed the circumstances in which the jurisdiction could be exercised. In this regard, Baroness Hale reflected the caution that had been expressed by Thorpe LJ in *Al Habtoor v Fotheringham* when observing at [64] that:

> "Mr Setright, with the able assistance of Mr Manjit Gill QC, has raised a number of important general considerations which may militate against its exercise. It is inconsistent with and potentially disruptive of the modern trend towards habitual residence as the principal basis of jurisdiction; it may encourage conflicting orders in competing jurisdictions; using it to order the child to come here may disrupt the scheme of the 1986 Act by enabling the child's future to be decided in a country other than that where he or she is habitually resident. In a completely different context, there are also rules of *public* international law for determining which is the effective nationality where a person holds dual nationality."

30. Within this context, in *In Re A* Baroness Hale endorsed the view of Thorpe LJ in *Al Habtoor v Fotheringham* that the foregoing matters were reasons for "extreme circumspection" in the decision as to whether to exercise the jurisdiction, albeit that each case would turn on its own facts.

31. The Supreme Court revisited the nature and extent of the residual *parens patriae* jurisdiction of the High Court over a child who is a British citizen but who is outside the jurisdiction of England and Wales, and the circumstances in which that jurisdiction might be exercised, in *Re B (A Child)* [2016] UKSC 4. As Mr Anderson rightly points out, much if not all of what the Supreme Court had to say in *Re B* regarding the residual jurisdiction is plainly obiter. It is nonetheless important to note that Lady Hale and Lord Toulson observed at [59] to [62] that:

> "[59] Lord Wilson has listed a number of important issues to which that question would have given rise and which must wait for another day. It is, however, one thing to approach the use of the jurisdiction with great caution or circumspection. It is another thing to conclude that the circumstances justifying its use must always be "dire and exceptional" or "at the very extreme end of the spectrum". There are three main reasons for caution when deciding whether to exercise the jurisdiction: first, that to do so may conflict with the jurisdictional scheme applicable between the countries in question; second, that it may result in conflicting decisions in those two countries; and third, that it may result in unenforceable orders. It is, to say the least, arguable that none of those objections has much force in this case: there is no applicable treaty between the UK and Pakistan; it is highly unlikely that the courts in Pakistan would entertain an application from the appellant; and it is possible that there are steps which an English court could take to persuade the respondent to obey the order.
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> [60] The basis of the jurisdiction, as was pointed out by Pearson LJ in *In re P (GE) (An Infant)* [1965] Ch 568, at 587, is that "an infant of British nationality, whether he is in or outside this country, owes a duty of allegiance to the Sovereign and so is entitled to protection". The real question is whether the circumstances are such that this British child requires that protection. For our part we do not consider that the inherent jurisdiction is to be confined by a classification which limits its exercise to "cases which are at the extreme end of the spectrum", per McFarlane LJ in *In re N (Abduction: Appeal)* [2012] EWCA Civ 1086; [2013] 1 FLR 457, para 29. The judgment was ex tempore and it was not necessary to lay down a rule of general application, if indeed that was intended. It may be that McFarlane LJ did not so intend, because he did not attempt to define what he meant or to explain why an inherent jurisdiction to protect a child's welfare should be confined to extreme cases. The judge observed that "niceties as to quite where the existing extremity of the jurisdiction under the inherent jurisdiction may be do not come into the equation in this case" (para 31).
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> [61] There is strong reason to approach the exercise of the jurisdiction with great caution, because the very nature of the subject involves international problems for which there is an international legal framework (or frameworks) to which this country has subscribed. Exercising a nationality based inherent jurisdiction may run counter to the concept of comity, using that expression in the sense described by US Supreme Court Justice Breyer in his book *The Court and the World* (2015), pp 91-92:
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> > "… the court must increasingly consider foreign and domestic law together, as if they constituted parts of a broadly interconnected legal

> web. In this sense, the old legal concept of 'comity' has assumed an expansive meaning. 'Comity' once referred simply to the need to ensure that domestic and foreign laws did not impose contradictory duties upon the same individual; it used to prevent the laws of different nations from stepping on one another's toes. Today it means something more. In applying it, our court has increasingly sought interpretations of domestic law that would allow it to work in harmony with related foreign laws, so that together they can more effectively achieve common objectives."

> [62] If a child has a habitual residence, questions of jurisdiction are governed by the framework of international and domestic law described by Lord Wilson in paras 27 to 29. Conversely, Lord Wilson has identified the problems which would arise in this case if B had no habitual residence. The very object of the international framework is to protect the best interests of the child, as the CJEU stressed in *Mercredi*. Considerations of comity cannot be divorced from that objective. If the court were to consider that the exercise of its inherent jurisdiction were necessary to avoid B's welfare being beyond all judicial oversight (to adopt Lord Wilson's expression in para 26), we do not see that its exercise would conflict with the principle of comity or should be trammelled by some *a priori* classification of cases according to their extremity."

32. Lord Sumption (with whom Lord Clarke agreed) delivered a dissenting judgment in *Re B.* However, Lord Sumption did not demur from the proposition that the residual *parens patriae* jurisdiction is protective in nature. In the context of the particular facts of *Re B*, Lord Sumption observed as follows at [87]:

> "[87] Given that the inherent jurisdiction exists to enable the English court to exercise the sovereign's protective role in relation to children, from what is it said that B needs to be protected? As I understand it, the suggestion is that she needs to be protected from the presumed unwillingness of the courts of Pakistan to recognise the status of the appellant in relation to the child in the way that the English court would now do if they had statutory jurisdiction. I cannot regard this as a peril from which the courts should "rescue" the child by the exercise of what is on any view an exceptional and exorbitant jurisdiction."

33. Within the foregoing context, in *Re M (A Child)(Exercise of Inherent Jurisdiction)* [2021] 1 FLR 415 the Court of Appeal revisited the question of the circumstances in which the residual *parens patriae* jurisdiction can be exercised. Lord Justice Moylan began by considering the status the obiter comments of the Supreme Court in *Re B*:

> "[92] I recognise, of course, that the obiter observations of the majority in *Re B* deserve great respect. They are also 'considered and deliberate observations' on an issue which had been fully considered by the Court of Appeal and on which the Supreme Court, per Lord Wilson at para [53], 'received extensive submissions'. On the other hand, we do not know what those submissions were, other than the very brief synopsis of the applicant's and the mother's submissions as set out in the law report. In addition, reference was made, at para [59], to 'important issues to which the question

> [of whether it would have been right for the court to exercise the inherent jurisdiction] would have given rise and which must wait for another day'. The specific question identified, at para [53], by Lord Wilson was whether the order being sought 'would improperly have subverted Parliament's intention in enacting the prohibitions' set out in the 1986 Act or whether 'in such circumstances, should the interests of the child prevail and indeed would Parliament have so intended?'
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> [93] There are two aspects of Lady Hale and Lord Toulson's judgment which I must specifically address. First, they set out, at para [59], 'three main reasons for caution when deciding whether to exercise the jurisdiction', also described as 'objections'. To repeat, they are: 'first, that to do so may conflict with the jurisdictional scheme applicable between the countries in question; second, that it may result in conflicting decisions in those two countries; and third, that it may result in unenforceable orders'. Do these potential objections to the exercise of the jurisdiction provide an alternative guide to when the jurisdiction should be exercised?
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> [94] In my view, they were not being put forward as providing a test or guide for the court to use when deciding whether to exercise the jurisdiction. They are general reasons explaining why the court should take a cautious approach although, no doubt, they will provide a specific reason or reasons why the jurisdiction should not be exercised in an individual case. The difficulty in using them as a guide to the exercise of the jurisdiction is that they would, in practice, provide a very low threshold which would not support the need for 'great caution or circumspection', Re B (A Child) (Reunite International Child Abduction Centre and Others Intervening) [2016] UKSC 4, [2016] AC 606, sub nom Re B (A Child) (Habitual Residence: Inherent Jurisdiction) [2016] 1 FLR 561, at para [59]."

34. Within this context, Moylan LJ concluded as follows in *Re M (A Child)(Exercise of Inherent Jurisdiction)* with respect to the test to be applied when the court is considering whether to exercise the residual *parens patriae* jurisdiction:

> "[104] I understand why, given the wide potential circumstances, concern was expressed in *Re B* that the exercise of the jurisdiction should not necessarily be confined to the 'extreme end' or to circumstances which are 'dire and exceptional'. But I do not consider that this means that there is no test or guide other than that the use of the jurisdiction must be approached with 'great caution and circumspection'. The difficulty with this as a test was demonstrated by the difficulty counsel in this case had in describing how it might operate in practice.
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> [105] In my view, following the obiter observations in *Re B*, whilst the exercise of the inherent jurisdiction when the child is habitually resident outside UK is not confined to the 'dire and exceptional' or the 'very extreme end of the spectrum', there must be circumstances which are sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction. If the circumstances are sufficiently compelling then the exercise of the jurisdiction can be justified as being required or necessary, using those words as having, broadly, the meanings referred to above.

> [106] In my view the need for such a substantive threshold is also supported by the consequences if there was a lower threshold and the jurisdiction could be exercised more broadly; say, for example, whenever the court considered that this would be in a child's interests. It would, again, be difficult to see how this would be consistent with the need to 'approach the use of the jurisdiction with great caution or circumspection', at para [59]. It is not just a matter of procedural caution; the need to use great caution must have some substantive content. In this context, I have already explained why I consider that the three reasons set out in Re B would not provide a substantive test and, in practice, would not result in great circumspection being exercised.
>
> [107] The final factor, which in my view supports the existence of a substantive threshold, is that the 1986 Act prohibits the inherent jurisdiction being used to give care of a child to any person or provide for contact. It is also relevant that it limits the circumstances in which the court can make a s8 order. Given the wide range of orders covered by these provisions, a low 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 *Re B*, at para [85]. This can, of course, apply whenever the jurisdiction is exercised but, in my view, it provides an additional reason for limiting the exercise of the jurisdiction to compelling circumstances. As Henderson LJ observed during the hearing, the statutory limitations support the conclusion that the inherent jurisdiction, while not being wholly excluded, has been confined to a supporting, residual role.
>
> [108] In summary, therefore, the court demonstrates that it has been circumspect (to repeat, as a substantive and not merely a procedural question) by exercising the jurisdiction only when the circumstances are sufficiently compelling. Otherwise, and I am now further repeating myself, I do not see, in practice, how the need for great circumspection would operate."

35. Having regard to the foregoing exegesis, the following cardinal points of principle govern the determination of whether the court should accede to the mother's submission in this case that the court should exercise its residual *parens patriae* jurisdiction based on the children's British Citizenship:

    i) Subject to the terms of the Family Law Act 1986, the court retains a residual *parens patriae* jurisdiction in respect of a child who is a British Citizen, which is exercisable notwithstanding that the subject child is outside the jurisdiction of England and Wales.

    ii) The residual *parens patriae* jurisdiction of the court is protective in nature.

    iii) The threshold for exercising the residual protective jurisdiction of the court is substantive and requires more than simply whatever the court considers to be in the subject child's best interests.

    iv) In order for the court to exercise its residual *parens patriae* jurisdiction there must exist circumstances which are sufficiently compelling to require or make

it necessary that the court should exercise its protective jurisdiction with respect to the subject child.

v) The need for caution when exercising the residual *parens patriae* jurisdiction of the High Court in respect of a child outside the jurisdiction of England and Wales is grounded in the well-recognised adverse consequences of the domestic court overreaching the jurisdiction of another State that has jurisdiction in respect of the child based on the primary connecting factors of habitual residence or physical presence.

36. Finally, in light of the case advanced by the mother, it is necessary to say something about the legal position in Sudan. It is important to note that this court does not have the benefit of a jointly instructed expert report on Sudanese law. However, exhibited to the mother's second statement is a letter from the mother's Sudanese lawyer and exhibited to the father's statement is a letter from his Sudanese lawyer. From those two letters, it is possible to extract the following common propositions with respect to Sudanese law:

i) The Islamic Family Law of 1991 (also referred to as the Sudanese Personal Status Act 1991) accords the courts responsibility for looking after the benefit of the children.

ii) The custody of children does not automatically transfer to a Muslim father when the children reach the legal age prescribed by law. A father must file a suit and the court must be issued by the court before custody can be transferred upon the children reaching legal age.

iii) The Islamic Family Law of 1991 (also referred to as the Sudanese Personal Status Act 1991) provides that a court may accord the custody of the male child after the age of seven and the female child after the age of nine to the mother or to a woman if the court deems it to be in the best interests of the child.

iv) If the father were to be awarded custody this does not permit the father to leave the child in the care of another. If the father left the child with another person, or the residence of the father was different from the residence of the child, the court allows the mother or the maternal grandmother to seek the judgment of the court awarding custody.

v) Where the children are in the custody of the mother, the Islamic Family Law 1991 accords the father a right to see the children and the court may make an order to that effect stipulating the time he can spend with the children.

vi) Were the English court to determine that the children should return to their country of birth the Sudanese court would not seek to interfere as the court will not deny the child the ability to move with his or her custodian, the custodian mother being permitted to travel without permission.

DISCUSSION

37. Having regard to the evidence before the court, and to the comprehensive written and oral submissions of Mr Jubb and Mr Anderson, I am satisfied that it is *not* appropriate

for this court to exercise its residual *parens patriae* jurisdiction in respect of the children in circumstances where B and E are habitually resident in Sudan, where the convenient forum for determination of welfare issues is Sudan and where, in that context, the evidence demonstrates no sufficiently compelling reason that the children require the protection of this court. My reasons for so deciding are as follows.

38. There is now no dispute that the children are habitually resident in Sudan. This was a sensible concession on the part of the mother. The children went to the Sudan in 2017 and have remained there since that date since (accepting that there is an issue between the parties as to why this was the case). Over the course of the past four years they have resided with members of their maternal family, are settled in the care of their maternal family and each attend nursery education (the school age in Sudan being 7 years of age). As the mother makes clear in her statement, E has received medical care in that jurisdiction. In light of this concession, and in any event having regard to the evidence before the court, this court can have no jurisdiction in respect of the children save for that provided by the residual *parens patriae* jurisdiction based on the children's nationality. Conversely, and whilst the court does not have the benefit of expert evidence with respect to the law of Sudan, on the basis of ordinary principles of private international law, Sudan has substantive jurisdiction with respect to each of the children based on both habitual residence and presence.

39. Within this context, I pause to note that it is, on the evidence before the court, also plain that applying *forum conveniens* principles the convenient forum for the determination of the welfare issues in respect of the children is Sudan. Both parents concede that there are ongoing proceedings in respect of the children in Sudan and, within that context, both parties have accepted the jurisdiction of the Sudanese court. In circumstances where those proceedings were ongoing for some three years prior to the mother making her application to this court, where those proceedings remain ongoing in Sudan and where those proceedings have ranged across the whole gamut of family law from divorce, through financial remedies to proceedings in relation to the children's welfare, I regret that I cannot accept Mr Jubb's optimistic submission that the diverse proceedings in Sudan have been akin to proceedings for urgent protective measures following child abduction. Further, the proceedings in Sudan have been able to be litigated in the first language of both parties, both parties are represented before the Sudanese courts, all of the witnesses, including the extended family members who bear on the disputed questions between the parties are in Sudan and, whilst the children are British Nationals, they also hold Sudanese nationality. This will be the position with respect to the still ongoing proceedings in Sudan moving forward.

40. Within the foregoing context, and as I have noted, it is clearly established that that the residual *parens patriae* jurisdiction is protective in nature and should only be invoked where the children's welfare requires the protection of this court. The protective nature of the residual jurisdiction requires to be held carefully in mind when deciding whether there are sufficiently compelling reasons for its exercise. Further, it is equally well established that the jurisdiction should be exercised cautiously in circumstances where an exorbitant exercise of a jurisdiction that has no statutory basis risks the adverse consequences inherent in the domestic court overreaching the jurisdiction of a State that has jurisdiction in respect of the child based on the primary connecting factors of habitual residence or physical presence. These adverse consequences include conflict with the jurisdictional scheme applicable between the countries in question, conflicting

decisions in those two countries the possibility of unenforceable orders. Again, the need for caution when exercising the residual jurisdiction requires to be held carefully in mind when deciding whether there are sufficiently compelling reasons for its exercise.

41. Holding these matters carefully in mind, and accepting that this court retains a residual jurisdiction based on the children's nationality, on the evidence currently before the court, I am not satisfied that there are sufficiently compelling reasons to invoke the residual *parens patriae* jurisdiction of the court.

42. With respect to the mother's submission that the children require the protection of this court because there is no person with parental responsibility currently in Sudan, it is correct that, as a matter of fact, both parents are at present in the United Kingdom. However, the solution to that situation does not only lie in the exercise by this court of its residual jurisdiction. The mother accepts that there is nothing preventing her from returning to Sudan. She is a Sudanese national and has a Sudanese passport. Her new husband resides in Sudan. If the court returns the father's passport, he too is able to return to Sudan. Further, the mother accepts that the maternal grandmother is currently acting in *loco parentis* with respect to the children. It is clear that the Sudanese courts likewise recognise that situation, an order of the Sudanese court 14 August 2018 evidencing that that court has accepted the delegation of parental responsibility to the maternal grandmother and is willing to enforce it.

43. Within this context, there is no evidence before the court that the children's care has suffered by reason of the parents' current absence from that jurisdiction or that the children have come to harm by reason thereof. Indeed, the evidence tends to demonstrate that the children's educational, medical and care needs have been met by their extended family notwithstanding that both parents are in this jurisdiction. Within this context, and having regard to the protective nature of the jurisdiction and the caution required when deciding whether to deploy it, I am not satisfied that the fact that at present there is no parent with parental responsibility with the children in Sudan amounts to a sufficiently compelling reason on the facts of this case to exercise the residual *parens patriae* jurisdiction of the court.

44. I reach the same conclusion with respect to the mother's evidence and submissions regarding the medical care of the children in Sudan. As rightly conceded by Mr Jubb, there is no medical evidence before the court sufficient to demonstrate that the children's medical needs are such that they are incapable of being met in Sudan. It is clear, not least from photographic evidence of E in hospital, that the children can access medical care in that jurisdiction. As I have observed, the Sudanese courts have further facilitated this by making an order on the application of the mother that the father pay the children's medical expenses in addition to his other maintenance obligations. Within this context, whilst I note what is said about the medical documents produced by the mother, it is not necessary for me to determine the provenance of those documents. Even accepting those documents as genuine, and again having regard to the protective nature of the jurisdiction and the caution required when deciding whether to deploy it, I am not satisfied that there is sufficient evidence before the court to demonstrate that the medical position of the children in Sudan amounts to a sufficiently compelling reason on the facts of this case to exercise the residual *parens patriae* jurisdiction of the court.

45. In my judgment, the same outcome follows from an analysis of the evidence with respect to the mother's assertion that the welfare of the children will be prejudiced by the legal system in Sudan, and in particular by the application of what the mother asserts are Sharia Law principles mandating that children who have reached legal age be cared for by their father. Once again, the evidence does not bear out this contention. Both parents' Sudanese lawyers are clear that under Sudanese law there is no automatic transfer of custody to a Muslim father upon a child reaching legal age. Rather, both lawyers confirm that such an outcome could only follow an application to the court by the father, in respect of which application the Sudanese court has a discretion to award custody to the mother if that is in the children's best interests, notwithstanding that they have reached legal age. With respect to the mother's contention that the father aims to leave the children with his parents and return to England, in her second statement, the mother accepts that if the father were to place the children with his parents, the mother would be able to apply to the court for the children to be returned to her custody, as confirmed by her Sudanese lawyer.

46. Further, in so far as the mother asserts that she will be unable to obtain justice in Sudan, that assertion is refuted by simply surveying the course of the litigation between the parents in Sudan that has taken place to date. In the context of the mother having chosen to litigate in Sudan in respect of all aspects of the family breakdown, the three strands of litigation have each been instigated by the mother in Sudan and the mother has been successful in obtaining orders in her favour in respect of each strand. A divorce was granted to the mother on her petition, child maintenance was granted to the mother on her application and custody was likewise granted to the mother, again on her application. By contrast, the father's applications in Sudan have been largely unsuccessful.

47. Within this context, having regard to the protective nature of the jurisdiction and the caution required when deciding whether to deploy it, I am unable to conclude that either the approach of the Sudanese courts to the children's welfare or the position of the mother in the litigation in Sudan constitutes a sufficiently compelling reason for the court to exercise the residual *parens patriae* jurisdiction of the court. The need for caution in this context is particularly acute. To assume jurisdiction in respect of children habitually resident in another State simply on the basis of differences of approach in the legal systems of the two jurisdictions concerned would, without more, constitute a particularly egregious example of an exorbitant exercise of jurisdiction on the part of this court.

48. Within the foregoing context, I am satisfied that the evidence demonstrates no sufficiently compelling reason that the children require the protection of this court. This is not a case in which, for example, the evidence before the court demonstrates that the children are at risk of suffering harm, whether by reason of the matters prayed in aid by the mother or otherwise. These are not children whose welfare is beyond all judicial oversight. Indeed, the Sudanese courts remain seised of the children's welfare and have continued to exercise their undoubted welfare jurisdiction with respect to both children. Within this context, I am not satisfied that there is any legitimate basis on which this court could now exercise jurisdiction in respect of the children under its residual *parens patriae* jurisdiction. Indeed, I am satisfied that to do so in the circumstances of this case would constitute an unjustified overreach by this court of the legitimate jurisdiction of the Sudanese courts.

49. I accept that, if the mother's case, denied by the father, that the father subjected her to domestic violence during their marriage and that his relatives stranded the children in Sudan in 2017 were to be made out, then the genesis of the situation that has resulted in the Sudanese court having jurisdiction lay in reprehensible conduct by the father. However, the mother took no steps in this jurisdiction to establish that contention until nearly *four years* after the conduct of which she now complains. Even assuming the mother's case is made out, the inevitable result of the delay in bringing that case before this court, and the fact that the mother has been litigating consistently in Sudan with respect to the children since that time, is that substantive jurisdiction in respect of the children now vests in the jurisdiction of Sudan. Absent sufficiently compelling reasons, it would not be appropriate for this court now to seek to remedy the consequences of the *mother's* delay through the exorbitant exercise of a non-statutory jurisdiction. Again, such a course would constitute unjustified jurisdictional overreach by this court and would be a course of action that runs contrary to the well-established international principles governing jurisdiction in respect of children. Within this context, the important questions of whether the father subjected the mother to domestic violence during their marriage and the question of whether the father and his relatives stranded the children in Sudan in 2017 are now, four years later, questions for the Sudanese courts to determine if the mother seeks to pursue those allegations in the ongoing proceedings in that jurisdiction.

50. Finally, Mr Jubb submits that the three factors identified by the Supreme Court as justifying the caution required when deciding whether to deploy the residual jurisdiction, are of lesser weight in this case in circumstances where there is no applicable treaty between this country and the Republic of the Sudan, that the decisions of the Sudanese courts are consistent with the outcomes the mother seeks before this court and that the orders sought from the English court will be enforceable against the father for so long as he is personally susceptible to the jurisdiction of England and Wales. Whilst acknowledging Mr Jubb's industry, that submission does not act to alter the conclusions I have reached.

51. The absence of a treaty between two nations is not by itself a reason to abandon the principles of comity, reciprocal understanding and co-operation between those jurisdictions. Further, absent sufficiently compelling reasons for the court to assume a protective jurisdiction, the fact that the relief sought in this jurisdiction is similar, in terms of outcome, to that sought in the country with substantive jurisdiction based on habitual residence will not justify this court assuming a *parens patriae* jurisdiction over the children. Finally, with respect to the question of enforcement, as Thorpe LJ pointed out in *Al Habtoor v Fotheringham*, the deployment of legal concepts understood only in common law jurisdictions is apt to cause confusion in cross-border cases. The *parens patriae* concept in particular can often seem to other jurisdictions esoteric in nature and obscure in origin, leading to confusion on the part of the foreign court which receives such an order. Within this context, the rhetorical question posed by Mr Anderson to demonstrate the likely difficulties of enforcing in Sudan the orders sought by the mother in this case is apt. Namely, if an order arrived from Sudan ordering the return of children over whom the English court had jurisdiction based on habitual residence, and in respect of whom the English court was seised of proceedings concerning their welfare, what would be the response of the English court to an attempt to enforce such an order? Within the foregoing context, I am satisfied that the recognised need for

caution when deciding whether there are sufficiently compelling reasons to exercise the residual *parens patriae* jurisdiction must apply with equal force in this case.

CONCLUSION

52. In the circumstances, I must dismiss the mother's application for orders under the inherent jurisdiction of the High Court. The children are habitually resident in Sudan, the Sudanese courts are already seised in respect of issues concerning the children's welfare and the convenient forum for the parents to litigate with respect to the welfare of the children is the forum in which the children are now habitually resident and in which they have been litigating for nearly four years. Within this context, I can identify no sufficiently compelling reason having regard to the evidence before the court that would justify this court now assuming a protective jurisdiction in respect of the children based on their nationality.

53. I further discharge the passport order in respect of the father. There is no basis for that order now to subsist in light of the dismissal of the mother's application. Once the order of the court is drawn and sealed and passed to the Tipstaff, the father's passport can be returned to him.

54. That is my judgment.