Neutral Citation number: **[2021] EWHC 2490 (Fam)**

Case No: FD21P00333

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF THE INHERENT JURISDICTION
IN THE MATTER OF THE HAGUE CONVENTION 1996
IN THE MATTER OF M (A GIRL)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/09/2021

Before :

MR JUSTICE PEEL

- -

Between :

MZ — **Applicant**

- and -

RZ — **Respondent**

- -
- -

Saiful Islam (instructed by **Legit Solicitors**) for the Applicant
Mai-Ling Savage (instructed by MB Law Ltd) for the Respondent

Hearing date: 6 September 2021

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JUDGMENT

Mr Justice Peel:

1. This is an ex tempore judgment.

2. M was born on 30/9/2018 and is now nearly 3 years old. Her mother removed M from this jurisdiction to India in March 2019, returning shortly afterwards without her. M has since March 2019 remained in India, staying with her maternal grandparents. Both parents live in England.

3. India is not a signatory to the 1980 or 1996 Hague Conventions. The father applied on 7 April 2021, some 2 years after the child's removal, under the inherent jurisdiction for (i) a wardship order and (ii) a return order. His principal concern is to ensure the return of the child to this country so as to develop a meaningful relationship with her. The relief sought by him could, and perhaps should, have been made pursuant to s8 of the Children Act 1989. In **Re NY [2019] UKSC 49** at paragraph 44 Lord Wilson said this:

> "The application for the return order may be framed either as a claim for a specific issue order under section 8 of the Children Act 1989 or for an order pursuant to the inherent power of the High Court. However, the latter course should only be invoked exceptionally. Exceptionality may be demonstrated by reasons of urgency, complexity or the need for particular judicial expertise."

4. Today's hearing has been listed before me to determine, on submissions only, two preliminary issue, namely:

   i) Does the court have jurisdiction including the question of whether M is habitually resident in India; and
   ii) If it has jurisdiction, is the father's delay in issuing proceedings fatal to his application?

5. I am very grateful to counsel for their focused written and oral submissions.

6. The background can be shortly stated. The father is a Bangladeshi national, the mother is an Indian national. The father has limited leave to remain in the United Kingdom, and the mother has had since January 2021 indefinite leave to remain. The parents met in London and started a relationship in 2012 or 2013. According to the Father they started living together in 2013, whereas according to the mother it was in 2015. They entered into a religious marriage in December 2016 which I am told would not be recognised such as to enable either of them to issue divorce proceedings. They lived, and continue to live and work, in England. Both accuse the other of gross relationship misconduct, including allegations of domestic and sexual abuse, deceit, controlling and coercive behaviour, drug and alcohol use. I am in no position to resolve such matters summarily at this hearing.

7. At the time of M's birth, neither parent was a British citizen nor settled in the United Kingdom. As a result, M did not automatically acquire British citizenship under s1(1) of the British Nationality Act 1981.

8. In January 2019 the parents separated. After separation, the father continued to see child although there was clearly ongoing tension between the parties.

9. On 23 March 2019 the mother and M flew from England to India. It is clear from the evidence, particularly contained in a sequence of text messages, that (i) the father was in general terms aware of the mother's plan to take M to India, (ii) he was given very short notice of the date on which she proposed to remove her and (iii) he plainly objected to the removal, and did not consent to it. He was clearly worried that M might be left in India, particularly if she did not (as was indeed the case) have a visa or other travel document entitling her to return to the United Kingdom.

10. The mother says that she removed M from England because she believed M was not safe here. It is also clear on the mother's own case that she did not intend it to be a permanent removal. She says at paragraph 33 of her narrative statement: "At the time I was deciding whether to leave my job and concentrate on looking after the baby but this was my only source of income….my plan was to bring her back once I got myself settled. I had no intention of keeping my baby in a different country".

11. In April 2019 the mother M returned to the United Kingdom and has developed her career. She left M in India with the maternal grandparents. Since her departure from this country, the father has not seen M in person although he has had some remote contact, in recent times once per week for 10 minutes. He would be gravely hampered in attempting to travel to India and see M there as he would then, by immigration rules, be prohibited from re-entering the UK.

12. On 2 May 2019 the father reported the matter to the police who took no action as they assumed the child to be safe and well. In Dec 2019 and January 2020 the parties had limited involvement with mediation.

13. In January 2021 the mother obtained indefinite leave to remain which, by s1(3) of the British Nationality Act 1981, entitles an application to be made on M's behalf for British citizenship.

14. On 7 April 2021 the father made his application under the inherent jurisdiction. I accept the general proposition set out in **Re B (A child) 2015 EWCA Civ 886**, applying **Al Habtoor v Fotheringham [2001] EWCA Civ 186** that extreme circumspection is required when being asked to exercise the inherent jurisdiction in respect of a child outside this jurisdiction.

Habitual Residence: the Law

15. Brussels II Revised is of no application as the father instituted proceedings after the end of the transition period following the withdrawal of the United Kingdom from the European Union.

16. Article 5(1) of the Hague Convention 1996 vests jurisdiction in the state "of the habitual residence of the child". Counsel agree that the relevant date for these purposes is the date of the application, namely 7 April 2021.

17. By Article 7(1) of the 1996 Convention:
(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and

a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

18. The father initially sought to rely on **Re H 2014 EWCA Civ 1101**. The underlying ratio of the case is that Article 10 of Brussels II revised, which is in near identical terms to Article 7(1) of the 1996 Convention cited above, applies only to contracting states. India, as I have already mentioned, is not a contracting state. Thus, it was originally submitted, the 1 year time limit after a wrongful removal or retention does not apply where there is a removal to a non-contracting third party state and, accordingly, habitual residence is retained by the state of origin even if no request for a return is made within one year.

19. The difficulty with that submission is that the Court of Justice of the European Union, by a judgment given on 24 March 2021 under the heading **In Case C-603/20 PPU**, has now definitively ruled that the time limit applies whether the removal is to a contracting or a non-contracting state. The decision arises out of a referral made by Mostyn J on 6 November 2020, prior to the end of transitional period. The decision is based on an analysis of Article 10 of Council Regulation 2201/2003, but the wording is near identical to Article 7(1) of the 1996 Convention and in any event the judgment makes plain at paragraph 62 that the decision apples equally to the 1996 Convention:

> "62. It follows from the foregoing that there is no justification for an interpretation of Article 10 of Regulation No 2201/2003 that would result in indefinite retention of jurisdiction in the Member State of origin in a case of child abduction to a third State, neither in the wording of that article, nor in its context, nor in the *travaux préparatoires*, nor in the objectives of that regulation. Such an interpretation would also deprive of effect the provisions of the 1996 Hague Convention in a case of child abduction to a third State which is a contracting party to that convention, and would be contrary to the logic of the 1980 Hague Convention."

Counsel realistically accepted that as a consequence of this decision, the father cannot rely on Article 7(1).

20. Accordingly, in my judgment the issue is whether the child was habitually resident at the date of the father's application, or by that point had become habitually resident in India.

21. The law on habitual residence was summarised in by Hayden J in **In re B (A Child) (Custody Rights: Habitual Residence) [2016] EWHC 2174 (Fam),** which has been referred to with approval by higher courts in **In the Matter of L (Children) [2017] EWCA Civ 441** and **In re C and another (Children) (International Centre for Family Law, Policy and Practice intervening) [2017] EWCA Civ 980, [2018] UKSC 8**. At paragraphs 17-18 he says this:

> 17. I think that Ms Chokowry's approach is sensible and, adopt it here, with my own amendments:
> (i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A, adopting the European test).

(ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual inquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, In re L).
(iii) In common with the other rules of jurisdiction in Council Regulation (EC) No 2201/2003 ("Brussels IIA") its meaning is "shaped in the light of the best interests of the child, in particular on the criterion of proximity". Proximity in this context means "the practical connection between the child and the country concerned": A v A , para 80(ii); In re B , para 42, applying Mercredi v Chaffe (Case C-497/10PPU) EU:C:2010:829; [2012] Fam 22 , para 46.
(iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (In re R).
(v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (In re LC). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.
(vi) Parental intention is relevant to the assessment, but not determinative (In re L, In re R and in re B).
(vii) It will be highly unusual for a child to have no habitual residence. Usually a child loses a pre-existing habitual residence at the same time as gaining a new one (In re B).
(viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (In re B —see in particular the guidance at para 46).
(ix) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (In re R and earlier in in re L and Mercredi).
(x) The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (In re R) (emphasis added).
(xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (article 9 of Brussels IIA envisages within three months). It is possible to acquire a new habitual residence in a single day (A v A; In re B). In the latter case Lord Wilson JSC referred (para 45) to those "first roots" which represent the requisite degree of integration and which a child will "probably" put down "quite quickly" following a move.
(xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (In re R).
(xiii) The structure of Brussels IIA, and particularly recital (12) to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, "if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former" (In re B supra).

18. If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc and an appreciation of which adults are most important to the child. The approach must always be child driven…"

22. It is convenient to note that in **Re M [2020] EWCA Civ 1105** at paragraph 63 Moylan LJ cited Hayden J's summary, commenting that he considered subparagraph (viii) (set

out above) should be omitted as it "might distract the court from the essential task of analysing "the situation of the child" at the date relevant for the purposes of establishing jurisdiction".

23. **In AB v EM 2020 EWHC 549 (Fam),** Macdonald J, on similar facts to those before me, found that a 4 year old girl, removed from England and placed in the care of paternal grandparents in Egypt where she attended school, retained her habitual residence in this jurisdiction.

24. Finally, it seems to me that the court must proceed upon the evidence, and not speculation. Where one party (here the mother) seeks to assert that the child has developed the necessary social and family integration in a particular jurisdiction (in this case India) to meet the habitual residence test, it is for that party to provide evidence enabling the court to be so satisfied. This is particularly so where, as here, the determination of habitual residence is essentially a question of fact. I accept that the legal burden of establishing habitual residence at the time of the application falls on the father, but there is surely an evidential burden on the mother to set out the child's circumstances in India. In this context I have had regard to Macdonald J's comments at para 56 of **AB v EM** that:

> "There is a paucity of evidence as to M's practical situation in Egypt between 30 April 2019 and 26 November 2019 (this is in part because, rather than focusing on the evidence the court requires to determine the jurisdictional issues in this case, the father's statement concentrates, in at times an almost obsessive level of detail, on the conduct the mother). In the circumstances, whilst Ms Renton asserts that, self-evidently, between 30 April 2019 and 26 November 2019 M was in Egypt, there is very little evidence before the court to demonstrate the degree to which she was, during this period, integrated in a social and family environment in the jurisdiction of Egypt. Within this context, whilst the father makes broad assertions in his very late statement that M is now happy living with her paternal grandmother, aunt and cousin, "has made immense strides both emotionally and scholastically", has learnt to speak Arabic in both Egyptian and Lebanese dialects in Egypt, takes ballet classes and has friends at school, between April 2019 and 26 November 2019 it is not at all clear from the father's statement of evidence where M lived during that period, who she was cared for on a day to day basis, what provision was made for medical treatment, when she commenced school and whether she changed schools, how quickly she settled in Egypt, what her day to day life comprised of during the relevant period, whether and for how long she has spent time in other jurisdictions and what her understanding was during this period of how long she would be remaining in Egypt and when and if she would be returning to what, up until 30 April 2019, had been her family home in London.

Parens Patriae

25. M is, as I have already observed, not automatically entitled to British citizenship by s1(1) of the British Nationality Act 1981. Since her removal from this country she has become entitled to apply for British citizenship under s1(3) of the British Nationality Act 1981 by reason of the mother obtaining indefinite leave to remain. Does that right to apply, without a guarantee that British citizenship will be secured, entitle the court to invoke the parens patriae jurisdiction? Counsel agree that it does not. There do not appear to be any reported authorities where the jurisdiction was invoked on such a prospective basis. In all the relevant cases, the child was beyond doubt a UK national at the date of the application and the hearing. It seems to me that if M were to obtain citizenship, then the right to invoke this jurisdiction would be available, but nothing less will do. Otherwise, in theory anybody who has a theoretical claim to British citizenship, whether well founded or not, and no matter how tenuous, would in such circumstance be able to litigate by invoking this jurisdiction. It is, furthermore, invidious for the court to judge the prospective success of any such application (if made

at all) which will be determined elsewhere. Accordingly, in my judgment a parens patriae application based on nationality cannot presently be made in respect of M behalf nor, in my judgment, can it ever be invoked unless the child is categorically a British citizen.

Analysis

26. I return to what seems to me to be the fundamental question, namely whether as at the date of the application M was habitually resident in England and Wales.

27. It is common ground that as at the date of removal from England and Wales, M was habitually resident in this jurisdiction. On balance, I have concluded that M continued to be habitually resident in England and Wales until, and as at, the date of application on 7 April 2021. In my judgment she did not lose her habitual residence here, nor has she become habitually resident in India. I say that for a number of reasons:

    i) Both parents, who have parental responsibility, were living in England at time of her birth, have continued to do so, and intend to continue to do so. The mother has indefinite leave to remain. They each have strong and settled roots in this country, are clearly integrated and habitually resident here.
    ii) Whilst I accept that M's habitual residence does not automatically follow that of either or both parents, it is part of the mother's case that she continues to take primary responsibility for the overall welfare of M, even if M is presently looked after by her parents. Thus, she provides financial support, is in regular contact with the doctor, and is fully able to determine whether M leaves the country or not. It is she who makes the arrangements for indirect contact and sends occasional photos of M to the father. In her written evidence sat paragraph 39 she says "I am a single mother talking care of our daughter and have been since she was born" which clearly indicates her continuing overall responsibility of M's care, even from afar.
    iii) The mother has not lived in India for many years; she is not integrated there and clearly not habitually resident there. The father has never lived there and has no meaningful connections with that jurisdiction.
    iv) On her written evidence to which I have already referred, the mother anticipated that M would stay in India while she settled down and furthered her career prospects in this country. She clearly intended it to be a temporary stay in India, under the temporary custodianship of her parents, neither of whom has parental responsibility. She sent text messages to the father prior to her departure that M would be brought back to this country; "u can also trust that I will get M to this country back"…" and "we are flying. Will be back soon to see you. M". In my judgment, she always anticipated and intended that M would return here, at a point of her choosing and when it suits her. She did not intend M's stay in India to be permanent.
    v) M has the strong connections with England of having been born here, lived 7 months here, and with both parents being here. After separation, she enjoyed time with each parent. She was clearly integrated into her social and family life here, and it is not suggested that prior to removal from this jurisdiction she was habitually resident anywhere other than England and Wales. These were powerful roots in, and connections with, England. Her connections with India are more limited and are premised on staying temporarily with wider family. Given her age, it is less likely that she has acquired the necessary degree of

integration in India. For example, there is nothing to suggest she attends any form of nursery or schooling, or has made friends, or become integrated into the Indian way of life. It is more likely, and I so find, that, viewed objectively M's true focal point of stability, seen in a social, family and territorial context, remains England and Wales.

vi) The removal was plainly wrongful and without the father's consent, in circumstances where she was enjoying time with both parents.

vii) In the mother's written evidence, there is almost no factual information about M's life in India, how she is cared for, her activities, any attendance at nursery, the practicalities of her life, the stability of her setting. I am struck by the paucity of evidence about her situation in India, her relationships, her day to day life, her language, her education, the level of integration into a social and family environment. Where is the evidence of facts and circumstances to justify a conclusion that habitual residence moved to India?

Delay:

28. Is the father's delay in bringing the application fatal to his case? In my judgment, having found that M was habitually resident in England and Wales at the time of application, it would be surprising if I then concluded that the father cannot pursue that application as a result of the mere passage of time. Delay will be a factor in considering whether a wardship order and/or return order and/or other relevant order should be made, but in my judgment it cannot by itself entitle the court to, in effect, strike out the claim unless satisfied that the prospects of success are so hopeless as to justify the exercise of case management powers in a profoundly draconian way. Delay is one factor, but must be looked at in the context of all the welfare checklist factors. Albeit in a financial remedy context, the decision of **Wyatt v Vince 2015 UKSC 14**, which precludes a summary judgment process under rule 4.4 of the Family Procedure Rules 2010, is on point. The father's application is legally recognisable, delay in making the application is not so lengthy as to constitute an abuse of process, and he is entitled to have the application heard on its merits.

29. I therefore conclude that the child was habitually resident at the time of the application and that the delay in bringing the application does not justify striking it out. It follows that the court must now move on to consider a welfare disposal in accordance with the principles in **Re NY [2019] UKSC 49**, a case concerning an outward return order, but which has been held by Mostyn **J in Re N 2020 EWFC 35** to apply equally to applications for an inward return order.

30. It is not appropriate for me today to make substantive welfare orders. The case before me was fixed solely for consideration of the two identified preliminary issues. I shall fix the matter for a directions hearing on the first open date after 8 weeks. I propose to appoint a Guardian for M. The substantive issues for consideration at the next hearing are (i) whether a wardship order should be made and/or (ii) whether an inward return order from India should be made and/or (iii) contact between the father and M for so long as M is in India and/or (iv) if a return to this jurisdiction is ordered, contact between the father and M in England. The existing interim orders shall continue.