Neutral Citation Number: [2023] EWHC 2016 (Fam)

Case No: FD23P00262/FD23F05005/FD23E07001

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 August 2023

Before:

MR DAVID LOCK QC
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between:

SA — **Applicant**

- and –

AA — **Respondent**

- -
- -

Ms Roshi Amiraftabi (instructed by Bindmans) for the **Applicant**
Ms Niamh Daly (instructed by Goodman Ray) for the **Respondent**

Hearing dates: 26 and 27 July 2023

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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

1. This is an application made by SA ("**the Mother**") against AA ("**the Father**") for an order for the return of her three children BA, CA and DA from Somaliland to the UK and for orders in respect CA arising out of concerns that she will be subjected to Female Genital Mutilation ("**FGM**") and/or forced marriage. The children are all British citizens.

2. The Return Order and associated welfare applications were made under form C66 which is an application for orders under the High Court's inherent jurisdiction in relation to children. However, it became clear during submissions that all of the return and welfare orders that were sought by the Mother were capable of being framed as specific issue orders under section 8 of the Children Act 1989. Lord Wilson said at paragraph 44 of *Re NY (A Child)* 2019 UKSC 49:

> *"i) 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"*

3. I therefore agreed to treat the applications as having been issued as applications for section 8 orders and only to consider the case as being advanced under the inherent jurisdiction if there was a good reason not to determine the matters as section 8 applications.

The facts.

4. The Mother is not sure when she came to the UK but explained that she believes it was in the early 2000s. At that stage she understood she was around 7 or 8 years old. She came on a flight from Uganda with her mother and father, and they all claimed asylum in the UK as refugees. Her parents were from Somalia but the family lived in Kenya throughout her childhood. She explained that her travel documents said that she was much older than she believed was her real age at the time. She believed that she was travelling on documents for a 14 or 15 year old when she was only really aged about 8.

She also explained that her travel documents claimed she was born in Somalia, but this was wrong as she was born in Kenya.

5. The Mother did not attend school when she arrived in the UK, but after a few years she began attending college. At this stage she says that she did not speak much English and tried the best that she could, but she found college very difficult. At some point during her childhood the Mother was subject to a form of Female Genital Mutilation ("**FGM**"). There is no medical evidence about precisely what form of injury was inflicted upon her but I accept that she was subject to FGM. Sadly, the evidence is that FGM is part of the cultural norms of parts of the Somali community and that 98% of women in Somaliland have been subject to FGM. The Mother has indefinite leave to remain ("**ILR**") in the UK but has not applied for UK citizenship. She does not have a British passport and, as I understand matters and as explained to me by counsel, she is presently not entitled to apply for a British Passport.

6. The Mother says she first met the Father informally when she says she was 14 or 15 but she may well have been older. The Father has provided no evidence about his background save that he is a British citizen and he has family who are living in both Ethiopia and Somaliland. However, he has chosen not to provide any detailed information about his family background as part of this case.

7. The Mother and Father developed a friendship and, although her father was not happy about things, she explained that the Father and her mother decided they should marry. The Mother gave the impression that she had little choice about this despite the fact that both she and the Father were living in England. The Mother and the Father went through an Islamic form of marriage and began living together but it does not appear that the couple ever legally married under UK law.

8. Their first child, a son BA, was born in November 2009. The Mother next gave birth to a girl, CA, in February 2012 and then a son, DA, in March 2016. The Mother makes allegations of domestic violence and controlling behaviour against the Father. She claims he neglected her during the marriage and left her with sole charge of the children for extended periods whilst he pursued relationships with other women. I have not been asked to make findings about these matters and do not do so, but it is clear that the

marriage was unhappy and there was a considerable level of tension between the couple.

9. The Mother and the Father separated in about February 2017 and the children stayed living with the Mother, but the Mother struggled to cope with the demands of being a single mother with 3 young children. The children suffered from eczema and the Mother appears to have had difficulties in applying appropriate medication. CA also suffers from asthma and it appears that the Mother found it challenging to manage this condition. The children's attendance at school also appears to have been intermittent. The local authority became involved with the family and raised concerns that the children's health needs were not being met by the Mother, that she was poorly supervising them, that the children were suffering harm as a result of domestic abuse between the parents and that the Mother was not engaging appropriately with professionals. It is not necessary for the purposes of the present hearing to go into any detail about those matters save to say that there were no allegations that the Mother was doing anything deliberate to harm the children. This was a sad case where, at that time, it became clear that she did not appear to have the ability to cope with the demands of parenting 3 small children.

10. A number of assessments were undertaken of the Mother in connection with the children proceedings brought by the local authority. These assessments concluded that the Mother's overall thinking and reasoning abilities were limited to the extent that placed her at a level between about 1% and 3% of the population, although there was some uncertainty about this because her English was still limited. The overall outcome was that the Mother's cognitive abilities were in the borderline range for learning disabilities. A positive parenting assessment was conducted in relation to the Father and he indicated a willingness to care for the children on a full time basis. With the greatest reluctance, the Mother agreed to this plan and the care proceedings were concluded in August 2021 with (a) no order being made in the public law proceedings and (b) an order being made within private law proceedings that the children should live with the Father on a full-time basis and that the Mother should spent time with the children.

11. During the course of those proceedings the Mother raised a concern with the local authority that the Father may take the children to live in Africa. The matter was looked into by the Local Authority but they concluded that there was no evidence to support this concern. However, the final order in the private law proceedings stated:

> *"It is a criminal offence to take a child out of the United Kingdom without the consent of everybody with parental responsibility unless the court has given permission"*

12. It follows that the Father knew that taking the children out of the UK without the Mother's approval would constitute a criminal offence.

13. Between August 2021 and about June 2022 the children lived with the Father on a full time basis and spent extended periods of time with the Mother, including overnight stays. There is no suggestion that the care provided by the Father to his children during this time was lacking in any material respect. It appears that he provided proper support to his children and also supported them to have a good relationship with the Mother. Whatever other findings I make about the Father in this judgment, I readily acknowledge that he was a supportive and loving parent to the children during this period.

14. The Mother's case is that in about May 2022 the Father raised the possibility of the children visiting Somaliland to see his Mother who he said was very ill. The Mother's case is that the Father said that the children had never seen their grandmother and he was anxious that they should be able to do so before she died. The Mother was naturally anxious about allowing the children to visit Somaliland because she feared that, once the children were taken abroad, the Father might not return with them to the UK.

15. A person with parental responsibility is entitled to apply for a UK passport for a child who is a British citizen. Although the details of both parents have to be given on the application form, it is not normally necessary for both parents to join in making an application for a child's passport. Passports for children are generally issued for a 5 year period by UKPA. The Mother's case is that the Father told the Mother that she needed to sign her approval for the children to obtain renewal of their passports. There

is some evidence that the children had passports prior to the summer of 2022 because there is a reference in the local authority notes to the Father being handed expired passports when he took over care of the children as explained above.

16. The Mother says that the Father told her that her consent was needed for UKPA to renew the passports for the children. He provided her with a form ("**the Passport Consent Form**") to sign for her approval and sent it to her by WhatsApp. The Father's case is that he was not listed on the birth certificate for at least one of the children and so, despite having a court order that he should look after the children, he needed the Mother's signature to get the passports renewed. The birth certificates are not in evidence and he has provided no documents from UKPA making this request.

17. The Passport Consent Form only refers to passports being issued to the two older children, BA (although ~~it~~ his name is spelt wrongly on the WhatsApp message) and CA. The Mother says that she thought about this but partly as a result of her reluctance to permit the children to travel and partly as a result of not having a paper copy to sign, she did not sign the passport consent form. She candidly accepted that the children were excited about the possibility of a holiday in Somaliland and the chance to meet their grandmother and other relatives for the first time. The Mother says that the children put her~~e~~ under a degree of pressure to agree to allow them to travel but she had reservations.

18. However, later that summer the Mother and Father had to deal with a difficult situation where BA was found to have shoplifted some sweets from a supermarket. He was with a friend when both boys were arrested. This incident clearly shocked the Mother and made her worried. The Mother said that the Father tried to persuade her to allow the children to go on a holiday saying that the children needed to have a period in Somaliland in order to understand their own culture as this would give them a grounding and hopefully avoid this type of behaviour in the future. The Mother was reluctant to allow the children to go on this trip but eventually agreed to the Father taking the children to Somaliland to see his mother and meet relatives. But she insists that she only agreed for a visit for a period of about 3 months. The plan, on the Mother's case, was that the Father would take the children to Somaliland in August

2022 and return in October 2022. By this stage the Mother says she had still not signed the passport consent form.

19. The Mother and the Father then met in McDonalds on 20 August 2022 which was the day before the children were due to travel~~led~~ to Somaliland. The Mother says that she had still not signed the passport form and the Father was complaining to her that the Passport agency would not release the passports to him to allow the children to travel unless she gave her approval. She says he provided her with a piece of paper to sign and she did so without reading it, believing this was the passport consent form. She says she was distracted by the children when she did this and the Father knew that her reading was not very good. However, whilst the document that the Mother signed was similar to the passport consent form, it was in fact a different document which gave the Mother's consent to the children moving abroad on a full-time basis ("**the Relocation Consent Form**"). The Relocation Consent Form provided that she gave her consent for the children to live abroad on a permanent basis.

20. The Relocation Consent form referred to all 3 children and not just the two children as per the earlier document. It refers to the Mother giving her permission to the children to "*move to Africa*" with the Father "*as he decided to go settle there*". It also states that "*The Mother … will be coming to visit as she wishes*". The Mother now accepts that she signed the Relocation Consent Form but says that she was distracted by the children at the time that she signed this document to get the passports released. She says that she thought she was only signing so that the children could go on a 3 month holiday to Somaliland with their Father, not a permanent move. She says that she was tricked into signing a document that provided her consent to the children going to live abroad on a permanent basis and that this document does not represent any real form of agreement on her behalf. She says that she was most reluctant to allow the children to visit Somaliland at all and would never have knowingly agreed to her children leaving the UK to live there on a permanent basis.

21. The Father's account of events is wholly different. His case is that he decided to move to live in Somaliland and the Mother consented to the children living with him there. He relies on the Relocation Consent form to show the Mother's consent but otherwise has provided virtually no details about why he made this decision to move from

London to Somaliland or the way that discussions proceeded over the summer of 2022. This was a hugely significant decision for both him and the children because it involved changing the country in which the children were living, the language they would speak, the culture in which they were living and their life opportunities. The Father does not explain why he decided it would be best for him and the children to move to live on a full-time basis in a completely different country and culture. The only details provided by the Father in his written statement are as follows:

> *"Having agreed with [the Mother] that the children could move to Somaliland, it followed that plans were put in place for this to happen. That included:*
>
> *a. Informing the extended family about the move.*
>
> *b. Informing their school, albeit, I accept that this was not done until we had moved to Somaliland.*
>
> *c. Ensuring we had all the travel documents that were required.*
>
> *d. Booking flights.*
>
> *e. Finding new schools in Somaliland, and ensuring that they were enrolled in school"*

22. I confess to having some difficulty in accepting this evidence at face value. First, there is no evidence from any other member of the extended family on either the Mother's side or the Father's side to confirm that they were aware of the Father's plans to move permanently to Somaliland. It would have been relatively straightforward for the Father to have sought corroborating evidence from relatives in this country or abroad who discussed this move with the Father before he left. In my judgment, the absence of any supporting evidence from anyone else to confirm that they were informed about these plans by the Father has some significance. Secondly, he referred to part of his plans involving finding new schools for the children in Somaliland. However, he has disclosed no documents to suggest that he made any inquiries about schools before he left. It later became clear that no arrangements were made for the children to attend schools in Somaliland until the Father had arrived in the country. He said that he then found that the school he hoped to send his children to was full and the only option was to send the children to an Islamic school where they spent their whole time learning Arabic and the Koran. That arrangement meant that the children have not progressed their education in any other subjects for the last academic year.

23. The Father offered no evidence about the process that the Father claims to have followed to discuss this proposed move with either the Mother or the children. He has provided no details of any discussions with the Mother that are supposed to have taken place about this proposed move, what her reaction was to his proposals and has not explained how he claimed to have convinced her to agree to her children moving to live in another country. Given that the Mother knew that she had no passport and would thus not be able to travel to see her children, it is significant that the Father's evidence does not make any reference to the way these discussions are supposed to have developed.

24. The mother, who still lives in London, gave evidence in person at the hearing and was cross examined. She came over as someone who spoke English but at times struggled with English. Her demeanour in the witness box was consistent with a young woman who had some measure of learning difficulties. At no point was she shown to be lying although she was confused about some details, as would be consistent with her learning difficulties. I am satisfied that she was genuinely trying to give truthful evidence as she recalled things and was trying to help the court.

25. The Father has not travelled to London for these proceedings and sought permission to give evidence via video link. Despite the requirements in PD22A, his solicitors had not taken steps to seek permission from the government in Somaliland for the Father to give evidence from abroad. The potential difficulties with witnesses giving evidence from abroad were explained recently by the Court of Appeal in *Raza v Secretary of State for the Home Department* [2023] EWCA Civ 29 at paragraphs 50 to 52:

> *"50. In Nare (evidence by electronic means) Zimbabwe [2011] UKUT 443 (IAC) the UT listed the factors which a tribunal should take into account when deciding whether to allow evidence to be given by electronic means (paragraphs 17-20). In paragraph 21, the UT gave some guidance which was 'not intended to be comprehensive'. The UT said that if it was proposed to give evidence from abroad, the party wishing to call the evidence 'must' be in a position to tell the tribunal that the relevant foreign government had raised no objection to live evidence being given from within its jurisdiction. It was not for tribunals to make*

the relevant inquiries, which should be addressed to the Foreign and Commonwealth Office ('FCO').

51. In 2013, the UT issued a Guidance Note No 2 entitled 'Video link hearings'. Paragraph 1 referred to rule 1 of the Rules. Paragraph 13 is headed 'Video links in overseas cases'. It provides that an application to call evidence from overseas is unlikely to be granted unless the party wishing to call the evidence satisfies the UT of seven listed points. Paragraph 14 provides that it should not be presumed that all foreign governments are willing to allow their nationals to take part in video link hearings from abroad. If there is any doubt, the party wishing to rely on the evidence should ask the FCO 'with a view to ensuring that no objection will be taken at diplomatic level'.

52. The effect of the judicial headnote of Agbabiaka (evidence from abroad: Nare guidance) [2021] UKUT 00286 (IAC)) is that there is an understanding among nation states that their courts will not, unless they have permission to do so, exercise their powers on one another's territory. Any breach of that understanding might damage bi-lateral and multilateral relations, is contrary to the public interest and might harm the interests of justice. The position of the Secretary of State for Foreign, Commonwealth and Development Affairs ('the FCDO') is, therefore, that the foreign state in question must have given permission for oral evidence to be taken (either generally, or in the specific case). After the promulgation of the determination, any party seeking to rely on such evidence must ask the FCDO whether the foreign state has any objection. The headnote records that the guidance in Nare 'is amended to the above extent'.

26. Those considerations apply equally to witnesses in family proceedings who wish to give evidence from abroad, as PD22A makes clear. My starting position was therefore that the responsibility for taking appropriate steps to secure permission for the Father to give evidence by video link lay with the Father's solicitors and they had failed to take those steps. The Father's solicitors only made a first approach to the FCDO to transmit the request to the Somali government on 24 July 2023, a few days before the final hearing. That meant there was no practical opportunity for the Somali government to consider and respond before the hearing. However, the situation here is unusual. It was

common round that "Somaliland" is a self-governing region within the country that is internationally recognised as part of the state of Somalia. Somaliland has been separately governed from the rest of Somalia since 1991 but there is no international agreement on the governance of Somaliland. There is no agreement between the *de facto* government in Somaliland and the government of Somalia, which continues to claim Somaliland as part of Somalia. As a result of the absence of internal agreement within Somalia, there are no diplomatic relations between London and Somaliland. It is therefore unclear to me whether the *Agbabiaka* request should have been made to the Somali government or the de facto government in Somaliland but, whatever request ought to have been made, it was not transmitted in time for a decision to be make before this hearing.

27. I offered the Father the chance to fly to London to give evidence in person but he declined to do so for a variety of reasons including claiming that he could not afford to do so. That left the court with a choice between allowing the Father to give evidence when his solicitors had not taken the required steps to secure permission from the relevant government for him to do so in contravention to the usual position set out in *Agbabiaka* or refusing to allow the Father to give evidence with the result that his written evidence was neither supplemented by his oral evidence or challenged by the Mother's counsel. Neither option was attractive. The court has only been left in this position because of the failures of the Father's solicitors to appreciate the importance of following the appropriate procedures to secure permission well prior to the hearing, although it may well be that the time taken to secure such permissions is inconsistent with the need for a measure of speed in cases involving children.

28. All parties agreed that, in the end, I had to make a case management decision as to whether to allow the Father to give evidence. On balance I decided that the Father should be permitted to give evidence from Somaliland by video link primarily because there were sharp factual disputes here and it would be unfair to the Father to make those decisions without hearing his evidence and hearing him cross examined on the points in contention. I also considered that, given the particular facts of this case, the risk to an adverse effect on intergovernmental relations between the governments in London and Hargeisa, the capital of the Republic of Somaliland, appeared very slim because there were no diplomatic relations between the two countries and, even if

requests had been made to the Somali government for permission, it seemed highly unlikely that any decision would have been made in a timescale which worked for these proceedings. I thus gave permission for the Father to give evidence remotely notwithstanding the absence of any permission from either the Somali government or the government in Somaliland. That decision seemed to me to be in the best interests of the children.

29. The Father gave evidence from a mobile phone in Hargeisa. The reception was intermittent but he was able to be cross examined. Overall, I did not consider him to be a reliable witness on matters of fact because of the multiple contradictions in his evidence and the lack of any supporting documentary evidence. If he had supporting documentary evidence for his case it would have been relatively straightforward for him to have obtained that evidence, and thus the absence of any such documentary evidence is telling.

30. His evidence details concerning his plans prior to his leaving for Somaliland did not appear to support his case that this was a carefully planned move. Three elements stood out in particular. First, he was renting a Council flat but did not inform the local authority from whom he was renting his flat that he was leaving the country. He had no good explanation as to why he had failed to surrender his tenancy prior to his departure from the UK and thus why he continued to incur rent responsibilities after he no longer needed the flat.

31. Secondly, he did not inform the Department of Work and Pensions that he was leaving the UK and would therefore not be eligible for benefits once he left. He explained that he was required to "sign on" every two weeks and assumed that, when he failed to sign on, they would assume that he was no longer entitled to benefits and would stop his benefits. That meant that he would receive benefits to which he was not entitled after his departure. His evidence was that he assumed that his failure to sign on would lead to his benefits and housing benefit being stopped and hence the local authority would find there were rent arrears and they would then repossess the flat. However, he did not take any active steps to inform either public body in the UK that he was ceasing to live in the UK.

32. Thirdly, he accepted that he was still in receipt of child benefit payments for all of the children at the date of the hearing. He fully accepted that he was not entitled to those benefits if the children had moved abroad on a permanent basis. The Father said to me that he had not taken any steps before he left to terminate this benefit and, now he was in Somaliland, he did not know who to contact to stop the child benefit payments. It thus appeared that he had not taken any steps to try to get the child benefits stopped before or after he left the UK. None of that evidence provides support for the Father's case that this was a carefully planned permanent move away from the UK.

33. The Father provided no written evidence about discussions with either the Mother or the children about a permanent move to Somaliland. He did not give any evidence about discussions with the Mother about this. He said that he did not know that the Mother not only did not have a UK passport but was not entitled to apply for a UK passport. The Mother's evidence was that ~~s~~she was fully aware that she did not have a UK passport and could not obtain one. I accept that evidence. It follows that, if she had had discussions with the Father about a move to Somaliland, ~~s~~she would have known that she could not visit her children there. I cannot accept the Father's evidence that he had discussions with the Mother and agreed for the children to move to live in Somaliland but that the fact the Mother could not travel to visit her children there because she did not have a passport was not even discussed. It thus seems to me to be more likely that there were no discussions between the Mother and the Father about the proposal for the children to relocate to Somaliland on a permanent basis.

34. When asked about prior discussions about his proposed move with the children to Somaliland on a permanent basis he was, in my judgment, evasive. He said that the children were excited about going to Somaliland to meet their relatives. To that extent, there is common ground between the Mother and the Father. However, when he was asked whether the children had ever been asked if they wanted to move to Somaliland on a permanent basis, he was only able to say that they had agreed but could not offer any detail to support that evidence except at a very high level of generality. It seems to me that these were children who had lived in the UK all of their lives. If they had been asked about a potential move to Somaliland with the consequence that they would be cutting themselves off from their friends and family in the UK, it seems to me inevitable that they would have had numerous questions. They would have asked why

the Father wanted the children to move to Somaliland, where they would be living, what type of education they would get there and crucially whether they would continue to see their mother and London friends once they moved abroad. They would ask what type of future they would have in Somaliland since, even a basic internet search would have shown that they were moving from a developed western country to a very poor country. They children may not have appreciated the full significance of the fact that this was a country with the fourth lowest GDP per capita in the world but any 12 year old in the UK who could access the internet would have been easily able to establish that Somaliland was a very poor country. It seems to me that, if the children had been asked about their views about moving to Somaliland on a permanent basis, they would have asked numerous questions of the Father and would have raised those issues with the Mother. It seems inevitable that they would have been concerned about cutting themselves off from their family in the UK, their friends and their lives in London and all those issues would have been raised. Hence, whilst I can entirely understand the Mother's evidence that the children were excited to be going to Somaliland on an extended holiday, I find it difficult to accept that they would have agreed to going on a permanent basis unless there had been very extensive discussions in the family about whether this was a good thing.

35. I was also troubled by the fact that the Mother's evidence was very clear that, at the point that the children left the UK in August 2022, the children thought that they were doing no more than going to Somaliland for an extended holiday. No challenge was made by counsel for the Father to the Mother about this part of her evidence during cross-examination. Thus, at the end of her evidence, the position appeared to be that the Father's case was that the Mother had consented to the children moving permanently to Somaliland, but the children thought they were going on an extended holiday. Thus, the Father's case thus appeared to be that he did not challenge the fact that the children were tricked into leaving the UK on a false basis. He challenged the Mother's case that she had been tricked into agreeing for her children to move abroad but not that the children had been misled. If it was the Father's case all along that the children knew that they were moving on a permanent basis to Somaliland, that they had discussed this plan with their parents and the plans had been agreed with the children, that ought to have been a central challenge to the Mother's evidence. There was no such challenge, and that substantially weakens the Father's position on this point.

Having heard the evidence of both the Father and the Mother, I am fully satisfied that the Mother has proved her case that the children thought that they were going to Somaliland on an extended holiday. I do not accept the Father's evidence that the children knew in advance that the plan was for them permanently to relocate to Somaliland.

36. That conclusion has a direct effect on the primary issue of fact between the parties, namely whether the Mother signed the Relocation Consent Form believing that it was the Passport Consent Form. There are a number of aspects of this dispute which are less than satisfactory. First, the Mother's evidence was that she did not sign the Passport Consent Form and was told by the Father that her consent was needed because the UK Passports Agency would not release the passports without her consent. There is no evidence from UKPA that UKPA ever imposed such a condition. If the Father made that statement to the Mother, it seems to me highly unlikely that it was true because, on his case, he had the children's passports by the time of the meeting ~~an~~ at McDonalds.

37. The Mother's case was that she had not signed the Passport Consent Form when it was sent to her in May 2022. That evidence was not challenged when she gave evidence. It thus appeared to be the Father's case that the Father had managed to persuade UKPA to renew passports for the children without the Mother signing the Passport Consent Form. However, when the Father gave evidence a different picture emerged and he claimed that the Mother had signed the Passport Consent Form. However, no signed Passport Consent Form was put in evidence and there is no good explanation of the lack of challenge to the Mother's evidence that she had not signed the form. All that has led me to conclude that it is more likely than not that the Mother never signed the Passport Consent Form. I accept her evidence that the form was sent to her by WhatsApp in May 2022 but she did not sign it.

38. That evidence sets the context for the events at MacDonalds on 20 August when the Mother signed the Relocation Consent Form. There is no dispute that the Father provided her with this form to sign. He says that she read the form but the evidence in this case is that the Mother's literary abilities were substantially limited and I accept that she did not read it. The Father was unable to say clearly whether he had explained what the form said or that he had read the form to her. His case was that this form

represented the agreement which had already been reached between them but, as I noted above, his evidence on this aspect of the case was far from satisfactory. Having heard both the Father and the Mother give evidence on this point and having very carefully taken note of all of the points made by both counsel in their skeleton arguments and in oral submissions, I have no hesitation in saying that I prefer the evidence of the Mother. I cannot accept that the Mother would have agreed to her children relocating to live with the Father on a permanent basis in Somaliland when this was not discussed and agreed with the children and when she knew that she had no passport and so could not visit them there. I do not accept that she would knowingly have signed a form saying that she would be visiting the children in Somaliland when she knew that, without a passport, this would not be possible.

39. I am thus satisfied that the Mother was tricked by the Father into signing the Relocation Consent Form on the mistaken belief that it was the Passport Consent Form. I also accept that she signed this form because she was told that the passport authorities would not release the children's passports unless she signed and that this would prevent them leaving the UK. I conclude that she was tricked into signing the form as she claimed.

The evidence about the children's lives in Somaliland.

40. The Father's evidence is that the children are happy in Somaliland but he did not go as far as to say that they wish to continue to live there. He accepts that they wanted to relocate back to London. The Mother's evidence is BA is unhappy in Somaliland. She says that she speaks to her children by WhatsApp almost every day and BA is stressed out about not coming back. He says that his Father is away from the house most of the time and he does not go outside and that he has no friends. He says there is no one in the house other than his paternal grandmother and a lady who helps in the house. He appears to have been upset by seeing what he described to his mother as being a horrific animal killing and he was missing school in London. She said that he reports being worried for CA as she is young and girls are married off at a very young age in Somaliland. She said he is worried about when he will come home and feels that all his dreams have been crushed and feels that he cannot trust either his Mother or his Father. The Mother also said that BA had spoken to her of killing himself. He explained that he was going to an Islamic school and the only things he learned were Arabic and the

Koran, and he was worried about being behind with his schooling if he returned to England. He said he had tried playing football with other boys but was made fun of because he could not speak Somali and the other children called him names. The Mother has exhibited two text messages from BA from 2 and 30 April 2023 saying:

> *"I don't feel comfortable in this country. I absolutely hate it I really want to come back to living with u guys I never thought I would experience things like a dogs dying and cats. That's enough. Right"*

> *"Hooyo. Do you mind getting me out this stupid ass country. I can't take this any longer Wallahi I can't play with my friends I can't speak with them I can't do anything I have nothing"*

41. Those texts are consistent with the Mother's descriptions of her phone conversations with BA. When the Father gave evidence he suggested that these texts did not represent BA's true views and that he had been put up to sending texts by his mother saying he was unhappy as part of her planned legal case. The problem with that explanation is that it was never put to the Mother in cross-examination and hence I can only conclude that the suggestion that these texts did not properly represent BA's own views was not part of the Father's case at that stage. I do not accept that the Mother put BA up to sending these texts. It seems to me more likely that they represent his views.

42. The Mother's evidence is that her daughter CA is not happy being in Somaliland. The Mother reports that she is missing school in London and missing her friends. She described how CA remained in close contact with all her friends through WhatsApp and knows what they are doing and feels left out of their activities. She said that no one goes outside and she does not speak Somali or Arabic The Mother reports that CA worries about her health, as she suffers from asthma and severe eczema. The Mother reported that her daughter had not seen a doctor.

43. The Mother's evidence about her youngest child, DA, is that he just cries a lot on the phone and repeatedly says that he wants to come home. He says that he misses home and his best friend.

44. The Father disputed all of this evidence when he gave evidence but he accepted that "they did struggle at the beginning" but he claimed that "they have adjusted very well". He claimed that they were happy and settled here but he accepted that:

> *"I am sure that they have said to their mum, at times, that they want to return to London"*

45. The Father's case was that the children's schooling at the Islamic school was only temporary and that his plan, once this term has finished, would be for him to apply for the children to go to Hormuud, which was full when he arrived, but he says it now has places. The Father says that this school offers a full curriculum but his evidence is that he has not yet made an approach to the school to see if there are available places for the children at this school in September or whether, even if there are places, the school will accept the children as pupils. I accept that the Father may well hope that his children will be able to go to this school in September but, at this point, in my judgment there is no guarantee that they will be any more successful in securing places at this school for this September than last September.

46. The Father's case is that, despite the fact the children have said they want to return to London, it is best for them to be in Somaliland. I see a problem with that evidence because the Father has not explained why he thinks it is better for them to be brought up in an exceptionally poor country with the limited life opportunities that Somaliland offers to the children as opposed to being brought up in London with all the opportunities of living in an advanced western democracy. The Father has never explained why he decided to move to Somaliland, what job he is doing in Somaliland or what the benefit would be for his children in Somaliland as opposed to living in London. His view appears to have been that, having made this decision, the only real options for the children were living with him in Somaliland or being in foster care in London and being with him was the better of those options. I do not accept that the options are as stark as the Father suggests because it is 3 years since the local authority last looked at the Mother's parenting abilities and the children are now 3 years older. Hence ~~and~~ it is unclear what view the Local Authority will take in 2023 as to whether it would be appropriate to seek care orders for the children if they were to return to live

with the Mother. There is no evidence of the benefits for the children of living in Somaliland other than being provided with accommodation and support by the Father.

47. I do not accept the Father's evidence that the children are happy in Somaliland or, looking at the evidence as a whole, that there are any real benefits for the children in staying in Somaliland. On the contrary I accept the evidence from the Mother, as supported by BA's texts, that they want to return to London.

The law.

48. Aside from the issues related to and for FGM and forced marriage where there is no dispute about the extra-territorial powers of the court, as mentioned above, the orders that the Mother seeks are all orders that could be made under section 8 of the Children Act 1989 ("**CA**") The first question to examine is whether the High Court has jurisdiction to consider and make orders on these applications.

49. An order made under section 8 CA is a "Part I order" as defined in section 1(1)(a) of the Family Law Act 1986 ("**FLA**"). Section 2(1) FLA provides:

> *"(1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless—*
>
> *(a) it has jurisdiction under the Hague Convention, or*
>
> *(b) the Hague Convention does not apply but—*
>
> *(i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2A of this Act is satisfied, or*
>
> (ii) *the condition in section 3 of this Act is satisfied*".

50. It follows that, on the facts of this case, I have jurisdiction to make the orders sought if either the court has jurisdiction under the Hague Convention or, if the Hague Convention does not apply, the condition in section 3 FLA is satisfied. The relevant

section 3 condition is that, on the relevant date, the child concerned ~~is~~ was habitually resident in England and Wales. The "relevant date" for these purposes is the date of the application: see section 7(c) FLA.

51. The references to the "Hague Convention" in the FLA are references to the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children which was signed in The Hague ("**the Hague Convention**"). The Hague Convention has direct effect under UK domestic law because it was designed as an EU Treaty by the European Communities (Definition of Treaties) (1996 Hague Convention on Protection of Children etc.) Order 2010. It thus continues to have effect as part of EU retained law: see *In re J (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] AC 1291.

52. Neither Somalia nor the Republic of Somaliland are signatories to the Hague Convention or to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. It is agreed between counsel that the 1980 Hague Convention has no application on the facts of the present case.

53. The Hague Convention is a treaty between nations and the general rule under international law is that the terms of a treaty between nations does not have legal consequences for third countries, as expressed by the general formula *pacta tertiis nee nocent nee prosunt*. However, that principle is not the same as saying that the Treaty cannot set up rules which all contracting states agree to apply in their own courts, regardless as to whether the rules are to be applied in a case which solely involves contracting states or involves a contracting state and a non-contracting state. It is entirely possible that a treaty is intended to set up a set of rules that all contracting states agree to apply to a specific issue in their own courts regardless as to whether the facts of a case ~~apply~~ relate solely to circumstances engaging another contracting state or circumstances engaging a state that is not a party to the treaty. The Hague Convention has provisions which are to be applied by all contracting states where a child has been wrongfully removed or wrongfully retained, regardless as to whether that wrongful removal or retention is to a contracting state or a non-contracting state: see articles 11(3) and 12(3). Thus at least part of the Hague Convention sets up a system of legal

rules that have to be followed by all contracting states in circumstances where a child is wrongfully removed or retained in a non-contracting country.

54. Article 5 of the Hague Convention provides:

> *"(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.*
> *(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction"*

55. The plain meaning of the words of article 5, including the incorporation by reference to the terms of article 7 within article 5(2), suggest that the High Court, as the judicial authority of the UK, which is a contracting state, has jurisdiction to take measures directed to the protection of the child's person, including making orders under section 8 CA, for as long as the child is habitually resident in the UK or otherwise has jurisdiction as a result of the provisions in Article 7 of the Treaty. There is nothing in the wording of article 5 which suggests that the UK courts are deprived of jurisdiction by reason of the fact that the child is physically present in a non-contracting state provided that, for the purposes of the Hague Convention the child either is habitually resident in the UK or otherwise the UK Courts have jurisdiction as a result of the provisions of the Treaty. Counsel for the Father helpfully referred me to *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659. Lord Justice Moylan said as follows at paragraphs 58ff:

> *"58. Lady Hale set out, at [20], that, for the purposes of determining jurisdiction, "the first port of call is the Regulation". That was a reference to the European Regulation, BIIa, which was then applicable in England and Wales. She explained her conclusion as follows:*
>
> > *"[20] Thus, if the order in question is a Part I order, the first port of call is the Regulation. But if it is not a Part I order, and is an order relating to parental responsibility within the meaning of the Regulation, the first port of*

call is also the Regulation, because it is directly applicable in United Kingdom law. That, however, raises the prior question of whether the jurisdictional scheme in the Regulation applies not only in cases potentially involving two or more European Union members who are parties to the Regulation (all save Denmark) but also in cases potentially involving third countries such as Pakistan."

As to the "prior question", Lady Hale concluded, at [30], that "there is nothing in the various attributions of jurisdiction in Chapter II [of BIIa] to limit these to cases in which the rival jurisdiction is another member state". Lady Hale added, at [33], that the CJEU decision of Owusu v Jackson [2005] QB 801 "reinforce[d] the conclusion that the jurisdiction provisions of the Regulation do indeed apply regardless of whether there is an alternative jurisdiction in a non-member state".

59. Following the UK's leaving the EU, BIIa no longer applies. However, having regard to the terms of sub- sections 2(1)(a) and 2(3)(a), it is clear, at least for the purposes of the present appeal, that her observation applies equally to the 1996 Convention."

56. I am bound by the judgment and thus have to accept that article 5 of the Hague Convention applies to establish the jurisdiction of the High Court regardless as to whether the child has been wrongfully removed or retained in a contracting state or a non-contracting state. That would normally suggest that I must apply the whole of article 5, including article 5(2) and the cross reference to the retention of jurisdiction rules in article 7.

57. It is, however, a more difficult question as to whether that approach in relation to article 7 is right because there is an unresolved legal issue as to whether the rules on retention of jurisdiction in article 7 of the Hague Convention apply in the case of a child that is wrongfully removed or retained in a non-contracting state. Article 7 of the Hague Convention provides:

"(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.

(2) The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

(3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child"

58. The parties in this case are agreed about the broad effect of this provision, if it applies. It provides that the jurisdiction of the High Court is retained in respect of a child who was previously habitually resident in the UK and has been wrongfully removed or retained in another state. It is agreed that, if this article applies in this case, the High

Court retains jurisdiction to make orders in respect of these children unless the Mother acquiesced in their removal to Somaliland because, at the date of the Mother's application and at the date of giving this judgment, the children have been wrongfully retained away from the UK for less than 12 months.

59. The Father's counsel did not argue that, if the Mother was tricked into signing the Relocation Consent Form, she nonetheless "acquiesced" in the relocation for the purposes of article 7(1)(a). In my view that was a correct approach. The Mother cannot be taken to have "acquiesced" in her children's removal from the UK on a permanent basis if she was tricked into signing the Relocation Consent Form.

60. Given that area of common ground and my factual findings that the Mother was tricked into signing the Relocation Consent Form, for the purposes of article 7 I conclude that the Mother did not acquiesce in the children's removal to Somaliland. Accordingly, if article 7 applies, the parties agree that the High Court retains its power to make orders under section 8 CA regardless as to whether the children were in fact habitually resident in Somaliland at the date of issue of these proceedings or are habitually resident there at the date of the hearing.

61. However, counsel for the Father submits that, whilst article 5(1) applies to these proceedings to give the court jurisdiction to make orders if the children were, as a matter of fact, habitually resident in Somaliland at the relevant date, the Court cannot rely on the jurisdiction extension provisions under article 7 of the Hague Convention in any case where the child is removed or retained in a non-contracting state because article 7 does not apply where the children are living in a non-contracting state. Counsel for the Mother submits that article 7 applies and that, once the court has found that the Mother did not acquiesce in the removal or retention, the 12 month rule applies and the High Court retains its power to make orders under section 8 CA. Both counsel rely on recent but conflicting High Court authorities by High Court Judges (not deputies) to support their arguments.

62. The origin of this line of jurisprudence is the decision of Mostyn J in *SS v MCP* [2020] EWHC 2971 (Fam). This case concerned the meaning of EU Council Regulation No

2201/2003 ("Brussels 2"). At that stage, prior to the UK's EU exit, Brussels 2 took precedence over the Hague Convention. Article 10 of Brussels 2 provided:

> *"In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:*
>
> *(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or*
>
> *(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:*
>
> > *(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;*
> > *(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);*
> > *(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7) ; (iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention."*

63. The *SS v MCP* case did not concern the alleged removal or retention of a child to another EU member state but to India. India is not a signatory to the 1980 or 1996 Hague Conventions. Mostyn J was concerned that, in the case of an alleged removal or

retention of a child to a non-EU member state, a literal interpretation of article 10 would lead to the EU state having perpetual jurisdiction in respect of any child who was previously habitually resident in the UK. He observed at paragraph 39:

> *"However, an interpretation which favoured a global reach of article 10 was adopted by the Court of Appeal in Re H (Abduction: Jurisdiction) [2014] EWCA Civ 1101, [2015] 1 WLR 863, [2015] 1 FLR 1132 at [38] –[53] per Black LJ. In that case the children had been in Bangladesh for nearly 6 years. The Court of Appeal held that while the English court retained jurisdiction under article 10 , that jurisdiction would nonetheless not be exercised and the application for a return order would be dismissed. It can therefore be seen that strictly speaking the decision as to the existence of a retained jurisdiction in England under article 10 was obiter dicta"*

64. Mostyn J therefore made a referral to the ECJ to decide whether article 10 had the global effect set out in *Re H.* The ECJ provided the answer in *Case C-603/20 PPU SS v MCP* [2022] 1 WLR 1923. The court noted that article 8 of the Regulation provided:

> *"1. The courts of a member state shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that member state at the time the court is seised.*
> *"2. Paragraph 1 shall be subject to the provisions of articles 9, 10 and 12"*

65. In this case the Advocate General Saugmandsgaard Øe examined the caselaw and then held at paragraph 44:

> *"It is therefore clear from the case law of the court that the application of article 8(1) of Regulation No 2201/2003 may cover legal relationships involving non-member states, notwithstanding the fact that the wording of that provision makes no mention whatsoever of such states"*

66. Advocate General then observed at paragraph 47 that "*article 10 of the Regulation is a special rule of jurisdiction which, as lex specialis, takes precedence over article 8(1) of that Regulation in the situations which it is specifically intended to govern namely the*

abduction of a child". The Advocate General thus supported the global effect interpretation of the Court of Appeal in *Re H.* At paragraph 71 the Advocate General concluded that "*where a child who was habitually resident in a member state is abducted to a non-member state, the courts of that member state retain their jurisdiction, for an unlimited period of time, to rule on parental responsibility in respect of that child".*

67. The ECJ however reached the opposite conclusion. The Court said as follows at paragraph 40:

> *"The fact that that article uses the expression "member state" and not the words "state" or "third state", and that it provides that the conferral of jurisdiction is subject to current or previous habitual residence "in a member state", while making no reference to the possibility of a residence being acquired in the territory of a third state, also implies that that article deals solely with jurisdiction in cases of child abductions from one member state to another"*

68. It then provided the first of three broad reasons to reach its conclusion, the first of which was as follows at paragraph 46:

> *"46. However, where the child has acquired a habitual residence outside the European Union, after being wrongfully removed to or retained in a third state, there is no room for the application of article 8(1) of that Regulation, given the absence of habitual residence in a member state. Indeed, that provision does not deal with such a situation. It follows that, in those circumstances, the rule laid down in article 10 of that Regulation, whereby it is possible to set aside the jurisdiction which could be claimed, on the basis of the general ground, by the courts of the member state where the new habitual residence has been acquired, loses its raison d'être, and there is not, therefore, any reason to apply it. Consequently, article 10 does not justify indefinite retention of jurisdiction by the courts of the member state where the child was habitually resident before his or her wrongful removal or retention, when that child has been abducted to a third state"*

69. As I understand that reasoning, it is that once as a matter of fact the child in question becomes habitually resident in a country outside the EU, the child is outside the scope of article 8(1). However, the ECJ appeared to me to interpret the purpose of article 10 as being a limited rule to apply between member states to retain jurisdiction in order, for a limited period, to prevent an abducting parent getting a procedural advantage by their wrongdoing. If that was the *raison d'être* of the rule, then the broader purpose of the scheme set up by the Regulation would be frustrated if a child who was taken to a third country would always have disputes litigated in a Member State because the child could never gain habitual residence in that third country for the purposes of the Regulation. Thus, the court concluded that the rule in article 8(2) which extends jurisdiction can only apply as between member states who are all bound by the terms of the Regulation and not between a member state and a non-member state since the latter state is not bound by the terms of the Regulation.

70. The second reason given by the ECJ was that restrictions were intended to be interpreted restrictively. The third reason, which appears to have been the decisive reason, was that "*it did not intend those rules to apply to child abductions to a third state, since such abductions were to be covered, inter alia, by international Conventions such as the 1980 Hague Convention*": see paragraph 50. The problem that the court identified was that the expansive interpretation of Regulation 10 would leave member state countries in breach of their obligations under the 1980 Hague Convention. This problem was identified in paragraphs 53 to 55 which provided:

> *"53. If article 10 of Regulation No 2201/2003 were to be interpreted as meaning that the member state where a child was previously habitually resident retained its jurisdiction indefinitely where the child had been abducted to a third state, that would have the consequence that, where the child has acquired a habitual residence in a third state which is a contracting party to the 1996 Hague Convention, following an abduction, article 7(1) and article 52(3) of that Convention would be deprived of any effect.*
>
> *54. Article 7(1) of the 1996 Hague Convention makes provision, like article 10 of Regulation No 2201/2003 , for a transfer of jurisdiction to the courts of the state where the child has acquired a new habitual residence, if certain conditions are*

satisfied. Those conditions are connected, in particular, to the passage of time together with acquiescence or inaction on the part of the person concerned who holds a right of custody, the child having become settled in his or her new environment.

55. That possibility of a transfer of jurisdiction would, however, be definitively precluded if, by virtue of article 10 of the Regulation, the courts of a member state were to retain indefinitely their jurisdiction. By the same token, that retention of jurisdiction would also be contrary to article 52(3) of the 1996 Hague Convention , which prohibits rules agreed between one or more contracting states on matters regulated by that Convention —such as the body of rules laid down by Regulation No 2201/2003 —from affecting, in the relationships of those states with the other contracting states, the application of the provisions of that Convention . To the extent that jurisdiction in matters of parental responsibility could not be transferred to those courts of contracting states, those relations would necessarily be affected"

71. Accordingly, the Court decided that article 10 of the Regulation did not apply in the case of a child who acquired habitual residence in a non-member state and provided that such a case was governed by the 1980 or 1996 Hague Conventions where both parties were contracting states. It did not, as far as I can determine, express any view on what rules should apply if there was a wrongful relocation or retention in a non EU member state which was not a party to the 1980 or 1996 Hague Conventions.

72. When the case came back to the High Court in *SS v MCP* [2021] EWHC 2898 (Fam), Mostyn J followed the interpretation of the ECJ with respect to article 10. However, the Judge also said at paragraph 9:

"the reasoning of the Court of Justice must apply equally to article 7 of the 1996 Hague Convention"

No reasoning was given in the judgment as to why Mostyn J reached this conclusion, but it appears to have been based on the fact that the wording of the two provisions are similar. However, that observation must be obiter as this was a case about perpetual

retention of jurisdiction. The 12 month rule under article 7(1) was not relevant on the facts of that case.

73. The issues next came before the Court in a case before Mr Justice Peel in *MZ v RZ* [2021] EWHC 2490 (Fam). This also concerned a case where a child was in India and had been in that country for more than 12 months. The Judge said as follows at paragraphs 188ff:

> *"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 <u>the time limit applies whether the removal is to a contracting or a non-contracting state</u>. 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 applies 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)" [Emphasis added]

74. As I read the above passage of this case, the Judge read the decision of the ECJ to mean that the one-year rule in article 7(1) of the Hague Convention applies to an unlawful retention of a child in a non-contracting state and thus there can be ~~is~~ no perpetual retention of jurisdiction. With respect to the learned Judge, I am not sure I agree that *Case C-603/20 PPU* reaches that conclusion. It seems to me that the case decided that, whilst article 8 of the Regulation applies to give the court of a member state jurisdiction in respect of a wrongfully retained child who is habitually resident in that state, the one year jurisdiction extension rule in article 10 of the Regulation only applies where the child is wrongfully retained in another EU member state but that rule does not apply where the child is wrongfully retained in a non-EU member state. It does not seem to me that the case decides that the one year rule in article 10 of the Regulation or, by parity of reasoning in article 7 of the Hague Convention, applies in the case of a non-member state.

75. The Father's counsel relies on a second decision of Peel J, namely *H v R the Embassy of the State of Libya* [2022] EWHC 1073 (Fam). In this case the children had gone to Libya in August 2020 and the proceedings were commenced in June 2021, namely within the 12 month time limit. Counsel for the Mother, who was seeking return, sought to rely on article 7 of the Hague Convention. The Judge considered his submission at paragraphs 51 to 58 where he considered the history which I set out above. He said at paragraphs 57 and 58:

"57. In MZ v RZ (Hague Convention 1996: Habitual Residence: Inward Return) [2021] EWHC 2490 (Fam) I similarly took the view that the CJEU's decision on article 10 of BIIa applies equally to article 7 of the 1996 Hague Convention.

58. I am accordingly satisfied that Article 7 does not assist M"

76. I confess to being troubled by that conclusion because it appears to be the contrary of the decision that the same Judge had reached in *MZ v RZ.* Unless there are typos in the judgment, it appears that, in the earlier case, the Judge concluded at paragraph 19 of his judgment in that case that the 12 month rule in article 7 did apply and yet in this case he reached he reached a different conclusion.

77. The final case relied upon by counsel is *FA v MA* [2022] 2 FLR 371 (Fam). The learned Judge, Mr Justice Williams, said as follows at paragraph 28:

> *"Article 7 refers to until the child has acquired a habitual residence in another State not another Contracting State and so it may be that there is a distinction. I have not heard detailed submissions on the proper interpretation of the phrase. It is clear from other Articles of the 1996 Convention that where it refers to a state it tends to differentiate between a Contracting State or a non-Contracting State and so the reference to a State without any descriptive preceding adjective is curious. Applying the principles deployed by the CJEU would tend to support an interpretation that Article 7 only applied between contracting states and thus was irrelevant for the purposes of this case. However applying the more literal approach seen in Re H, which was subsequently referred to by the Supreme Court without disapproval suggests that Article 7 should be applied according to a literal reading of the words. On that basis it would apply to any other state. However for reasons which will become apparent I have concluded that Article 7 would not apply to retain jurisdiction in this case for other reasons and so my conclusions on this are not central to the outcome of this decision"*

78. It is clear that those conclusions are both tentative and are *obiter dicta,* but it seems to me that they reach the same conclusion as Peel J in *MZ v RZ (Hague Convention 1996: Habitual Residence: Inward Return)* but point to the opposite conclusion to the decision of Mostyn J in *SS v MCP* and Peel J in *H v R the Embassy of the State of Libya*.

79. I thus consider that there is no clear line of authority on this point and, although I do so tentatively as I am a Deputy Judge and these are decisions by full High Court Judges, I have to reach my own view as to whether article 7 of the Hague Convention applies in the case of a child who is unlawfully retained in a state which is not a contracting state

under the Hague Convention. In approaching this question, it seems to me that I have to treat the meaning of the Hague Convention as a matter of statutory construction in a conventional way, but have to pay due respect to the decision of the ECJ in *Case C-603/20 PPU* because, under UK law, the Hague Convention is part of EU retained law. However, it must be relevant that (a) *Case C-603/20 PPU* was not a case about the Hague Convention but was confined to discerning the proper interpretation of the Regulation and (b) part of the reasoning in that case was to seek to avoid member states being placed in a position where the jurisdiction rules under the Regulation reached one conclusion and the jurisdiction rules under the Hague Convention reached the opposite conclusion. That latter problem does, of course, not exist in a case of a non-contracting state under the Hague Convention because there is no competing and opposing set of rules that the High Court has to apply.

80. It follows that the third reason reached by the ECJ at paragraph 46 of *Case C-603/20 PPU* does not appear to me to be relevant in understanding the meaning of article 7 of the Hague Convention. The focus must therefore be on the first reason, as set out at paragraph 46 of the decision. The reasoning in that paragraph is, in summary, that once a child has become habitually resident in a non-member state, article 8(1) of the Regulation ceases to apply and that the jurisdiction extension rule under article 10 does not apply because that rule is confined to rules between Member States who are all parties to the Regulation. Thus Regulation 10 is to be treated an internal rule between Members States. The reasoning is that it only applies to allocate jurisdiction between Member States and has no application in a case where a third state is involved ~~since~~ because that third state is not bound by the terms of the Regulation. Looked at in that way, it seems to me that, in order to understand whether the same reasoning applies in the case of article 7 of the Hague Convention, it is right to ask whether the Hague Convention and the wording of article 7(1) in particular was intended to apply to child abductions solely between contracting states or was intended to set rules that had to be applied by contracting states regardless as to whether the state where the child had been wrongfully removed or retained was a contracting state or a non-contracting state. I have already referred above to parts of the Hague Convention that clearly set rules that have to be applied by a contracting state regardless as to whether the child has been taken to a contracting state or a non-contracting state. The question is whether article 7 should be interpreted differently.

81. There is some indication in the Lagarde Report on the meaning of article 7 that the intentions of the drafters of the Hague Convention intended its effect to be that it ~~in~~ set rules to be applied in all cases, not just in cases between contracting states. It thus set rules to be applied in the case of a child abducted to a non-contracting state, as is the case with 11 and 12 of the Hague Convention. At paragraph 49, the Report considers the interplay between the 1996 Convention and the 1980 Convention bearing in mind that all parties to the 1980 Convention may not be parties to the 1996 Convention. It states[1]:

> *"These conditions bring to mind those which are posed by Article 12 of the Convention of 25 October 1980. This text permits the requested authority not to order the return of the child where the proceedings for return have only been commenced after the expiration of a period of one year and it is demonstrated that the child is settled in its new environment. The discordance arises from the fact that, in the Convention of 25 October 1980, the period of one year starts with the removal or retention, while in the new Convention, as indicated above, this point of departure is later. Therefore, one cannot eliminate the hypothesis in which the authorities of the State to which the child has been removed or in which the child has been retained are not bound to order the return of the child – which might make one think that the child's habitual residence has been transferred to that State and that its authorities have acquired jurisdiction, in any case under Article 5 of the 1961 Convention, to take measures of protection and decide in particular on custody and rights of access – while this jurisdiction over protection would still belong, under the new Convention, to the authorities of the State in which the child had his or her habitual residence immediately before the wrongful removal or retention. If, in this hypothesis, the authorities of this latter State, which have jurisdiction under Article 7 of the new Convention, decide to change the custody rights, it seems that the authorities of the State to which the child has been wrongfully removed will have to recognise and enforce this decision in accordance with Articles 23 et seq. of the new Convention. But if this State is not a Party to the new Convention and is a Party only to that of 25*

[1] See https://assets.hcch.net/docs/5a56242c-ff06-42c4-8cf0-00e48da47ef0.pdf

October 1980 (or even to the Convention of 5 October 1961), it will not be bound to recognise this decision; and it may, it seems, consider itself alone to have jurisdiction"

82. Whilst this passage is not entirely clear in answering the question as to how the obligations in the Hague Convention should apply when dealing with a non-contracting state, the end of the above passage seems to suggest that states who are parties to the 1996 Hague Convention are expected to apply all the rules in article 7 of the Convention in all relevant cases regardless as to whether the state to whom the child has been taken is a contracting state or not. However, as the text recognises, states that are not parties to the Convention may not be under a duty to recognise steps taken by the courts in a convention country.

83. Seeking to pull these strings together, it does not seem to me that it is necessary or appropriate to follow the approach in paragraph 46 of *Case C-603/20 PPU* in construing the meaning of article 7 of the Hague Convention because of the reasons tentatively identified by Williams J in *FA v MA*. The wording of article 7 does not limit itself to contracting states and this suggests the rules in the Hague Convention seek to set the rules for contracting states to apply both in cases where a child is unlawfully retained in a contracting state and in a non-contracting state. There are occasions when the text uses the word "Contracting State" and other occasions when it uses "non-Contracting State". It thus seems to me that where the text uses the word "state", it should be interpreted as encompassing both a contracting state and a non-contracting state unless the context clearly indicates to the contrary. In contrast to the words of the EU Regulation 10, there is nothing in article 7 of the Hague Convention which limits its application to a child which has been unlawfully retained in a contracting state. Applying that approach which is consistent with the Lagarde Report, in my judgment the High Court is required to apply the rules in article 7 because it covers a child which has been taken to any other state, regardless as to whether that state is a contracting state or not.

84. I also bear in mind that this is a provision which extends the ability of the court to take protective measures to protect children in the event that they are taken from one country to another in breach of the rights of the other parent. There are agreed

minimum standards to protect children in contracting states but, by definition, there are no such agreed minimum standards to protect children in states which are not signatories to the convention. I thus find it difficult to envisage any policy justification for limiting the powers of the courts in contracting states to take action to protect children when they are wrongly taken from one country with agreed standards to another that has no such agreed standards in breach of the rights of the other parent.

85. I thus conclude that:

a. In this case the Mother did not acquiesce to any of her children remaining in Somaliland for longer than the agreed holiday of 3 months;

b. When the Father failed to return the children in October 2022, the Father acted in breach of her parental rights and thus wrongfully retained the children in Somaliland;

c. These proceedings were commenced in May 2023, namely within 12 months of the date of the wrongful retention; and

d. The effect of article 7 of the Hague Convention is that the High Court has jurisdiction to order the children to be returned to the UK.

86. I thus conclude that this case comes within section 2(1)(a) FLA and I am not prohibited from making a return order and consequential orders for the children's welfare.

Habitual residence.

87. It seems to me that there is sufficient ambiguity about the application of article 7 that I should go on to consider the alternative case, namely that article 7 of the Hague Convention does not apply because that provision only has application in the case of a child who is unlawfully retained in a contracting state. Counsel were agreed that, on that assumed position, I was required to consider whether the condition in section 3 FLA was satisfied. As explained above, the test in section 3 is whether the children were habitually resident in the UK on the "relevant date" which is in May 2023 when these proceedings were commenced.

88. Both counsel agreed that the test of habitual residence was a question of fact and that the list of factors set out by Hayden J in *In re B (A Child) (Custody Rights: Habitual Residence)* [2016] 4 WLR 156 ("*Re B*") was relevant in determining the place of habitual residence of a child. The Judge in that case said:

> *"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[2], 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 enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, Re KL).*
> *iii) In common with the other rules of jurisdiction in Brussels IIR 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)); Re B (para 42) applying Mercredi v Chaffe at 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 (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 (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 (Re KL, Re R and Re B);*
> *vii) It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (Re B); (emphasis added);*
> *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*

[2] Re A (Children) (Rev 1) [2013] UKSC 60

child had with the state in which he resided before the move (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 (Re R and earlier in Re KL 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 (Re R) (emphasis added);*

xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (A v A; Re B). In the latter case Lord Wilson referred (para 45) 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 (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" (Re B supra)"

89. Both counsel accepted that the children were habitually resident in the UK prior to August 2022 and that the onus of proof in showing that they had adopted a new residence rested on the party who was alleging a change of habitual residence, namely

the Father. It was also agreed that I needed to carry out a "*comparative or balancing exercise of the factors connecting*" the children to the UK and those connecting them to Somaliland in order to decide if the children had reached a sufficient degree of integration in Somaliland in order to displace the integration that they previously had in the UK: see *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention) (Rev2)* [2023] EWCA Civ 659 at paragraph 72.

90. I have been placed in very significant difficulty in carrying out that comparative exercise as a result of the paucity of information about the children's lives in Somaliland and the almost total absence of reliable information available to me from sources other than the Father. Doing the best I can on the evidence available to me, the position is that the children appear to be living in a house where they rarely go out save to go to school. They appear to have few friends outside the house and little if any wider social interaction with people in Somaliland. There is no reliable information that they have interacted regularly with other members of the Father's family apart from his Mother who has moved from Ethiopia to live in Somaliland in this property. The only reference in the evidence to the children having interaction with other children is to BA playing football with local children and this appears to have been an alienating rather than bonding experience for him.

91. I accept the Mother's case that the children left for Somaliland expecting to stay there for 3 months and have found themselves trapped there against their wills, rarely going out of the house. I accept they are unhappy and that part of this unhappiness is that they have stayed in close contact through social media with their friends in London and have feelings of missing out on all the activities and events that they learn about through that social media. Their network of friends does not appear to have changed between the date when they left the UK and today but what has changed is their ability to take part in the lives of their friends in any way other than through social media. I accept that they cannot speak the local language of Somali at anything other than at a basic level and have limited opportunities to interact with local people as a result. It appears clear from the text messages and the Mother's evidence that the children still see their home as being in London and are anxious to return home.

92. I also consider that the schooling arranged for them at the Islamic School was only intended to be a temporary arrangement and, with its very limited curriculum, has not assisted them in integrating into Somaliland.

93. Both counsel agreed that there was no evidence of any significant change in the position between the date of issue of these proceedings and the date of the hearing, save that Ms Daly submitted that this was another period of time and that, of itself, would eventually lead to a finding of habitual residence having changed. However, she accepted that this could only be a factor which had a marginal effect given the short period between issue and trial. It was also not suggested that there was any difference between the habitual residence of the children. They had all either acquired habitual residence in Somaliland or none of them had done so.

94. These children had a high degree of stability in the UK before they moved in August 2022; they had lived in the UK for the whole of their lives. They have been required to remain in Somaliland against their wishes and the focus of their lives remains on their lives in London as opposed to being focused on their lives in Somaliland. I am not satisfied that their new situation in Somaliland has any real features of stability for the children. They know hardly anyone in Somaliland apart from their Father and his Mother, do not have settled schools and do not speak the local language. Based on the limited information available to me, their emotional ties appear to remain firmly linked to their Mother and their friends in London based on a desire to return and, no doubt, a failure on the part of the children to understand why they cannot return. In my judgment I do not have sufficient evidence to conclude that these ties have been replaced by ties in Somaliland. I thus conclude that, as a matter of fact, the necessary degree of integration required for the children to acquire habitual residence in Somaliland has not been established and these children remain habitually resident in the UK both today and in May 2023.

95. I am therefore satisfied that the condition in section 3 FLA is satisfied and I have the power to make a return order. Thus, even if this court did not retain jurisdiction as a result of article 7 of the Hague Convention, it has power to order the children's return from Somaliland.

Should I exercise the power to make a return order.

96. In making the decision whether to order the return of these children to the UK, "child's welfare shall be the court's paramount consideration": see section 1(1) CA. I am required to have regard to the factors set out in section 1(3) including "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)". As set out above, I accept that these children want to come home to London. I accept that their educational needs are more likely to be met in London than in Hargeisa.

97. I am particularly concerned about the likely effect on CA of remaining in Somaliland. The evidence in this case is that the Father is opposed to FGM but 98% of women in Somaliland experience a form of FGM. In a culture where the application of this practice is virtually uniform, it is far from clear to me that CA would be safe from being subjected to this vile procedure even if the Father remains opposed. I also accept that it is the culture for children to be subject to arranged marriages and for the children to have very little say in the matter. The Mother explained her concerns when she said that "the men" in Somaliland make all the decisions. It is not clear to me whether that is wholly correct because senior woman also appear to be important figures in the culture as was the case for her. It is clear that marriage decisions were made in her case without her having a real choice in the matter and I accept that the same issue may arise if these children stay in Somaliland. There is thus a real danger that the Father will come under pressure to ensure that CA will enter into an arranged marriage once she reaches puberty. I accept that the Father's present position is that he would not allow that to happen. I also I accept that the Father is devoted to his children and is doing what he considers to be best for them, but given the wider cultural environment there remains a significant risk that CA will be forced into an early arranged marriage if the children remain in Somaliland.

98. I accept that, if the children return to the UK, the local authority will undertake an assessment to determine whether the Mother is capable of providing adequate parenting for her children. If the children are returned, the Mother has arranged for her sister to come to live with her and to support her in looking after the children. Islington LBC have told the court that, if the children return, they will undertake a fresh assessment. I acknowledge the Father's fears that, if the children return to London, they will end up

in foster care. The Father also relies on the fact that the Mother has not until very recently engaged with therapy and support to assist her to learn parenting skills. However, she explained that she is presently seeking support and may well now have a very different attitude to engaging with social services than she had in 2020.

99. It seems to me too early to reach any conclusion as to whether the children going into care is a likely outcome, particularly if the Mother's sister comes to live with her to help to parent the children. However, based on the limited information available to me and having regard to the views of the children, I consider that it would still be in the best interests of these children to be back in London but in a period of foster care as opposed to living their present lives in Somaliland.

100. I will therefore make immediate return orders in this case. I am grateful for the explicit acknowledgment that the Father made in evidence when he assured me that, if this court makes a return order, he will comply with the order. I accept that, once he made the decision to move to live in Somaliland, he felt he was doing what was best for his children in requiring them to live with him. I hope that he will accept that, however he hoped things would work out once the family arrived in Somaliland, the children have been there for some time and are not settled. The evidence in this case makes it very clear that the children want to return to live in the UK. It is, of course, a matter for the Father as to whether he takes the decision that he will return to the UK. I accept that his present position is that he does not wish to return to live in the UK but I also accept that he is entitled to change his mind and return to live here. If he does so, there will be a difficult question to examine as to whether the children should continue to reside with him, as they did prior to August 2022, or live with the Mother and her sister. I express no views about that issue because, at present, the Father has indicated his intention to remain in Somaliland. Whilst I respect that decision, I trust he will abide by his promise to the court and will co-operate in making arrangements for the immediate return of the children.

101. I would add that, even I had been satisfied that the children had become habitually resident in Somaliland, as the children are British citizens and given all the circumstances of this case, I accept that I have the power to make a return order under

the inherent jurisdiction of the High Court and would have been satisfied that it was appropriate to make such an order.

102. I will therefore make a return order, a forced marriage protection order in respect of CA and an FGM order in her case. I require all parties to attend the next hearing on 7 August 2023, with the Father attending by video, when the precise arrangements for the children's return and consequential orders can be discussed.