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Case No: FD23P00444

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 February 2025

Before :

MR JUSTICE CUSWORTH

- -

Between :

FN **Applicant**

- and -

AM **Respondent**

- -
- -

Brian Jubb (instructed by **Anthony Louca Solicitors**) for the **Applicant**
AM, the **Respondent,** appeared in person

Hearing dates: 20 and 21 February 2025

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JUDGMENT

This judgment was handed down remotely at 10.30am on 18 March 2025 by circulation to the parties or their representatives by e-mail and by release to The National Archives.

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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 children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Cusworth :

1. This matter has come before me as the final substantive hearing in an application made under the inherent jurisdiction on 31 August 2023, by an applicant mother, seeking orders in relation to her son, KA, who was born on 7 March 2022. KA who is now aged 2 years and 11 months, but as at the date of the application was just one year and 5 months old. The orders which were sought in the mother's Form C66 included that KA be made a ward of court, an order requiring his father, the respondent, to surrender his passport, and an order directing the summary return of KA to England, neither of which latter orders are now pursued. She also sought 'any such other Order as the court deems fit and proper'.

2. KA was born in England, at a time when both of his parents, who are nationals of country Q, were married and working and training in this country in the medical profession. They have since been divorced. The application first came before Judd J on 8 September 2023 for case management, and was next heard by me, sitting as a deputy, on 11 October 2023, when I determined that as at the date of my judgment, KA, who was then in the Middle East in country Q with his mother in circumstances which I will describe, remained habitually resident in England and Wales. In that judgment I made findings about the relevant background, having read statements by and heard oral evidence from both of his parents. Those findings remain undisturbed and I set them out below:

3. ***'The history**. The police became involved with this family following an alleged incident of domestic violence in the family home on 11th February 2023. The mother made a 999 call and later provided a statement to the police (albeit it appears that the police are taking no further action on these allegations). The parties separated with immediate effect thereafter, with the mother taking a temporary rental in a county in England with KA.*

4. *The mother had been present in this jurisdiction as a dependent on the father's Tier 2 (health and care) visa. The father contacted the Home Office, on the day after he had been arrested following the mother's police complaint, seeking to cancel her visa. He accepts that he knew that this would present her with problems in seeking*

to remain in the UK. He says that he felt under an obligation to do this because of the terms of his visa.

5. *In April 2023, the father booked one-way tickets for the mother and KA to travel to country Q and also instituted an application in the Shari'a court in country Q to impose a travel ban in respect of KA, preventing him from leaving, once he arrived in that country. He did not inform the mother that he had done this. After the mother separated from the father, she and KA initially went to live in rented accommodation in a county in England, as described above. After a 2 month period renting there, the mother left England with KA, she says with the intention of returning to the UK after a break there. The father does not accept this, and rather suggested to me in his submissions that the mother's intention was to return permanently to country Q with KA.*

6. *Indeed, consistent with that position, the father then made allegations of child abduction to the police, which he repeated in his submissions to me. Although he accepts that he had previously bought tickets for them to travel back to country Q, he says that he was unaware of the plans for the trip which actually transpired. Notwithstanding that complaint, he also made his application to the Shari'a Court, so that in the event of such a trip, KA would be unable to return without his agreement to the releasing of the order, or a Court process in country Q.*

7. *It is the mother's case that the father's conduct has effectively restricted her to living in country Q where she has very limited funds. She has no job (she had discontinued her membership of the relevant professional body in country Q), and has no child support currently being paid by the father, despite requests. The mother wishes to bring KA back to the UK and asks for the court to accept jurisdiction on the basis of KA's habitual residence here.*

8. *The father told me clearly that, if the mother were to have a job in England which would enable her to financially support KA, then he would have no objection to KA's return here with her. In that situation he told me that he would have no welfare concerns. However, in the absence of such employment, he was not prepared to agree to KA's return, which he did not consider would be in his son's interests, even though*

at present his own contact with KA is limited to a couple of hours every 2 to 3 months, at most. He currently intends to remain in England until 2027.'

9. The principal issue before me at that hearing was in respect of jurisdiction, and I was then able to determine that KA remained habitually resident in this jurisdiction, having considered the test for habitual residence as expressed by MacDonald J in *NM v SM* [2023] EWHC 2209 (Fam). I said this:

10. '*In this case, although (i) I accept that KA has the nationality of his parents, and so has a passport issued by country Q, and (ii) will no doubt have picked up some words of Arabic, in circumstances where since May a child of his age has been living in country Q, surrounded by his mother's family, which (iii) certainly gives him durable ties to the country, I consider the following points for KA to be the more important in the determination of his current habitual residence:*

    a. *KA was only 14 months old when he travelled to country Q with his mother, and despite having had a couple of lengthy visits to see family during the first year of life, I am entirely clear that he was up until May 2023 habitually resident in England with his primary carer, his mother, as well as (up until their separation 3 months before), his father. This is where he had been born, and where his parents were settled for the first year of his life. I consider that his habitual residence would have been indistinguishable from that of his mother prior to their departure from England in May 2023.*

    b. *Whatever her intention as she sat on the plane (a matter of dispute), it is very clear that the mother was greeted on arrival in country Q with the information that the father had obtained an order preventing KA leaving country Q again. Her response, I accept, was to do all that she could to secure their return to this jurisdiction as soon as possible. There has therefore been no period since May 2023 when she and KA can be said to have been settled in country Q, or embarking on any process of putting down roots. The conditions under which they remain in country Q are those of insecurity and impermanence, against the mother's wishes. Their stay is involuntary, and*

there has been no attempt made consciously to settle, despite their heritage and family.

c. *I have acknowledged that, over a period of months, there will for KA have been some degree of acclimatisation living with his mother and her family in country Q, but I consider that KA's primary family and social relationship remains with his mother – who has been his sole primary carer at least since February, and I am satisfied that she has taken no steps to integrate him into life in country Q, beyond exposure through her to his family, in the same way as might happen over an extended holiday.*

d. *The current circumstances for KA are essentially unstable, cared for as he is by a parent who at no point has wanted that either he or she become integrated back into society in country Q. The mother's lack of desire to re-integrate will have produced a significant barrier to KA's own position, which I accept may be different from hers. But I am satisfied that neither she nor KA have yet lost their habitual residence in England. Such loss must become much harder to establish in circumstances where the parent with care for such a young child is not only not seeking to establish the transfer, but rather doing what she can to return to their country of originally established habitual residence. It is rather the father, himself habitually resident here, who is seeking by denying KA's return to impose such a change. Whilst such a change in those circumstances, especially for an older child, may be possible to achieve, I cannot accept that with a child of KA's age that this will happen quickly against the will of his primary carer.*

11. At this hearing, the father who appears in person has asked me to reconsider the question of jurisdiction, as a further 16 months have now passed since that first order was made, and so he argues that jurisdiction in relation to KA may have been lost in England and Wales. Mr Jubb for the mother takes the view that it has not and that the court retains its jurisdiction to make the orders sought. Clearly, given the basis upon which I determined that habitual residence was established as set out above, the further passage of time might have merited further consideration of where KA was now habitually resident, if it was the case that the date of this hearing was the

relevant one for the purposes of determining habitual residence, and so whether this court has jurisdiction to make the orders which it now considers to be in KA's best interests.

12. I have given careful thought to these arguments, and considered a number of relevant authorities, the most helpfully on-point being the decision of Peel J in *H v R & Anor* [2022] EWHC 1073 (Fam), where he dealt extensively with the question of jurisdiction in cases such as this one, where the application is framed in Form C66 as one under the inherent jurisdiction for wardship and seeks (initially) an inward return order. He first said this:

> 26. In **A v A and another (Children: Habitual Residence) (Reunite International Centre Child Abduction Centre and others intervening [2013] UKSC 60** at paras 25-28, Baroness Hale described the bare inward return order made under the inherent jurisdiction in that case as not encompassing care or contact and therefore not falling within s1(1)(d) of the Family Law Act 1986. On the facts of **A v A**, habitual residence was established under Article 8 of BIIa so that the order made was upheld by a different route.
>
> 27. For the reasons given, I take the view that in this case M did not seek solely an inward return order; she sought substantive child arrangements orders and secured such orders from the court on 17 June 2021. That potentially brings the application within s1(1)(d), plotting, as I will explain, a route from the Family Law Act 1986, via the 1996 Hague Convention, and then back to the Family Law Act 1986.
>
> **Jurisdiction: habitual residence**
>
> 28. The starting point is the Family Law Act 1986 which at s1 includes within the definition of a "Part I order":
>
> > a) *a section 8 order made by a court in England and Wales under the Children Act 1989;*
> >
> > *d) an order made by a court in England and Wales under the exercise of the inherent jurisdiction of the High Court with respect to children –*
> >
> > > *(i) so far as it gives care of a child to any person or provides for contact with, or the education of, a child;*
>
> 29. As I have indicated, in my view the nature of M's application, being for the children to be committed to her care, brings it within s1(1)(d).
>
> 30. That being so, one travels to s2(3) of the Act which provides that a s1(1)(d) order shall not be made by the court unless:

a) *it has jurisdiction under the Hague Convention, or*

b) *the Hague Convention does not apply but –*

(i) the condition in section 3 of this Act is satisfied.

31. The condition in s3 is, so far as relevant for these purposes, that "*on the relevant date*" the child concerned was habitually resident in England and Wales. And by the interpretation at s7(c), "*relevant date*" is "*the date of the application"*.

32. As the statute says, M's application is governed first by the 1996 Hague Convention. This is described by Baroness Hale at para 20 of **A v A** as the "first port of call". True, that was a BIIa case, but it is clearly analogous to a 1996 Hague Convention case (and was part of the wording of s2(3) of the Family Law Act 1986 before the exit of the UK from the European Union).

33. I turn to the 1996 Hague Convention. By article 5(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"*.

13. Peel J then looked at the situation under the terms of the 1996 Hague Convention, to which the UK is, but country Q is not, a signatory. He concluded that in a case where both countries are signatories to the Convention, that the principle of *perpetuatio fori* is excluded, and that if by trial habitual residence lies in the recipient contracting state, jurisdiction will have moved. He expressed 'some misgivings' about the law if that were the case. He continued:

38. '…I have already remarked upon the opportunity for unscrupulous abductors to take advantage of delay, or indeed to manufacture delay, so as to engineer a change of habitual residence. An innocent party may act promptly and properly, yet find themselves in a habitual residence race against time, powerless as the court proceedings take their course.

39. However, in this case, different principles may apply because Libya is not a Contracting State under the 1996 Hague Convention. The Lagarde report goes on as follows:

"On the other hand, in the case of a change of habitual residence from a Contracting State to a non-Contracting State, Article 5 ceases to be applicable from the time of the change of residence and nothing stands in the way of retention of jurisdiction, under the national law of procedure, by the authority of the Contracting State of the first habitual residence which has been seised of

the matter, although the other Contracting States are not bound by the Convention to recognise the measures which may be taken by this authority."

40. Again, on a plain reading, this suggests to me that the position is different where the other state is a non Contracting State. If at the date of the final hearing, habitual residence lies in the country of origin, then so does jurisdiction. If, however, between issue and final hearing habitual residence moves to the non Contracting State, jurisdiction does not travel with it, but nor does it remain with the Contracting State under the Convention. Therefore, as the report says, Article 5 ceases to apply and national law takes over. I accept that there is no specific Article to this effect, but the report is clear, and, in my view, it is logical that jurisdiction should not transfer to a non Contracting State. After all, why should a non Contracting State be fixed with jurisdiction pursuant to a Convention which it has not signed? It is equally logical that if *perpetuatio fori* does not apply, then the 1996 Convention gives no answer to the issue of jurisdiction if habitual residence is lost from the country of origin, and, as the Lagarde report says, the position then reverts to domestic law. This outcome avoids the unsatisfactory situation where children are in a non Contracting State, and lengthy proceedings play into the hands of a party who seeks to dispute the jurisdiction of England and Wales, including, as here, raising a challenge to jurisdiction very late in the day, so as to fix habitual residence and jurisdiction in a State with which this country has no reciprocal Treaty arrangements.

14. Peel J concluded, before considering whether there had in that case been a change of habitual residence, by saying that:

45. However, it seems to me that where the other country …is a non Contracting State, the second part of the Lagarde report accurately reflects the position. If habitual residence lies in England at the date of trial before me, Article 5 is operative and on any view, England retains jurisdiction. If, however, between issue in June 2021 and hearing in April 2022, habitual residence transferred to Libya, then Article 5 ceased to apply, and national law became operative.

46. It follows that, on that second scenario (i.e at the date of hearing habitual residence lay in Libya), jurisdiction is then governed by domestic law i.e the Family Law Act 1986 ss1, 2 3 and 7 which cumulatively provide that the court has jurisdiction under English law if:

i) The order sought is a s1(1)(d) order under the inherent jurisdiction giving care of the children to any person which, for reasons already given is, in my judgment, the case here; and
ii) The children were habitually resident in England and Wales at the relevant date, which is defined as the date of application.

15. I agree with all of Peel J's conclusions. From them it follows that, if KA were found to still be habitually resident in the UK, then this court would clearly retain jurisdiction to determine any issues in the case. If on examination it were to be

determined that KA's habitual residence may have changed with the passage of time, then jurisdiction would be retained here provided that the orders made by the court fell properly within the ambit of s.1(1)(d) of the Family Law Act 1986. Of course, as Baroness Hale made clear in *A v A* (above), a simple inward return order would not so qualify. However, in this case, the mother in her C66 sought from the court '*any such other Order as the court deems fit and proper*'.

16. In *H v R*, the application was simply framed as one for wardship and an inward return order. Only at paragraph 41 of her supporting statement did Peel J find her seeking a return of the children to her care, supported by a recital contained in a subsequent order by Poole J where the children were in fact committed to her care in the event of return for a limited period. In this case the mother has expressly sought such other relief as the court deems fit and proper, which relief must certainly cover orders directed to or in support of the care and education of KA and arrangements for him to spend time with each of his parents.

17. I also bear in mind that in this case, jurisdiction was properly established at the outset on the basis of KA's habitual residence. I also bear in mind that the mother has throughout been seeking to restore that residence, and, at least until the change of regulations on 10 September 2024, the only thing that was preventing her returning with him to the UK was the Travel Ban imposed on him through the courts of country Q by the father's unilateral application. The father has therefore been causing, by his refusal to lift the ban, a situation where the mother has had no choice but to remain with KA in country Q.

18. After that time, matters have become complicated by the fact that the mother was no longer entitled to make use of the visa waiver system, and instead now has to formally apply for a visa to return to the UK. The evidence from the expert Julian Norman is to the effect that the mother's best option in terms of any visa application would be for her to make an application for Leave Outside the Rules ('LOTR'), as she does not currently have a job offer to enable her to seek to enter on the basis of being a Tier 2 Skilled Worker; she is currently in the process of re-sitting the second stage of medical exams. The likely initial timescale for such an application, which the mother commenced in December 2024, is about 6 months. Thereafter, however,

she unlikely to be in a position to physically return before the end of 2025. Even if the mother can eventually overcome her visa position and put herself into a position where she could return to the UK, she could not even then do so with KA, by reason of the travel ban. In those circumstances, Mr Jubb cannot seek an immediate return order, even if one were jurisdictionally available. Given that KA remains in his mother's care, such an order is in any event not strictly required. What counsel does seek are orders which would enable KA to return to this jurisdiction with his mother as soon as she is able to do so, which will require the lifting of the travel ban.

19. In light of all of the above, including the reasons why no return for KA has been possible, I am satisfied that, in the event that the court now makes orders which fall within the ambit of s.1(1)(d) of the Family Law Act 1986, as it may do pursuant to the mother's request for such orders as to be made as are fit and proper, it still retains the jurisdiction to do so, regardless of any current analysis of KA's habitual residence as could be undertaken. As indicated, the mother is not anyway in a position to pursue the inward return order which was the initial headline application which she made. And it is a significant matter that, had it not been for the order obtained by the father in country Q, the mother and KA would, as I find, have returned to the UK before the end of 2023.

20. The position under the law of country Q has been comprehensively described by Ian Edge and is not in dispute. Specifically in his report in relation to the impact of any decisions in this court he made clear:

> *Enforcement of Orders of the English Court*
>
> 19. If the English Court made orders in relation to the guardianship, custody and welfare of the Child (who is a national of country Q) in this case these would not be enforced in country Q as the Child is now present and resident in country Q so that the courts of that country would consider they had sole jurisdiction in all matters involving the child including matters relating to guardianship, custody, contact and residence. There are no bilateral or multilateral treaty provisions for recognition and enforcement of judgments between the UK and country Q. There is provision in the relevant Civil Procedure Law providing for general principles by which foreign orders and judgments can be recognised and enforced in country Q. However, these provisions are intended to apply to judgments in commercial

matters (mainly monetary judgments) and are not used to obtain the recognition and enforcement of court orders and judgments in family/personal status matters.

21. Later he responded to a question about any lifting of the travel ban as follows:

> *Question 1: What is the procedure for lifting the current travel ban placed upon the child in country Q (i) in the event the father agrees to it being lifted and (ii) in the event that the father opposes it being lifted?*
> 23. As to (i), the Father could remove the travel ban easily by informing the Shari'a court that he wished it to be withdrawn. The court would need to make an order and distribute it to the relevant authorities but this should not take a long time. As to (ii), as the time for appeal has passed then there is little to do. Removal of the ban could be sought as part of a process of seeking relocation but as that is hardly likely to be successful and again it is unlikely to succeed by itself. The law of country Q allows for application to the court for permission to leave country Q temporarily if the guardian refuses permission but it does not apply to relocation for residence purposes.

22. So, it is clear that whilst there is little to be done to render the prospect of any order of this court becoming enforceable in country Q remotely likely, it would be straightforward for the father if he chose to do so to lift the ban and allow KA to return to the UK.

23. What is particularly sad, and frustrating about the situation in which KA finds himself is the fact that there is no disagreement in principle between his parents that it would be in his best interests at this time to be in the UK, living with his mother and spending time with his father. The issue between them has now distilled to the circumstances which will obtain when the father decides to return to country Q, which he says was always his and the family's long term plan; and whether at that stage, or later if she was still then undergoing medical training, the mother would be obliged to return with KA.

24. The mother says that she does not wish to be tied down to a return. Indeed, the father himself might yet decide that it is not ultimately what he wants for himself. However, for the moment, he further requires that the mother will, as he says is regularly required and implemented in country Q, offer family guarantors who will agree to accept travel limitations of their own as a form of surety for KA's eventual return to that country. The father makes the point that, as part of the mother's own financial

claims against him in country Q, his own uncle has been accepted as such a guarantor. He says that, if the guarantor offered wishes to be released, then a substitute can readily be offered and agreed.

25. The father also says that this has long been his position. Indeed, it is right he made this proposal when this matter was first listed for final disposal before me on 12 November 2024, stating in his opening document to the court that: '*I am willing to lift the ban if the mother secures an NHS position as a doctor, on the condition that she provides a guarantor to the Shari'a court to ensure KA's return to country Q at a mutually agreed-upon time. This arrangement allows her to advance her career without jeopardizing my parental and legal rights in country Q.*'

26. On the basis of that proposal, and in circumstances where the parents' agreement is far more valuable than any order which this court could make given the position under the law of country Q outlined above, I elicited the parties' agreement at the outset of that hearing to enter into mediation in the hope that they could, between them, come to an arrangement whereby the parameters for KA's future residence and travel arrangements could be made between them. Today, in his careful and lucid submissions the father has explained to me that even if the mother were not able to arrange to arrive in the UK to continue her medical training until 2026 or 2027, he would still be willing for her to stay here, with KA, for a period of several years whilst she was in that position, and he indicated that in that event he may also stay for longer and seek a job as an NHS consultant. The stumbling block for him remains the uncertainty in the event that he decided to return to country Q, if she then instead wished to remain here indefinitely with KA. He is not willing to accept a future determination of KA's best interests by a court in this jurisdiction.

27. Unfortunately, the planned mediation did not get off the ground, for reasons which only became apparent during this hearing before me. The mediation agency expected that the parents would engage in joint sessions which the father was not willing to do, although his offer, he now tells me, remains open for discussion. The mother's team were told that he was not willing to mediate, and so, unfortunately, no further discussions ensued between the November hearing and this rearranged fixture. The gap, however, remains presently unbridgeable, even after I allowed time for further

discussion at this hearing. As things stand, the parties remain separated not by a disagreement as to which arrangement will suit KA's interests best now, but rather by the extent to which future plans can now be set in stone in a way that the father is assured will not lead to him living in a separate jurisdiction from his son.

28. This means, regrettably, that since the spring of 2023, he has been apart from KA, and has only been able to see him intermittently when he has been able to return to country Q. I am quite satisfied that he loves his son, and that he knows that it will not have been in KA's interest to have been deprived of time with his father as he has been growing up. If agreement cannot be reached, then that position looks set to continue for KA for another 2 years, until 2027 when the father says that he will return to country Q. The father sees this as ensuring that, once he does return to country Q, his son will be close at hand. The inevitable truth will be that the relationship between father and son will not be nearly as close and cemented as it could have been, which will inevitably have been harmful to KA.

29. It will also mean that the mother's entirely legitimate ambition to train as a doctor in England will have been thwarted, because although she is free to return here once her visa position is regularised, she feels unable to do so without being able to bring KA with her, which the father by his decision is preventing her from doing in the absence of guarantees about his son's future return. The mother does not feel able to give those guarantees, and it must be said that a court in this jurisdiction would be most unlikely to require such commitments of her unless given freely. The result is an impasse which harms everyone involved.

30. In those circumstances, what should this court now do? As explained above, the court's jurisdiction does not extend only to making a simple return order in respect of KA, but that would not anyway be appropriate given that the mother cannot presently travel to the UK. The mother as explained seeks by her application such orders as the court deems fit and proper, which must be orders which fall within the terms of s.1(1)(d) of the Family Law Act 1986 to be jurisdictionally secure. I am very clear that KA should continue to reside with the mother, and that he should be able to spend time with his father, not only in country Q, but also in the UK. It would further be in his interests if the mother were in a position to accompany him to the

UK and care for him here whilst resuming her studies, as soon as she is able via the visa system. It is far better for KA if his parents are living and working in the same country and he can spend time with each of them without the need for significant journeys for all parties. I will therefore make orders and recitals to that effect, leaving the detail of the arrangements to the parents' further agreement.

31. To facilitate those arrangements, it would clearly be in KA's interests for the travel ban preventing him from leaving country Q were to be lifted. Once lifted, it would not be in his interests for such a ban to be reimposed whilst the current circumstances obtain – KA was born in the UK, and both his parents wish to live and work here for the time being; he is also a national of country Q, and should be able to travel freely between the two countries. Consequently, once the ban is lifted it should not be reimposed by the father whilst he remains habitually resident in the United Kingdom. It cannot be in KA's interests to be prevented from visiting his father as he grows up, even at his father's instance. The position would require review in this regard if his father were to return in due course to live in country Q, for then different considerations would arise. Preventing a national of country Q, resident there from exercising his rights under the law of that country, is not a step that any court should take lightly.

32. However, I also recognise that in reality the mother will not be able to enter the UK for some months, and KA will not therefore be likely to travel until she can accompany him. As explained above, an agreement as to the way forward between the parents remains, without question, the only sure way to avoid conflict and secure KA's best interests, which are not being served by the present impasse. I will therefore provide some time before the mandatory order that I propose to make requiring the father to lift the travel ban comes into force, to enable the parties to further negotiate.

33. I propose to order that the father must secure the lifting of the ban by 30 June 2025, just over 4 months hence. If he fails to do so, he will then find himself in contempt of court, and potentially liable to be punished for the same. He will however have time to find a solution that is acceptable both to him and to the mother before the time for his obligation to act expires. The mother will know that, if she declines to

negotiate, and the order becomes effective but is not complied with, the prospect of the ban being lifted in country Q without the father's cooperation remains remote. I hope very much that KA's parents can now find a way to resolve their differences without the need for the order that I am making to require implementation.

34. That is my judgment.