Neutral Citation Number: [2020] EWFC 37

Case No: LS18C00768

IN THE FAMILY COURT SITTING AT LEEDS
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2020

Before:

THE HONOURABLE MR JUSTICE COBB

- -

Between:

Local Authority B	**Applicant**
- and -	
X (mother)	**Respondents**
-and-	
V (father)	
-and-	
T	
(by his Children's Guardian)	

- -

Re T (Jurisdiction: BIIR: Cyprus)

- -

Gillian Irving QC and Michael Gration (instructed by **Legal Services for Local Authority B**) for the Local Authority
Mark Twomey QC and Alexander Laing (instructed by **Lam & Meerabux**) for the Mother
Nkumbe Ekaney QC (instructed by **Makin Dixon**) for the Father
Karl Rowley QC and Clare Garnham (instructed by **Ridley & Hall**) for the Children's Guardian

Hearing dates: 16 & 17 July 2019
HAND DOWN OF JUDGMENT [6 MAY 2020] AT A REMOTE HEARING LISTED AT THE FAMILY COURT IN SHEFFIELD

- -

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.

THE HONOURABLE MR JUSTICE COBB

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, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cobb:

Introduction

1. This application concerns a child, T. He is now about 5 years old. He is a British national; both his parents are British nationals. He was born in Kyrenia in the Turkish Republic of North Cyprus ('TRNC'), and lived there from his birth in early 2014 until late summer 2018 when he travelled with his mother to the Republic of Cyprus, the southern territory of the island[1], where he remained until 17 October 2018. On that day, he flew to London, again in the company of his mother. On each occasion on which T and his mother travelled, the mother was the subject of a formal deportation order from the relevant territory of the island of Cyprus. On her arrival in this country the mother was arrested and taken into custody, where she has remained to date. A police protection order was made in relation to T on his arrival in England, and he was placed into foster care, where he, in turn, has remained.

2. On the day after his arrival in London, namely 18 October 2018, Local Authority A issued care proceedings (*Part IV Children Act 1989*) in relation to T. The proceedings were later transferred to the Family Court sitting at Leeds given the mother's historical links with the North East of England, and Local Authority B

[1] I shall refer in this judgment to the area under the effective control of the Republic of Cyprus, located in the south and west of the island, as the "Republic of Cyprus" to distinguish it from the "TRNC" which I shall use to describe the region under Turkish control in the north of the island.

(hereafter 'the Local Authority') was substituted for Local Authority A as the relevant designated authority. It is in the context of these care proceedings that the issue before me arises.

3. That issue is whether the Family Court in this country can properly exercise jurisdiction in relation to T. The Local Authority contends that it can and should do so; its stance is supported by the Children's Guardian on behalf of T, and by T's father (Mr. V), who lives in England. The mother opposes that outcome and argues that this court should decline jurisdiction; she argues that the courts of the Republic of Cyprus (notably in the southern territory, not the courts of the TRNC) should assume jurisdiction for T, and further argues that T should be physically sent back to the Republic of Cyprus forthwith.

4. The legal issues in the case are complicated by the internal territorial and political division within Cyprus. The United Kingdom, in accordance with its obligations under international law, has not recognised, and does not recognise, the TRNC as a state, yet the Republic of Cyprus is a Member State of the EU.

5. No oral evidence has been led on this jurisdiction issue. I have had access to a huge quantity of documentary material, much of which has been generated during the criminal investigations concerning the mother's activities in the TRNC. I have a transcript of her evidence, recently given at the Crown Court, which traverses much relevant ground. Having received detailed and high-quality submissions from leading and junior counsel for the parties, I briefly reserved judgment.

Notification to relevant authorities

6. In accordance with standard practice laid down by Sir James Munby P in *Re E* [2014] EWHC 6 (Fam), the authorities of the Republic of Cyprus and the TRNC have been made aware of the proceedings, and of this hearing. No one from either of the Cypriot authorities has attended the hearing.

Republic of Cyprus and the Turkish Republic of North Cyprus

7. Since 1974, Cyprus has been a divided island, separated by a UN buffer zone known as the 'Green Line', albeit with crossing points. In 1983 the northern part of Cyprus unilaterally declared independence and formed an unrecognised breakaway state, the TRNC. While the Republic of Cyprus government is the legal authority for the whole island, the northern part of Cyprus (the TRNC) remains outside government control. The Republic of Cyprus has *de jure* sovereignty over the entire island, but the island is *de facto* partitioned into two main parts.

8. The Republic of Cyprus acceded to the European Union on 1 May 2004. The application of the *acquis communautaire* (the bundle of accumulated legislation, legal acts, and court decisions which constitute the body of European Union laws) to the areas of the island over which the Republic of Cyprus does not exercise sovereign jurisdiction was (and is) suspended by separate Protocol (Protocol 10), at least until final settlement of the Cyprus problems. Protocol 10 provides that the "application of the *acquis* [*communautaire*] shall be suspended <u>in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus</u> does not exercise effective control." (emphasis by underlining added). This was explained by the Court

of Justice of the European Union (CJEU) in the case of *Orams v Apostilides (British Residents' Association Intervening)* [2010] EWCA Civ 9, [2011] QB 519 ("*Orams*") (see below) in this way at [33/34]:

> "[33] … the Act of Accession of a new Member State is based essentially on the general principle that the provisions of Community law apply *ab initio* and *in toto* to that State, derogations being allowed only in so far as they are expressly laid down by transitional provisions (see, to that effect, Case 258/81 *Metallurgiki Halyps* v *Commission* [1982] ECR 4261, paragraph 8).
>
> [34] In that regard, Protocol No 10 constitutes a transitional derogation from the principle set out in the preceding paragraph, based on the exceptional situation prevailing in Cyprus" (emphasis by underlining added).

The border between the sides of the country is not formally considered to be an *external* border of the EU, but strict border controls are in place and a special regime applies to the movement of goods and people between the two sides of the island at the Green Line.

9. The European Union and the wider international community do not recognise the "authorities" in the northern part of Cyprus. The only country formally to recognise the northern part of Cyprus as an independent country currently is Turkey. For that reason, the TRNC is seen as a safe haven for parents and families to take their children to evade UK social services, or other UK legal action. The Hague Convention is not applicable in the TRNC; the diplomatic mission and British High Commission in Nicosia have no legal authority there. The European arrest warrant procedure is not acknowledged there.

10. Despite the lack of any formal diplomatic or legal relationship, in practice a reasonably co-operative working relationship has built up between the administrative services and the police in both parts of the island. This cooperation relating to the two halves of Cyprus and of the TRNC with other states was examined by the Divisional Court in the case of *R (Akarcay) v CC West Yorkshire & others* [2017] EWHC 159 (Admin). Burnett LJ (as he then was) usefully cited in his judgment (at [8]) a 2011 Foreign and Commonwealth Office memorandum to the Serious Organised Crime Agency which contains the following:

> "The UK does not recognise the self-declared "Turkish Republic of Northern Cyprus" and has no relations with it at state level. It is not possible for the UK to conclude international agreements with the "TRNC" on any issue. However, the UK maintains a dialogue with the political leadership of the Turkish Cypriot community and co-operates with Turkish Cypriot authorities on many issues of immediate concern. Such co-operation does nothing to undermine the non-recognition of the "TRNC"." (emphasis by underlining added).

Burnett LJ had earlier referred in his judgment (at [7]) to the fact that fugitives from justice living in the TRNC would necessarily have to "sustain the relatively constrained life inevitable if they never leave its territory".

This judgment

11. I handed down a version of this judgment, what may be regarded as the 'definitive version', on 1 August 2019. In that version, in the next section ('*Background facts*') I set out, in reasonable detail, an account of the mother's life and T's life. At the hearing at which the judgment was handed down, the mother indicated (through counsel) that she opposed publication of the judgment in that form, contending that the factual content, when read together with some limited material in the public domain, could lead to the identification of T as the subject of the proceedings. All other parties supported publication in a largely unredacted format. I adjourned the issue of whether the judgment should be published to hear full argument.

12. I heard that argument on 3 October 2019. The parties' positions remained as set out in the previous paragraph. At that stage, I accepted the mother's argument that publication during the ongoing care proceedings was not in T's interests, and further adjourned determination of the question of publication until the conclusion of the care proceedings. This course allowed for (a) consideration of the issues without the impact on them of *section 97 CA 1989* ('privacy for children involved in certain proceedings'), and (b) attempts to be made to research the extent of information already in the public domain. The care proceedings were effectively concluded last month. At my direction, the parties have filed further submissions on the issue of publication. The position of the parties on the issue of publication remains the same.

13. Having reviewed the matter with the benefit of further written submissions, I concluded (for reasons which I have more fully set out in a judgment of even date which will *not* be published) that the balance of competing factors and of the relevant rights under the ECHR (*Article 8* and *Article 10*) would be appropriately struck by publication of this judgment but in a materially redacted form. I concluded that T, whose welfare is a primary (though not the paramount) consideration in this regard, is entitled to enjoy the protections of his private life, and this outweighed the public interest in revealing detail about his and his mother's life. I accepted that I should not take any *unnecessary* risk of him being identified by the piecing together of an information 'jigsaw'. I therefore significantly edited the next section containing the 'background facts'. The balance of the judgment remains (save for some minor editorial tweaks) as it was in the original version, unedited.

Background facts

14. In 2012 the mother travelled to the TRNC. At the time, she was pregnant with T, her second child. Her principal motivation in moving was to escape the involvement of social services (child protection) in her family life, with her (then unborn) baby. The mother's first child had, some years earlier, been removed permanently from her care following public law proceedings. T's father remained in England. The mother went on to form a relationship with a Turkish national who is a fugitive from British justice.

15. On her arrival in the TRNC in 2012, the mother was granted a time-limited visitor's visa to stay. This was apparently renewed on more than one occasion, but is unlikely on the evidence to have been renewed or extended beyond January 2015 at the latest. The mother says that she stopped renewing her visa because she felt that the authorities on the Green Line between the TRNC and the Republic of Cyprus had begun to ask her "too many questions"[2]; she said that "in the end I stopped as I did not want to leave the country (i.e. the TRNC)" for the purposes of renewing her visa[3]. From that time on, the mother was resident in the TRNC unlawfully as (she now accepts) an 'overstayer'.

16. The mother has recently filed evidence describing her life, and specifically T's life, in the TRNC from 2012 to 2018. T spent his first 4 years 8 months there; although the mother gave T an English name, she also used a Muslim name for him. The mother says that T would call himself by his Muslim name, although I note from the filed evidence of the Local Authority that he vehemently opposes its use now. According to the mother, T spoke "extremely good" Turkish. It appears that T attended a nursery in the TRNC. He had a TRNC identity card. According to the mother T strongly bonded with his stepfather who is Turkish, and with his wider family with whom T apparently spent much time; T formed close relationships with his stepfather's children. It is apparent (from a summary of the social work records in my papers) that T was distressed to be separated from his stepfather (more so, as it happens, than his mother) when he was removed into care in the TRNC in late summer 2018, this corroborating (to a degree) the mother's account of these family relationships.

17. The mother plainly carved out a life for herself in the TRNC; she appears to have spent much time with her Turkish partner's family and appears to have formed friendships with others in the community, both English and Turkish. On her own account, she moved home many times in the 5 or more years she lived in the TRNC, but only left the TRNC occasionally in the early months to renew her visa.

18. In November 2014 the mother became involved in criminal activity both in Cyprus and in the UK. The UK police began to investigate, and as a result, arrested some of those allegedly involved in the criminal behaviour here.

19. In late summer 2018, the mother was located by the Turkish Cypriot Police in the TRNC and she was arrested; she was taken to her local police station and interviewed. The Turkish Cypriot Police did not apparently inform the British High Commission of the mother's arrest. The mother purportedly gave a voluntary written statement to the police at the time. I have seen the statement which bears her signature. The mother now claims that she was "bullied" into making the statement without the benefit of legal advice, and that it contains inaccuracies; she maintains that she signed it not knowing its contents. The information contained in the statement describes her life in Cyprus.

20. The law-enforcement authority in the TRNC resolved to order the mother's deportation as an illegal immigrant (overstayer). In the meantime, the mother remained in custody.

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[2] Extract from transcript of mother's evidence before the Crown Court: 2.7.19
[3] Extract from transcript of mother's evidence before the Crown Court: 2.7.19

21. In light of these developments, T was referred to the social services agencies in the TRNC and was received into institutional care.

22. The deportation order was executed on 31 August 2018 from the TRNC. The following important information about this deportation has been provided by the TRNC representative in London (this is said to be a "verbatim" account of a conversation, which is – as to its accuracy – unchallenged before me):

    i) [T] was "taken into care [in late summer] 2018 then deported alongside the mother [three days later]";

    ii) "The only way for [the mother] to return to the TRNC is if she makes a case to the Court in the TRNC and wins, otherwise she will not be permitted to return";

    iii) "As the child ([T]) has been deported with his mother, regardless of his age, the same rules apply. The only way for the child to return to the TRNC is if someone makes a case to the Court in the TRNC and wins, otherwise he will not be permitted to return – regardless of his age." (emphasis by underlining added).

23. At the point of deportation, the Foreign and Commonwealth Office was alerted for the first time to the fact that the mother and her son had exited the TRNC, and were being escorted by UN police across the Green Line. At 18:38 on 31 August 2018 the Cyprus Ministry of Interior Migration Department (CRMD) (the relevant body for the Republic of Cyprus) issued a deportation order in relation to the mother. The order was faxed and served on the mother later that evening. The relevant text reads as follows:

> "… your … conduct represents a genuine present and sufficiently serious threat … therefore your right of freedom of movement and residence is restricted … it has been decided to deport you from the Republic of Cyprus.
>
> I have proceeded with the issue of deportation and detention orders…
>
> Your re-entry into Cyprus after your deportation is forbidden for the next three years from the date of deportation. … you may submit an application for lifting of the exclusion order after a reasonable period and in any event after three years from the enforcement of the final exclusion order, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering your exclusion. The relevant authorities shall reach a decision on this application within six months of its submission and you shall have no right of entry to the Republic of Cyprus while your application is being considered.

> You have the right to file a recourse against the decision for your deportation before …[the Court] … within 75 days from the date of receipt of this letter." (emphasis by underlining added)

24. The mother accepts that she was handed this letter on the same day [31.8.18][4]. She did not then, or subsequently, 'appeal' against the decision.

25. At 18:45 hours on 31 August 2018 the mother was formally arrested by the Republic of Cyprus police for being a prohibited migrant; she was detained and taken to a deportation centre in Larnaca. T was taken into the care of social services in Nicosia and placed in a children's home. At 19:18 hours the FCO was updated by Interpol that the mother was in custody. Updates were provided to the Crown Prosecution Service in England.

26. There followed some weeks of legal and administrative liaison between the Republic of Cyprus and the authorities in the UK. On 17 October the mother and T were escorted to Larnaca airport where they boarded a flight to London, accompanied by two Cypriot immigration officers and a social worker. Immediately upon arrival at London Heathrow, the mother was arrested. T was taken into the care of Local Authority A's social services under a police protection order.

27. On the following day, 18 October 2018, the mother was produced at the Magistrates Court. She pleaded guilty to a number of offences relating to her international criminal activity. On 19 October, T was made the subject of an interim care order, the court recording that it felt able to make "interim emergency orders" using its protective powers under *Article 20* of the *Council Regulation (EC) No.2201/2013* ('*BIIR*') and/or *Article 11* of the *Hague Convention on the Protection of Children 1996*.

28. As to the legal basis for the removal of T from the Republic of Cyprus with his mother, this was clarified by e-mail which was made available on the second day of the hearing before me:

> "The Cyprus National Law that relates to deportations permits [the mother] to be deported as a subject of the Order whilst it also allows the removal of [T] with [the mother] as he is a dependent child who entered the country under [the mother's] care and control.
>
> … [T] is not subject to any deportation order but will be removed with his mother as a dependent child."

29. Shortly after entering her guilty pleas, the mother changed solicitors. She then applied to the court to vacate her earlier pleas on the basis that there had been a serious abuse of process. This important issue was considered and determined by the judge determining matters at the Crown Court on the 9 July 2019 after a 2-day hearing. The mother's argument was that the National Crime Agency (NCA) and the Foreign & Commonwealth Office had been guilty of such gross executive misconduct

[4] This is to be found in the transcript of the mother's evidence at the Crown Court: 2.7.19

as would cause the prosecution to be repugnant to the interests of the criminal legal system. The Crown Court Judge rejected the mother's case and concluded:

> "The Republic of Cyprus wished to deport [the mother] for reasons of their own, she was not deported from the Republic of Cyprus at the request of the UK authorities. They facilitated provision of such matters as authority to travel for the child but that should be seen within the overall context of the obligation to achieve the overriding aims and the strong public interest in the cooperation with foreign law enforcement agencies.
>
> … the defendant [mother] has failed to establish the burden of proof to the necessary civil standard that there has been a gross abuse of process in this case and/or abuse of executive power. In these circumstances in my judgement it would therefore be wrong to permit the defendant to vacate the pleas which she has made to the four offences committed to the … Crown Court for sentence."

30. The family law litigation concerning T has progressed at a slower than usual pace, not least because of the abuse of process challenge, and this jurisdiction argument. The court has thus far proceeded on the basis that "[a]lthough the child is not habitually resident in the UK", it is satisfied that it has power to deal with the case by exercising its interim protective powers under *Article 20 BIIR* (see above and below). On 7 November 2018, the Local Authority's application for a care order was listed before Her Honour Judge Hillier, the Designated Family Judge for West Yorkshire, for directions. The order generated on that day records the following: "Counsel instructed for the mother submitting that the court does not have jurisdiction to make any order under the *Children Act 1989*" concerning T. On the following day (8 November 2018), on a separate application by the Local Authority, the mother accepted the jurisdiction of the English court, *agreeing* "that it would be appropriate for the court to exercise jurisdiction", based upon British citizenship. A week later (on 16 November 2018) at a court hearing concerning T, it was recorded that "counsel for the mother no longer advances any argument that this court does not have jurisdiction to make *section 31* and *section 38* orders" in respect of T. Counsel then instructed later acknowledged that this concession had been made without instructions. Just over one month later, on 18 December 2018, the mother's position was confirmed on the order generated on that day which records: "Counsel on behalf of the mother has indicated that the mother seeks to challenge the jurisdiction of the court to make any orders under the *Children Act 1989* in respect of [T]" (emphasis in each case by underlining added). The mother has maintained this position since that time. Since March 2019, the mother has instructed her current legal team.

31. The issue of jurisdiction was to be listed for hearing before a Judge of the Family Division on 7 March 2019. This had to be vacated on 13 February 2019 when it was known that the mother was to pursue her 'abuse of process' argument in the Crown Court. Further third-party disclosure was, in any event, required. Hence, it was re-listed before me, and all parties agreed that the jurisdiction dispute should in the circumstances await the 'abuse of process' hearing.

32. Various interim welfare issues (including issues of contact between T and the mother, and other family members), and applications for wider family assessments, have been determined by HHJ Hillier. T's stepfather (Mr. W) has recently instructed solicitors in England and has intimated a wish to make an application within the proceedings for contact with, or care of, T.

Jurisdiction issue: The Questions

33. Counsel have proposed that the following questions arise for consideration on the issue of jurisdiction at this juncture:

    i) At the point when the English Court was seised of legal process on 18 October 2018, where was T habitually resident? If he was habitually resident in England and Wales, it is agreed that the proceedings are properly brought in this jurisdiction.

    ii) If T was *not* habitually resident in England & Wales at that time, was he:

        a) Habitually resident in the TRNC;

        b) Habitually resident in the Republic of Cyprus (where he had been from 31 August to 17 October 2018);

        c) Without an habitual residence? In which case, does *Article 13 BIIR* apply?

    iii) If he was habitually resident in the TRNC at the material time ([33](ii)(a) above), do the provisions of *BIIR* apply to him? If *BIIR* does apply, should the court simply decline jurisdiction under *Article 17* (*ibid*.)? If *BIIR* does not apply should the court here assume jurisdiction under *Article 14* (*ibid*.)?

    iv) Is this a case where *Article 15 BIIR* could apply?

34. In relation to question [33](iii) above, the mother, through counsel, indicated at an earlier hearing (and formally confirmed this subsequently in writing) that she wished the court to make a referral to the Court of Justice of the European Union under *Article 267* of the *Treaty on the Functioning of the European Union* with the following question:

> "Is a child who is habitually resident in the part of the Republic of Cyprus in which the application of the *acquis communautaire* is suspended by article 1 (1) of Protocol No 10 of the Act of Accession of 2003 of Cyprus to the EU habitually resident in a "Member State", namely the Republic of Cyprus, for the purposes of article 8 of Council Regulation (EC) No 2201/2003?"

The mother contends that the question posed above should be answered in the *affirmative*. If I were to find (a) that the child was habitually resident in the TRNC as at 18 October 2018, and that (b) the TRNC is included within the Member State of the Republic of Cyprus, then she contends that *Article 8* of *BIIR* will apply and this court should decline jurisdiction. All other parties maintain that the issue does not arise as

either (a) T was *not* habitually resident in the TRNC at the material time, and/or in any event that (b) it is sufficiently clear from the construction of *BIIR*, policy and caselaw, that the question posed above should be answered in the *negative*.

Habitual Residence: The Law

35. The natural starting point for considering jurisdiction in this case is the judgment of Sir James Munby P in *Re E* (see [6] above). I reproduce here, for ease of reference, his seminal guidance:

> "[23] It is a curious fact that the jurisdictional reach of the courts of England and Wales in relation to public law (care) proceedings brought under Part IV of the Children Act 1989 is not spelt out in any statutory provision (as it is in relation to private law proceedings brought under Part II of the Children Act 1989 by sections 2 and 3 of the Family Law Act 1986). The rule developed by the judges of the Family Division is that what normally founds jurisdiction in such a case is the child being either habitually resident or actually present in England and Wales at the relevant time: see *Re R (Care Orders: Jurisdiction)* [1995] 1 FLR 711, *Re M (Care Orders: Jurisdiction)* [1997] 1 FLR 456 and *Lewisham London Borough Council v D (Criteria for Territorial Jurisdiction in Public Law Proceedings)* [2008] 2 FLR 1449.
>
> [24] However, in the case of a child from another European country this is fundamentally modified by BIIR. The key point is that, where BIIR applies, the courts of England and Wales do not have jurisdiction merely because the child is present within England and Wales. The basic principle, set out in Article 8(1), is that jurisdiction under BIIR is dependent upon habitual residence. It is well established by both European and domestic case-law that BIIR applies to care proceedings. It follows that the courts of England and Wales do not have jurisdiction to make a care order merely because the child is present within England and Wales. The starting point in every such case where there is a European dimension is, therefore, an inquiry as to where the child is habitually resident." (emphasis by underlining added).

36. To clarify further, *Article 1(2)(d)* of *BIIR* provides that the scope of the regulation relating to "the attribution, exercise, delegation, restriction or termination of parental responsibility" includes public law proceedings and in particular "the placement of a child in a foster family or institutional care".

37. The relevant provisions of *BIIR* in relation to jurisdiction are to be found in *Articles 8(1), 12, 13(1), 14, 17* and *20* of *BIIR*.

> *Article 8*:

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.

Article 12(3)

The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

> (a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State; and
>
> (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

Article 13:

Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.

Article 14

Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State.

Article 17

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.

Article 20

In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the

> court of another Member State has jurisdiction as to the substance of the matter.
>
> The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

38. It is apparent from the history above (see [30]) that the mother wavered on whether to accept the jurisdiction of this court to make decisions concerning T; on no interpretation of the record could it be said that the mother has prorogued the English Court's jurisdiction (*Article 12(3)* above). All other parties, while resolute that this court should find itself able to accept jurisdiction, have themselves wavered as to the basis on which the English Court should do so.

39. I was referred to a number of authorities in this area. Counsel submitted that the principles emerging from those authorities are most neatly summarised in the judgment of Hayden J in *Re B (A child)(Custody Rights: Habitual residence)* [2016] EWHC 2174 (Fam)[5], and I do not disagree. I do not propose a re-rehearsal of the significant case-law in this judgment, but simply draw attention to seven key propositions which have governed my approach in this case:

i) The test of habitual residence is essentially a factual one, which should not be overlaid with legal sub-rules or glosses. The factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence; "Each child is an individual with his own experiences and his own perceptions"[6];

ii) 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; it is not necessary for a child to be *fully* integrated before becoming habitually resident in a place. When looking at the degree of integration of the child in a social and family environment in the country concerned, the court will look at numerous factors, "including the reasons for the family's stay in the country in question"[7];

iii) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her. This would be particularly so for a young child (as in this case). That said, the investigation should remain child-

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[5] Hayden J specifically drew on the five Supreme Court decisions: *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60, [2014] AC 1, *sub nom Re A (Children) (Jurisdiction: Return of Child)* [2014] 1 FLR 111 ("A v A"); *In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 75, [2014] AC 1017, *sub nom Re KL (A Child) (Abduction: Habitual Residence: Inherent Jurisdiction)* [2014] 1 FLR 772 ("Re KL"); *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1, [2014] AC 1038 *sub nom Re LC (Children) (Abduction: Habitual Residence: State of Mind of Child) ("Re LC")*; *In re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2015] UKSC 35, [2016] AC 76, sub nom AR v RN (Habitual Residence) [2015] 2 FLR 503 ("Re R"); *Re B (A child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4, [2016] 2 WLR 557 ("Re B").

[6] *Re LC* at [62]

[7] *A v A* at [54]

focused; it is the child's habitual residence which is in question and, it follows the child's integration which is under consideration;

iv) It will be highly unusual, albeit possible or conceivable, for a child to have no habitual residence. Usually a child loses a pre-existing habitual residence at the same time as gaining a new one;

v) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up *the degree* of connection which the child had with the state in which he resided before the move;

vi) It is the *stability* of a child's residence as opposed to its *permanence* which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there. In *Re LC (Reunite: International Child Abduction Centre Intervening)* [2014] UKSC 1 [2014] 1 FLR 1486, Baroness Hale discussed the habitual residence test as requiring an answer to the question:

> "has the residence of a particular person in a particular place acquired the necessary degree of stability (permanent is the word used in the English versions of the two CJEU judgments) to become habitual?" ([59]) (emphasis added)

She had earlier (see para.26) referred to the fact that if a child's residence is 'precarious' it may prevent it from acquiring the necessary degree of stability, and added:

> "An illegal immigrant may desperately want to become habitually resident in this country, but that does not mean that he does so. A tax exile may desperately want to lose his habitual residence here, but that does not mean that he does so." [59]

vii) 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.

40. In *Re LC*, Baroness Hale makes a further important point which particularly resonates on the facts of this case:

> "If a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly. If a person leaves his home country for a temporary purpose or in ambiguous circumstances, he may not lose his habitual residence there for some time, if at all, and correspondingly he will not acquire a new habitual residence until then or even later. Of course there are many permutations in between, where a

> person may lose one habitual residence without gaining another" [63] (emphasis by underlining added).

41. In certain circumstances the requisite degree of integration can occur quickly, as can the relinquishing of an habitual residence. In this regard reference can usefully be made to the analogy of the see-saw which featured in *Re B* [2016] UKSC 4, [2016] 2 WLR 557, at [39] and [45]. Lord Wilson there described the process of shifting an habitual residence thus:

> "The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts *down* those first roots which represent the requisite degree of integration in the environment of the new state, *up* will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it".

Lord Wilson went on to make the point (at [46]) that the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state; the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree.

42. While the authorities cited above are undoubtedly invaluable in establishing and illustrating points of principle of *general* application, none deal specifically with the situation of a young child who is moved across international borders as a dependent of a person who is being deported, particularly where – as here – the deported person is simultaneously debarred from returning to the country/ies from which she has been deported. The closest comparison may be that of the asylum-seeking child or the trafficked child. As to the first category, Peter Jackson J in *Re J (Child Refugees)* [2018] 1 FLR 582 at [16] observed that the analysis of the see-saw (*Re B*) "does not lend itself easily to asylum-seeking children in cases of this kind". He added:

> "It is the tragedy of children in this position that they lose their habitual residence without gaining another. The danger and impermanency of the transit and the arrival without any ties in a new country have none of the characteristics of an habitual residence." ([16])

In *Re J*, Peter Jackson J fell back on *Article 13* to establish that jurisdiction lay with the English Court. As to the second category, I was able to find in *London Borough of Barking & Dagenham v SS* [2014] EWHC 3338 (Fam) at [37] that the fact that a young person had travelled across borders as a trafficked person did not mean that she could not acquire an habitual residence over time in the country to which she had been brought. The fact that her life is:

> "… unconventional, occasionally lawless and generally unstructured did not mean that she had not in her own way – and to a significant degree – integrated into that society in which she lived …. That someone lives on the fringes of

> society … does not mean, in my judgment, that they are not members of that society. Nor does it therefore mean that they cannot acquire habitual residence in the country in which they have settled and made their home".

Habitual residence: the arguments.

43. No party has argued, and rightly so in my view, that T acquired an habitual residence in England in the very short time between the arrival of the flight at Heathrow Airport on the afternoon of 17 October and the launch of the proceedings on the following day.

44. The mother's case is that T was habitually resident in the TRNC at the time the court in this country was seised of legal proceedings. She relies in particular on the matters which I set out above at [16]. The mother maintains that as at 18 October 2018 T had not lost his habitual residence in the TRNC. In support of that contention she maintains that his removal from the TRNC and/or from the Republic of Cyprus was in breach of his protected rights under *Directive 2004/38/EC* of the *European Parliament and the Council of the European Union* (esp. *Article 3, 27, 28*); as to this argument, (a) it is highly contentious whether the *2004/38/EC Directive* applies to the TRNC given the effect of Protocol 10, and (b) I am not in a position to determine the question of whether the removal was in breach of those specific rights. It has not been fully argued, and the competent authority of the Republic of Cyprus is unaware (so far as I know) that the point has even been raised. In any event, I venture to suggest that had he not been allowed to accompany his mother (as his sole parent with parental responsibility) on her return to the UK, there would have been a powerful argument that his and her rights to respect for family life under *Article 8 ECHR* had been wrongly breached. The mother further maintains that T was 'habitually resident' in a Member State at the material time, and that I should therefore decline jurisdiction under *Article 17* of *BIIR* (see [54]-[70] for my discussion of this issue below).

45. The Local Authority and father joined common cause in arguing that *if* T was habitually resident anywhere at the time that the English court was seised, then he was habitually resident in the TRNC, but that as *BIIR* does not apply to the TRNC (because of Protocol 10 suspending the *acquis communautaire*), he is not "habitually resident in a Member State" and that *Article 14* therefore applies. It argues that in the circumstances, I can/should exercise jurisdiction based on T's presence in this jurisdiction.

46. In submitting their written case before the hearing, Leading and Junior Counsel for the Children's Guardian had presented the argument that neither T nor his mother had ever acquired an habitual residence in the TRNC between 2013/14 and 2018. Counsel provided a helpful summary of the factors which, they reasoned, pointed for and against such a conclusion; they drew attention to the *instability* of the mother's circumstances as a fugitive and an overstayer, and observed, with considerable force, that criminal offending hardly facilitates the integration of a person with the social and family environment in a particular country. Having seen the recently filed evidence of the mother (summarised at [15] and [16] above) Mr. Rowley QC and Ms Garnham in fact conceded at the hearing that T probably *had* acquired *sufficient degree* of integration as to justify a finding of habitual residence in the TRNC prior to August 2018, but that by the time the court here was seised, he had lost that habitual

residence in the TRNC when his mother was deported, with him 'in tow'. They argue that he had not gained habitual residence in the Republic of Cyprus or in England; he was therefore without an habitual residence. They further argue that if T remained habitually resident in the TRNC when the court here was seised, he is not captured by *BIIR* which does not apply to the TRNC, and that the courts of England and Wales can assume jurisdiction under *Article 14 BIIR*.

Habitual residence: findings and conclusion

47. The evidence is clear that the mother travelled to the TRNC in 2013 with a view to remaining there indefinitely, or at least, perhaps, until she no longer had dependent children. The fact that she was a fugitive from social services living in the TRNC, in a relationship with a man who had himself fled criminal prosecution here, is in my judgment relevant to the stability and permanence of her habitual residence; as Burnett LJ described it (see [10] above), she was also forced to "sustain the relatively constrained life inevitable if [she] never leave[s] its territory". This is a factor which must have coloured the quality of her life to some extent, given the restrictions on her freedom of movement; it may well have (as Mr. Rowley submitted) given her an underlying sense of fear and insecurity in her renegade state, but did not in my judgment of itself prevent her from integrating to a degree into her new community. The fact that she was an over-stayer in the country made her continued residence yet more precarious and unstable (see [39](vi) above), and indeed unlawful, but, again, it did not significantly or materially impede (as I found in *SS* at [41] above) her ability to integrate.

48. By contrast, the mother's integration into life in the TRNC was evidenced by her having formed a relationship with Mr. W, a Turkish national, soon after her arrival, bearing his child there and raising her there. The mother worked in the TRNC as a cleaner (prior to her earning money through the proceeds of crime), she apparently made friends, and on her account assimilated into Mr. W's wider Turkish family; her statement reveals how she was able to participate in, and how she enjoyed, the culture and the character of her new homeland. An independent social work assessment of Mr. W (commissioned by the court here) verifies some of these points. It is equally apparent on the written material that T integrated sufficiently too, largely as the mother herself has described in her statement (see [15] above). It follows that I accept that the mother and T integrated into life in the TRNC sufficiently in the years since 2014 to justify a finding that T was habitually resident in the TRNC up to 31 August 2018. For the reasons set out at [39](v) above, the see-saw was not firmly rooted to the ground in that country, but was susceptible to relatively easy disruption.

49. The mother's move from the TRNC was sudden, and unplanned. The move was effected under the strict supervision and control of the authorities of the TRNC. The mother did not choose to leave the TRNC, and would indeed have preferred not to do so; neither she nor T had chance for any goodbyes. I infer (though I am not sure that I have been specifically told) that the mother would wish to return. Her partner (Mr. W) and youngest child (U) remain in the TRNC. All of these factors may point to the maintenance of enduring ties to the TRNC which may be said to keep alive her 'habitual residence' in that country.

50. On the other hand, the mother's arrest and subsequent ejection from the TRNC ruptured her connections with that state profoundly and fundamentally, and in some

respects potentially irreversibly. The relevant authorities of the TRNC have made it crystal clear that she cannot return to the TRNC at the present time, and indeed for the foreseeable future. The only way in which she can achieve a return to the TRNC is if she makes a case to the Court in the TRNC and succeeds, "otherwise she will not be permitted to return" (see [22](ii) above). In this way, in a very short space of time, she accomplished a significant, if not complete, 'disengagement'[8] from the environment which had been her home for nearly 5 years. Significantly, T too has been "deported"[9] from the TRNC. It is clear that regardless of his age (a point emphasised by repetition in the conversation with the relevant authorities), the same rules and considerations apply. The only way for T to return to the TRNC is if someone makes a case to the Court in the TRNC and wins "otherwise he will not be permitted to return".

51. It seems to me that a person cannot readily retain (or I would suggest retain at all) an habitual residence in a country which he or she has left under a deportation order (or as a dependent of a person under a deportation order), and to which he or she cannot lawfully return on the edict of that country's competent authority. In those circumstances, he or she cannot practically continue, or resume, any of the features of his or her life which represent the life he or she has previously enjoyed; integration – even to a limited degree – is lost both abruptly and decisively. Of the illustrations offered by the authorities, the situation of the deported person is perhaps most analogous to that of the child refugee who loses their habitual residence without gaining another (see *Re J* at [42] above), or the person 'emigrating', referred to by Baroness Hale in *Re LC* (see [40] above); it is notable that the émigré quickly (even "immediately") loses his or her habitual residence. These points are consistent with the fact that *BIIR* is designed to facilitate a readily accessible basis of jurisdiction in matters of parental responsibility falling primarily (i.e. "in the first place") in the Member State of the child's habitual residence; *BIIR* could not, or could not easily, be applied effectively across Member States if jurisdiction could be said to lie in a country from which the child, and his parent, are barred from entry, by the authorities of that country.

52. I find that T was never habitually resident in the Republic of Cyprus. No one argued that he had acquired such status in the very short time he was resident in a children's home (31 August – 17 October 2018), separated from his mother, having been deported from the TRNC, and before he travelled on with his mother (under a deportation order) to the UK. Significantly, the mother was deported from the Republic of Cyprus too on the basis that her "conduct represents a genuine present and sufficiently serious threat" (see [23] above). The mother has also been barred from re-entry to the Republic of Cyprus for three years.

53. It follows that most unusually at the point at which the court here was seised, I find that T had no habitual residence (as that term is understood in the authorities), having lost his habitual residence in the TRNC over previous weeks, but not having established any sufficient degree of integration into life in England and Wales as to acquire one here (see [39](iv) above). This is not therefore a case to which *Article 17* applies. The English Court may assume jurisdiction for him under *Article 13 BIIR* by reason of his presence in this country.

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[8] *Re B* at [45]/[48]

[9] I deliberately use the word 'deported' as this is the word used by the officials of the TRNC: see [21](iii) above

Habitual residence in the TRNC and the application of BIIR

54. I received detailed argument on the question of whether a person who is habitually resident in the TRNC is habitually resident in a 'Member State' for the purposes of *BIIR*. The mother claims that such a person would be. All other parties maintain that such a person would not.

55. If, contrary to my finding at [53] above, in fact T was habitually resident in the TRNC at the time the court here was seised, the parties would need to know my determination on the question whether *BIIR* applies to him. In any event, in deference to the detailed arguments advanced before me, I felt that I should address the points, and express my view.

56. Mr. Twomey QC and Mr. Laing contend that when the Republic of Cyprus acceded to the European Union in 2004, it was the *whole* of the country which acceded to the Union, and that a child habitually resident *anywhere* in that Member State is caught by the provisions of *BIIR*. They placed reliance on the case of *Orams*[10] which, they argue, is of direct relevance to the issues arising here. *Orams* was a dispute which concerned the recognition and enforcement of a foreign judgment under *Council Regulation (EC) No.44/2001* ('*Brussels 1*'). The judgment placed before the English Court for enforcement was one made in favour of Mr. Apostilides in the District Court of Nicosia (i.e. undoubtedly a court within the Republic of Cyprus, a Member State). The land which was the subject of the dispute was in Kyrenia in the TRNC (within the *de jure* control of the Republic of Cyprus, but outside its *de facto* control). The court here found in favour of Mr. Apostilides.

57. Put shortly, counsel for the mother contend that Protocol 10 does not impinge on the question of this court's jurisdiction in relation to property located (or, by analogy, people habitually resident in) the TRNC. They rely on the fact that the CJEU found that the suspension of the application of the *acquis communautaire* in those areas of the Republic of Cyprus in which the government of that member state does not exercise effective control, does not preclude the application of *Brussels 1* to a judgment which is given by a Cypriot court sitting in the area of the island effectively controlled by the Cypriot government, even though that judgment concerns land situated in areas not so controlled. They contend that *Brussels 1* treats the TRNC as part of the Member State of the Republic of Cyprus, and so should *BIIR*. They further contend that given the many direct similarities between the language and the purpose of the two regulations, *Brussels 1* and *BIIR*, *Orams* provides good authority for the argument that T, habitually resident in the TRNC (outside the Government's effective control) was nonetheless, at the critical point, subject to the provisions of *BIIR*. They rely on *Orams* for the further proposition that the Protocol (giving effect to the *suspension* of laws) should be interpreted restrictively ("limited to what is absolutely necessary in order to obtain its objective": see para 35 CJEU judgment).

58. Miss Irving QC argues that *BIIR* is intended to apply only to cross-border situations within the European Union ("for the proper functioning of the internal market" – per *Article 65 Treaty establishing the European Community*, a phrase underlined by her and Mr. Gration in submission), and not to cross-border situations involving a

[10] *Orams v Apostilides (British Residents' Association Intervening)* [2010] EWCA Civ 9, [2011] QB 519

Member State and third state outside of the territorial limits of the application of EU law. For present purposes, this would include the TRNC.

59. Miss Irving (in arguments to which Mr. Ekaney QC and Mr. Rowley associated themselves) disputes that *Orams* provides the support contended for by Mr. Twomey. First, she contends that *Orams* is dealing with a different situation altogether, and that the regulations (*Brussels 1* and *BIIR*) are directed to very different purposes. Specifically, the case of *Orams* was not concerned with the establishing of primary jurisdiction (as here) but was concerned with the *recognition and enforcement* of a judgment issued out of a court of a Member State – the Republic of Cyprus (i.e. *not* the court of the TRNC, which the Adv Gen in *Orams* made clear would not be a court of a Member State). She emphasised that by reason of the island's division, the judgement reached by the Cypriot court was not directly enforceable in the TRNC, hence Mr. Apostolides used *Brussels 1* to have the Cypriot judgment registered and applied against the Orams' assets in the UK, and this is not a remedy which can translate to the facts here. Miss Irving contends that it is not of significance (as a point of fact) that the land which was the subject of the dispute was physically situated in the TRNC.

60. This last point leads her into her second submission; that the Court of the Republic of Cyprus can exercise jurisdiction over *property* in the TRNC, and that it matters not as an issue of Cypriot *national domestic* law that the property is outside of the Member State's effective jurisdiction. This harps back to the division of the country post-1974. The CJEU reflected this point in its judgment in *Orams* at [12]:

> "… according to national legislation, the real property rights relating to those areas of the Republic of Cyprus in which the Government of that Member State does not exercise effective control ('the northern area') subsist and remain valid in spite of the invasion of Cypriot territory in 1974 by the Turkish army and the ensuing military occupation of part of Cyprus" (emphasis by underlining added).

61. This was further explained in *Orams* at [38], where the court specifically contemplated that an obligation existed on the Republic of Cyprus to apply *Brussels 1* in the "Government Controlled area" but significantly this "does not mean that that regulation must thereby be applied in the northern area".

62. Thirdly, Miss Irving (relying on Adv Gen Kokott's opinion in *Orams* at [42]) emphasises that Protocol 10 suspends the *acquis communautaire* 'in' the area of the TRNC, thus capturing the situation of a person who is habitually resident 'in' that area. While the Adv Gen acknowledged the relaxation of the suspension in relation to the promotion of economic development between the two regions (see [40] of the Opinion), she did not assert that the EU laws applied in the TRNC. Significantly, enforcement of the judgment in *Orams* did not give rise to any "unrealisable obligations" for the Republic of Cyprus, as the court there *could* enforce the judgment against land in the TRNC, whereas *by contrast* the courts of the Republic of Cyprus *would not be able* to exercise jurisdiction in relation to a person habitually resident in the TRNC; therefore, it was argued with some force, if the mother's case were to be preferred, this would give rise to "unrealisable obligations".

63. While Mr. Twomey was keen to demonstrate the similarities between *Brussels 1* and *BIIR* (see [57] above), Mr. Ekaney was equally keen to demonstrate the differences. In doing so, Mr. Ekaney drew my attention to the judgment of Miss Theis QC (as she then was) in *JKN v JCN (Divorce: Forum)* [2011] 1 FLR 826 which usefully highlighted and described the "material" *differences* in the approach and application of the two regulations: see [136] and [147(v)-(vi)]. *JKN* was approved in *Mittal v Mittal* [2013] EWCA Civ 1255, [2014] Fam 102. In my judgment, Mr. Ekaney makes good his argument that the differences are greater, and more significant, than the similarities.

64. It is accepted that the Republic of Cyprus *is* the Member State, and the entirety of the island is considered to be part of the EU. It is similarly uncontroversial that while *de jure* the Republic of Cyprus is a Member State in its entirety, it is *de facto* a divided island. Miss Irving and Mr. Gration submit that the term 'Member State' as it is used in the context of the *BIIR* regulation is intended to refer to those member states to whom the Regulation applies (i.e. where the EU law, including *BIIR* is in force), but does not define the territorial scope.

65. Miss Irving (supported again in this regard by Mr. Ekaney and Mr. Rowley) drew attention to two judgments of the English High Court (Family Division) which gave rise to comparable issues to those arising here. In both cases a parent had removed children to the TRNC when social services were on the point of implementing a child protection plan. In *Re K and D (Wardship, Without Notice Return Order)* [2017] EWHC 153 (Fam) the Local Authority had argued that the TRNC is "an area outside the province of the 1980 Hague Convention and the [*Brussels IIR*] regulation" (see [7]). Macdonald J set the scene for consideration of the argument at [2]:

> "Since the intervention of Turkish troops in 1974, the island of Cyprus has been effectively partitioned into a Greek Cypriot southern area and a Turkish Cypriot northern area. The Republic of Cyprus is recognised as a State in international law by the international community and although, *de jure*, it represents Cyprus as a whole, *de facto* it controls only the southern area of the island. In the northern area, the Turkish Republic of Northern Cyprus (hereafter "Northern Cyprus"), recognised only by Turkey, is in control".

66. He went on to reference the other recent domestic case concerning children removed to the TRNC (*Chhatbar*) and expanded his discussion of the issues generally at [17] & [18]:

> "[17] As Mostyn J recognised in *Leicester City Council v Chhatbar* [2014] EWHC 830 (Fam) at [5]:
>
> > "As is well known, the Turkish Republic of Northern Cyprus is recognised as an independent state only by Turkey. The rest of the world, and specifically the European Union, regard the Turkish Republic of Northern Cyprus as being a military occupation by Turkey of part of the Cypriot Republic. The Turkish

> Republic of Northern Cyprus is not a signatory to the 1980 Hague Convention on the Civil Effects of Child Abduction, nor does it subscribe to or apply the child abduction provisions of the *Brussels II* regulation."
>
> [18] The Republic of Cyprus is a signatory to the 1980 Hague Convention. The Republic of Cyprus is also a party to BIIa by virtue of its accession to the European Union in 2004. In this context I pause to note however, that whilst the Republic of Cyprus acceded to the European Union in 2004, this did not act to apply the provisions of BIIa to Northern Cyprus. As noted above, although, *de jure*, the Republic of Cyprus represents Cyprus as a whole, *de facto* it controls only the southern area of the island. Within this context, the application of the *acquis communautaire* (the accumulated legislation, legal acts, and court decisions which constitute the body of European Union law) to the areas of the island over which the Republic of Cyprus does not exercise sovereign jurisdiction was suspended by a separate Protocol to the Treaty of Accession (see Art 1.1 of Protocol No 10 on Cyprus annexed to the Act of Accession of 2003)."

67. Materially, Macdonald J referred to the (wrongful) removal of the children to the TRNC as being:

> "… for present purposes, to a non-Member State in circumstances where the application of the *acquis communautaire* to the areas of the island over which the Republic of Cyprus does not exercise sovereign jurisdiction is suspended by Art 1.1 of Protocol No 10 on Cyprus annexed to the Act of Accession of 2003. Finally, and within this context, the habitual residence that, on the evidence before the court, both children *appear* to have established in Northern Cyprus subsequent to their removal from the jurisdiction in England and Wales in 2012 is thus, for present purposes, habitual residence in a non-Member State. Accordingly, and having regard to the interpretation placed on Art 10 by the Court of Appeal in *Re H (Jurisdiction)*[11], on the evidence currently before the court it is arguable that the basis for the court's jurisdiction in this case can be said to be the continued habitual residence of both children in England and Wales, they not having acquired habitual residence in another Member State for the purposes of Art 10 of BIIa" (emphasis by underlining added).

68. Having reviewed these arguments with care, I have reached the clear view that the suspension of the *acquis communautaire* to the TRNC under Protocol 10 is effective to achieve an effective derogation of the provisions of community law, including

[11] *Re H (Jurisdiction)* [2015] 1 FLR 1132

BIIR, in and to the TRNC. The CJEU based its decision in *Orams*, materially, on the fact that the judgment which was the subject of the application for enforcement was issued from a court of the Republic of Cyprus (undeniably a court of a Member State). *Orams* therefore provides good authority for the proposition that British courts are able to enforce the judicial decisions made in the Republic of Cyprus, which uphold the property rights of Cypriots forced out during the invasion. The CJEU was not concerned that the subject matter of the judgment/dispute was in the TRNC, and the mere fact that it was did "not mean that that regulation must thereby be applied in the northern area" (see [61] above).

69. I am fortified in this conclusion by the following points (particularly when taken in combination):

i) the courts and authorities of the TRNC do not apply *BIIR*; it must be remembered that the courts of the TRNC apply their own law, not Cypriot law;

ii) there is no relevant "judicial co-operation in civil matters"[12] relevant to the parental responsibility for, or movement of, children between the UK and the TRNC as there would be in a way which is "necessary for the proper functioning of the internal market"[13];

iii) there is no formal co-operation or reciprocity between the courts and authorities of the TRNC and the Republic of Cyprus; this would impede any mutual recognition or enforcement of orders relating to parental responsibility made on either side of the Green Line;

iv) the co-operation provisions in relation to the gathering of evidence available under *BIIR* do not apply as between the Republic of Cyprus and the TRNC; *Regulation (EC) 1206/2001* does not apply in the TRNC;

v) *Orams* is distinguishable for the reasons submitted by the Local Authority, father and Children's Guardian; there was no dispute but that EU law applied in both the Republic of Cyprus and the UK, but this did not mean that *Brussels 1* applied in the TRNC;

vi) the 'criterion of proximity'[14] which shapes and underpins *BIIR* would be frustrated were I to hold otherwise. On the mother's case, jurisdiction would be held by the court of the Republic of Cyprus (as the court of the Member State), rather than the actual court of the 'proximate' country which (on the mother's case) would be the TRNC. This would lead to a situation in which there would in fact be *no* practical connection / proximity[15] between the child and the country in which his future is being decided, whereas the courts most proximate would be prevented from exercising jurisdiction. Further, assuming the court of the Republic of Cyprus exercised its powers and made orders in relation to a child who is actually habitually resident in the TRNC, it would then be unable to enforce those orders.

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[12] Preamble to *BIIR* para.1.
[13] Preamble to *BIIR* para 1
[14] Preamble to *BIIR* para.12
[15] *A v A* (para 80(ii)); *Re B* (para 42) applying *Mercredi v Chaffe* at para 46

70. It follows from all of the above that if (contrary to my earlier finding) T was habitually resident in the TRNC at the time that the court here was seised, then as a matter of law he was not in my finding resident in any Member State at that point, and *Article 14* therefore applies. The Courts of England and Wales could thus assume jurisdiction based on T's presence.

Referral to the CJEU

71. At a directions hearing in May 2019, the mother's legal team proposed that the issue of habitual residence in the TRNC, and the relevance of such a finding to *BIIR*, should be referred to the CJEU for determination. The question which they sought to have answered is set out at [34] above. *Article 267* of the *Treaty of the Functioning of the European Union* provides as follows:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices, or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
>
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay".

72. In view of my factual finding (see [53] above) I do not regard it as "necessary" to refer the question posed by the mother's lawyers to the Court of Justice of the European Union. Moreover, in relying on the decision of Macdonald J in *Re K and D (Wardship, Without Notice Return Order)*, disposing of the mother's case on habitual residence in the TRNC (referred to at [65]-[69] above), I am satisfied the point raised is not sufficiently new as to justify this course.

Article 15 BIIR

73. A subsidiary point arose in argument, as to whether, if jurisdiction were to be declined here under *Article 17* or otherwise, and proceedings relating to T were subsequently commenced in the court of the Republic of Cyprus, the court in the Republic of Cyprus could/would be able to seek transfer of the proceedings back to the courts of England and Wales under *Article 15 BIIR*. Mr. Twomey argued that the court of the

Republic of Cyprus might not be able to do so, as it would not be the court 'first seised'. In this way, on the mother's case, there is considerable doubt whether or not the English Court could find itself with jurisdiction. Mr. Gration (who argued this point orally for the Local Authority) contended that the court of the Republic of Cyprus *would* be able to transfer the proceedings, on the basis that if jurisdiction was never properly founded here in the first place, then the court of England and Wales would not be treated as the court 'first seised'. In this respect, he relied on the case of *Case of C-489/14.* For what it is worth, I prefer the submission of Mr. Gration, but I do not believe that we will ever be in this situation in this case.

Conclusion

74. In summary, for the reasons set out above, I have reached the following conclusions:

i) At the point when the court in this country was seised of the application for a public law order, on 18 October 2018, I am satisfied, as an issue of fact, that T was unusually without an 'habitual residence', as that phrase is known and understood in law;

ii) The court of England and Wales can, in the circumstances, assume jurisdiction to determine the proceedings relating to T under *Article 13 BIIR*;

iii) If, contrary to my finding of fact as to his lack of habitual residence, T was in fact still habitually resident in the TRNC (reflecting the primary argument of the mother, and at least the secondary arguments of all other parties), this court can and should still exercise jurisdiction under *Article 14*, as (in my finding) *BIIR* does not apply to the TRNC; therefore at the material time T did not have an habitual residence in any other Member State;

iv) This is not a case in which it is 'necessary' to make a referral to the CJEU.

75. Finally, I should record that in the course of the hearing, I took the opportunity to discuss with all counsel the teleology of the mother's arguments, as presented by her counsel. It is the position of all parties (other than the mother) that the mother's case would be likely to import the following consequences. First, this court would be prevented from taking any further steps to consider or promote T's wellbeing. Secondly, *if* a state authority were to take legal proceedings in relation to T in the court of the Republic of Cyprus (i.e. it is accepted that the English Court would cede jurisdiction to the courts of the Republic of Cyprus *not* the TRNC), it is highly questionable that the court there would consider that it could exercise jurisdiction. Thirdly, if it did feel able to exercise jurisdiction, the court seised with deciding T's future would be one in a country/territory with which he has only the slimmest of connections[16]. Fourthly, the mother's re-entry to the Republic of Cyprus is forbidden within three years of the date of her deportation; thus she would not be able to position herself to care for T there, nor would there be any prospect of direct contact between T and her there, as there is here. Fifthly, there is no person in the Republic of Cyprus with a connection to T, to offer him care; he would in all probability lose contact with his father (in England). Finally, during any legal process, the mother

[16] He passed through the Republic of Cyprus between 31 August and 17 October 2018, resident for that period in a children's home in Nicosia.

would be unable to participate in person (given the embargo on her return to the Republic of Cyprus), and in any event may well be in custody in this country in relation to a range of offences. The mother took issue, or reserved her position, on some or all of these points. While they have not influenced my analysis of the jurisdiction issue, or conclusion, I consider that it is right that they should be articulated to provide context for the determination on which I was engaged.

76. That is my judgment.