Neutral Citation Number: [2025] EWFC 27

Case No FD22P00279
and YO20P00341

IN THE FAMILY COURT HIGH COURT OF JUSTICE
FAMILY DIVISION
AND IN THE FAMILY COURT AT YORK

Date: 18/02/2025

Before :

MR JUSTICE POOLE

- -

Re CX (Jurisdiction: Wrongful Removal to Northern Cyprus)

Between :

AZ

Applicant

- and -

(1) BY
(2) CX (A child by his Children's Guardian)

Respondents

- -
- -

Gemma Carr (instructed by Meum) for **the Applicant**
William Horwood and Lauren Starmer (instructed by Dawson Cornwell) for **the First Respondent**
Andrea Ferguson (instructed by Freeman Johnson) for **the Second Respondent**

Hearing date: 27 January 2025

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APPROVED JUDGMENT

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the child and members of 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 Poole:

Introduction

1. The child with whom I am concerned, CX, is seven years old. When he was three and was the subject of ongoing s8 proceedings in the Family Court, his mother, BY, took him from his home in England to The Turkish Republic of Northern Cyprus ("TRNC") where they both remain. Later, CX's Children's Guardian applied under the inherent jurisdiction for wardship and return orders. Notwithstanding a series of orders in the Family Court and the High Court, BY has steadfastly refused to return CX to England. Now she invites the Court to find that it does not have jurisdiction, to discharge the existing orders, and to dismiss the applications.

2. Counsel and solicitors for AZ and BY act pro bono and I record my gratitude for their assistance and for the considerable work they have provided in their own time, doubtless at cost to themselves, in providing advice and representation to the parents in this case.

3. AZ issued an application for a Children Act 1989 ("CA 1989") section 8 child arrangements order ("CAO") as long ago as 24 September 2020. This followed earlier proceedings that had concluded with a CAO that CX lives with BY and spends time with AZ. In the later proceedings allegations were made by both parents including allegations of abuse against AZ. The evidence available to me from the second set of proceedings (which are ongoing) is that the parties did not ever live together as a family and that AZ and BY had not seen each other face to face since December 2018. On 12 January 2021 the Court gave directions including an order for a family psychological assessment. At a remote hearing on 7 June 2021 the parties reached agreement as to the allegations and the court recorded the following findings:

> "1 During the relationship the Father made a number of derogatory remarks about the Mother's friends and family and this had the effect of the Mother feeling isolated and that her relationships were damaged as a result.
>
> 2 The Father was verbally abusive towards the Mother throughout their relationship [and used] highly inappropriate language towards her, for example referring to her as a "nutter" when the Mother was struggling with her mental health.
>
> 3 The Father was on occasion intimidating towards the Mother and in particular, the message sent by him on 3rd December 2016 stating "Pray to god we don't come face to face" caused her to feel in fear for her physical safety,
>
> 4 The Father would undermine the Mother on occasions during their relationship which gradually became toxic and this had the effect of causing the Mother to question her own judgement and affected her mental health.
>
> 5 The Father would make comments to the Mother suggesting that she was not a good parent to CX thereby undermining her

> confidence as a mother and occasioning her considerable distress. On occasions the Father would film the Mother whilst she was upset. The Mother believed these recordings would be used to further undermine her position as a mother.
>
> 6 There have been occasions until December 2018 whereby the Father has had disagreements with the Mother in the presence of CX causing the child emotional upset and distress.
>
> And upon the Court indicating that this represented a line in the sand allowing matters to move forward in the best interests of CX
>
> And upon the Father indicating that that he now wishes to move on from what was a difficult relationship between the parties and focus upon developing his relationship with his son
>
> And upon the Mother confirming that she wishes to see an ongoing relationship between CX and his Father"

4. AX attended an appointment with the psychologist but further psychological assessment never took place and the Court never had the chance to receive further evidence from the parents on welfare arrangements. BY now admits that she had already travelled with CX to TRNC six days before agreeing the order. She not only did so clandestinely, without the knowledge of AX, the Guardian or the Court, but she also positively misled everyone involved. She purported to attend the hearing on 7 June 2021 remotely from another part of the UK when in fact she was in TRNC. Her confirmation that she wished to see an ongoing relationship between CX and AZ was untrue since she had taken CX abroad to TRNC without informing AZ that she had done so or where they were and she clearly wanted to avoid the psychological assessment and any chance of the court ordering and enforcing contact between her son and his father. The whereabouts of CX became an increasing concern. The police became involved. The Court required three family members to give information about the whereabouts of BY and CX but none revealed their whereabouts. A neighbour later revealed that BY had left her house complaining that she was fleeing an abusive partner. It was not until late September that AZ learned that BY and CX were in TRNC.

5. On 9 August 2021, when it was still unknown where the mother had taken CX, the Court made an order that CX should live with AZ.

6. In a position statement drafted by Counsel for AZ in September 2021, it was stated, "Ultimately therefore and for the avoidance of all doubt, F seeks the urgent return of [CX] to his care. He invites the Court to take all steps necessary to secure this." On 1 October 2021 the Court noted that it was believed that CX was with BY in TRNC and that North Yorkshire Police had launched an investigation into CX's abduction. The Court further directed:

> "If permission is granted in accordance with the request made, the proceedings will be listed before a Judge of the High Court

> or a Deputy High Court Judge to determine the applications made on behalf of the applicant father and the child for the court to exercise the High Court's inherent jurisdiction with respect to the child and for disclosure of information held by North Yorkshire Police."

7. On 24 November 2021, HHJ Troy directed that:

> "These proceedings are re-allocated to be heard by a judge of High Court level and shall be listed on the same date and before the same judge considering any application issued in respect of the child in the Family Division of the High Court."

I happened to be the Family Presiding Judge for the North East Circuit at the time and had agreed to the re-allocation of the Family Court proceedings to a judge at High Court level. Thus, the proceedings were not transferred to the High Court but re-allocated within the Family Court. AZ did not have legal aid to make an application in the High Court and so, after some delay, the Guardian made an application under the inherent jurisdiction on his behalf. The application was dated 29 March 2022. The supporting statement requested that CX be made a ward of court with consequential orders for his return.

8. As it happens, whilst the Family Court proceedings gained a mention in some orders made within the inherent jurisdiction proceedings, they were not listed before any High Court or Deputy High Court Judges over the subsequent months and years. It seems to me necessary to correct that omission now, and so I treat myself as hearing both the High Court proceedings and the Family Court proceedings. No procedural point was taken by the parties at the hearing before me although it is fair to note that the issue was not raised.

9. On 9 May 2022, Peel J declared that on the evidence then before the Court, CX was habitually resident in England and Wales (i) on 1 June 2021 (when he was removed to TRNC), (ii) on the date of issue of the inherent jurisdiction proceedings on 29 March 2022, and (iii) at the date of the hearing. He made CX a ward of court and ordered BY to return CX to the jurisdiction of England and Wales within 14 days. She did not do so.

10. A number of subsequent orders were made in the High Court concerning CX's return. On 28 April 2023, BY appeared remotely at one such hearing but at most of the hearings she did not attend or participate until from 1 December 2023 she attended consistently including at the hearing before me on 29 October 2024. On that occasion, BY's Counsel submitted that the Court did not have jurisdiction. Along with making orders maintaining the wardship and requiring CX's return, I gave directions leading to a hearing of the issue of jurisdiction before me on 27 January 2025.

11. The issue of jurisdiction is raised in relation to both the CA 1989 s8 proceedings and the inherent jurisdiction proceedings. In each case, habitual residence is a key issue. It is common ground that CX was habitually resident in England and Wales up to the

point of his removal from the jurisdiction to TRNC on 1 June 2021 but BY submits that:

a. CX was not habitually resident in England and Wales when the inherent jurisdiction proceedings were issued on 29 March 2022, by which time he was habitually resident in TRNC.
b. CX is habitually resident in TRNC now.
c. CX not being present in England and Wales, jurisdiction in the s8 proceedings is founded on CX's habitual residence in England and Wales and so jurisdiction was lost when he was no longer habitually resident here. Jurisdiction may be lost during proceedings.
d. The Court has no Jurisdiction in the inherent jurisdiction proceedings because:
    i. There was no application for and no order made with respect to CX "so far as it gives care of a child to any person or provides for contact with, or the education of, a child" – Family Law Act 1986 ("FLA 1986") s1(1)(d); and/or
    ii. CX was neither present nor habitually resident in England and Wales at the commencement of the inherent jurisdiction proceedings and is not so now.
e. Whilst the Court is in principle entitled to exercise its *parens patriae* jurisdiction based on CX's nationality, it should not do so because the threshold for exercising that jurisdiction is not met on the facts of this case.
f. If the Court were to have jurisdiction it should discharge the s8 Orders and dismiss the proceedings applying the "no order" principle in CA 1989 s1(5). Likewise, the wardship proceedings should be dismissed because there is no practical benefit to CX and the wardship and return orders are of a purely symbolic nature.

12. AZ and the Children's Guardian submit that, due to the particular circumstances of wrongful removal and life in exile in TRNC, CX has remained habitually resident in England and Wales to this day. In any event, jurisdiction is founded on habitual residence at the date of the commencement of proceedings and that it is not lost even when habitual residence moves to another country, if that other country is a non-Contracting State, i.e. a state that is not a Contracting State under the Hague Convention 1996.

Habitual Residence

13. I shall first consider CX's habitual residence. CX was born in England to English parents. He was 4 years old when removed to TRNC. He had lived in England all his life to that point. He and his mother had no connections with TRNC. His removal was plainly wrongful, as has been recorded in numerous court orders in the inherent jurisdiction proceedings. His removal was made without consent or court order. BY misled the court, her legal representatives, and others about her whereabouts. I acknowledge that the agreed schedule of facts recorded in the order of 7 June 2021 - a schedule agreed at a time when BY had legal representation and had already travelled to TRNC – establishes intimidating and verbally abusive conduct by AZ in the past (prior to December 2018) which had undermined BY's confidence, but the

wrongful removal of their child to TRNC could not reasonably be viewed as a proportionate response to that conduct, unacceptable though it was. It is clear that BY took herself and CX to TRNC to avoid the proceedings and the potential CAO that might follow – she took matters into her own hands. Thus CX arrived in TRNC in a state of some turmoil and uncertainty. His removal had been achieved using subterfuge. The duration of his stay there was uncertain. He was with his primary carer but BY had no reason to be in TRNC other than to avoid the family justice system in England.

14. BY has given little evidence to the Court about what life was like for CX during his first weeks and months in TRNC. On her instructions, Mr Horwood told the Court that BY and CX have only moved home twice in TRNC and that soon after arrival CX started at nursery and made friends. Unfortunately, I do not have evidence, let alone corroborative evidence, of these matters and I have to be mindful of the danger of "after the event" accounts which serve a party's case.

15. I accept evidence that currently CX is in education but that is remote learning. He previously attended school in person but BY has changed his schooling to online. He now stays at home and uses an education provider that claims to be "the UK's Leading Global Online School". It appears he started at the online school in 2024. That means that his integration in school life is much reduced and is not firmly rooted in the life of TRNC. However, his previous attendance at school in person will have allowed for a degree of integration. Unfortunately, I do not have very much evidence as to the extent of that integration. I accept that BY herself works in TRNC to provide an income for her and CX. She assures the Court that she and CX have friends in TRNC and that CX is involved in activities, including martial arts which he started, she says, soon after moving to TRNC. I have seen evidence of CX's involvement in martial arts activities.

16. BY has said in a witness statement from 2024:

> "CX is a very popular boy and has developed meaningful and cherished friendships in the past 2 years and 9 months. His teacher has described him as a 'great role model for his classmates' (as can be seen in his mid-term report provided to the Guardian). CX participates in many activities in which he is thriving; basketball; hip-hop and kung fu, where he has just achieved his red belt. CX is flourishing and has a huge support network who would be happy to write to the court, should this be requested."

BY's removal of CX from the school begs questions as to what his actual circumstances were when he was attending there.

17. BY says that her family members have frequently visited TRNC but, again, I do not have corroborative evidence of that. She has also said in an undated "open letter" that her own mother pleaded with her to return CX to this jurisdiction.

18. Having made no progress through the proceedings in this jurisdiction, AZ resorted to travelling to TRNC and eventually to beginning proceedings there. Last autumn he

and BY entered a consent order by which AZ may see CX during four trips to TRNC a year, but such time with his son is supervised. There is also agreed weekly indirect contact but AZ reports that, although his time with CX in person has been positive and a happy experience for CX, most often indirect contact ends as it begins with CX telling him he does not want to speak to him. AZ suspects that this is due to BY's influence. AZ has expressed serious concerns about CX's weight and health.

19. I approach the written evidence of BY with caution. It appears to me that she has controlled what she wants others to know. There has in fact been little to no access to CX since he was removed to TRNC by the Guardian or social services. The Court does not have the benefit of independent "eyes and ears". BY has supplied some documentation which shows that he is attending an online school and that, from May 2023 at the latest he was engaged in a martial arts club but the Court does not have more extensive evidence of CX's circumstances that BY could have provided.

20. The law on habitual residence has been considered at length in a number of published judgments including five Supreme Court decisions as set out and summarised by Knowles J in *A Local Authority v A Mother, A Father and Others* [2024] EWFC 110. As she noted, the more recent judgment of Moylan LJ in *Re A (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659, offers some corrective guidance. Knowles J referred to the summary of the applicable legal principles provided by Hayden J in *Re B (A Minor: Habitual Residence)*[2016] EWHC 2174 (Fam) with revision following Moylan LJ's observations in *Re M (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105. Those principles can be stated shortly as follows:

    a. 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.
    b. The test is a factual one with factual enquiry focusing on the circumstances of the child most relevant to their habitual residence.
    c. The test for habitual residence is shaped by the child's best interests and in particular the practical connection between the child and country concerned.
    d. It is possible for a parent to change a child's habitual residence without the consent of the other parent.
    e. Whilst the investigation is child-focused, a child, particularly a younger child, may well share the same habitual residence as the parent(s) who care for them.
    f. Parental intention is relevant but not determinative.
    g. Usually a child gains habitual residence at the same time as losing a previous habitual residence.
    h. Full integration in a social or family environment is not required. Sufficient integration is required.
    i. Habitual residence may be acquired swiftly depending on the circumstances.
    j. Stability of residence is important, not whether it is permanent.
    k. It is in a child's best interests to have a place of habitual residence and so a finding that the child had no habitual residence would be highly unlikely.

21. When considering whether CX was habitually resident in England at the date of issue of the inherent jurisdiction proceedings on 29 March 2022, the evidence does not all point one way. There are factors which weigh in favour of a finding that CX's

habitual residence moved to TRNC by that date and others that weigh against that conclusion. In my judgement, however, a key factor is that CX was wrongfully removed from the place of his habitual residence and taken to TRNC in clandestine circumstances, evading justice in the form of the ongoing court proceedings, to live in effective exile with BY. It is difficult to achieve stability in your residence in a place of exile in such circumstances. That is not to say that it cannot be gained, but CX's circumstances were far removed from an open, planned, agreed decision to move him to another country. The evidence does not persuade me that it was known from the outset that CX would remain in TRNC for years ahead. BY used subterfuge to prevent the authorities from knowing where CX was living and then refused or failed to engage with authorities who were trying to ensure that CX was safe and well. She was effectively "on the run" and taking CX with her. I accept that by the end of March 2022, CX had been in TRNC for ten months. He was with his main carer and he had engaged in activities in TRNC. He and BY had a home in TRNC although I have very little information about it. He may have engaged in education. However there was insufficient stability and insufficient integration in social and family life in TRNC for me to conclude that he was habitually resident there by the time the inherent jurisdiction proceedings were begun. His residence in TRNC was fragile and could have ended at any moment. His life there was precarious because his main carer was evading justice. Had events taken a different turn from the end of March 2022, CX could at any time have been removed from TRNC to another country or have been returned to England and Wales.

22. I note that on 9 May 2022 Peel J recorded that on the evidence then before him he was able to conclude that CX was habitually resident in England and Wales both at the commencement of the inherent jurisdiction proceedings and at the time of the hearing before him. So far as I can see there is very little further evidence about CX's circumstances in TRNC up to 29 March 2022 that was not before Peel J.

23. The Guardian was sufficiently concerned about CX's welfare in TRNC to make the inherent jurisdiction application, effectively on behalf of AZ. The determination of habitual residence is not made on the basis of what is in the best interests of the child concerned, but the Guardian's concerns as of 29 March 2022 speak to the precarious circumstances in which CX was at that time.

24. I have to make the determination on the evidence before the Court. Other evidence might have been made available but that was within the control of BY and she has chosen not to provide the Court with fuller information.

25. Weighing all the evidence available to me, and applying the principles set out above, I have concluded that CX remained habitually resident in England and Wales up to and including the date of the issue of the inherent jurisdiction application at the end of March 2022. His residence in TRNC did not have the degree of stability and he was not sufficiently integrated into family and social life there to enable me to conclude that his habitual residence had moved from England to TRNC by that time.

26. As matters now stand, CX has lived in TRNC for three and a half years. It may be that he is now habitually resident in TRNC notwithstanding that he remains in effective exile in a place not recognised as a state by the UK government, out of reach of the courts here, unable to travel because his mother would fear that justice

would take its course and he would be returned to England. However, for the reasons given below, I do not believe that I have to determine whether in fact CX is now habitually resident in TRNC.

Jurisdiction to Bring and Continue the s8 Application

27. Domestic legislation governing jurisdiction in relation both to applications for orders under CA 1989 s8, and certain applications under the inherent jurisdiction is found in the Family Law Act 1986 including the following provisions:

> "1 Orders to which Part I applies.
>
> (1) Subject to the following provisions of this section, in this Part "Part I order" means—
>
> (a) a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order …
>
> (d) an order made by a court in England and Wales in 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; but
>
> (ii) excluding an order varying or revoking such an order;
>
> 2 Jurisdiction: general.
>
> (1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless—
>
> (a) it has jurisdiction under the Hague Convention , or
>
> (b) the Hague Convention does not apply but—
>
> (i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2A of this Act is satisfied, or
>
> (ii) the condition in section 3 of this Act is satisfied.
>
> …

> (3) A court in England and Wales shall not make a section 1(1)(d) order 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, or
>
> (ii) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection.

Section 2A has no application in the present case. FLA 1986 s3 provides so far as relevant:

> "3 Habitual residence or presence of child.
>
> (1) The condition referred to in section 2(1)(b)(ii) of this Act is that on the relevant date the child concerned—
>
> (a) is habitually resident in England and Wales, or
>
> (b) is present in England and Wales and is not habitually resident in any part of the United Kingdom,
>
> and, in either case, the jurisdiction of the court is not excluded by subsection (2) below."

Section 3(2) is not of relevance to the present case. FLA 1986 s7 provides that the date of the making of the application is the "relevant date".

28. Counsel have helpfully referred me to a large number of authorities but I gain particular assistance from the judgment of Peel J in *H v R and the Embassy of the State of Libya* [2022] 2 FLR 1301, approved by the Court of Appeal *in Re London Borough of Hackney v P and Others (Jurisdiction: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 1213 and applied by Cusworth J in *WB v VM* [2024] EWHC 302 (Fam). The key point in a case such as the present one is that the change of habitual residence was from a Contracting State to a non-Contracting State, i.e. a state which is not a signatory to the 1996 Hague Convention. The key question is whether, if a child who was habitually resident in England and Wales when the relevant proceedings were begun, and whose habitual residence then changes to a non-Contracting State, jurisdiction remains in England and Wales.

29. Article 5 of the 1996 Hague Convention provides:

> "(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have

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

The provisions of Article 7 are not of concern for present purposes because TRNC is not a Contracting State.

30. In *H v R* (above), Peel J was concerned with jurisdiction in relation to an application for wardship, i.e. for the court to exercise its inherent jurisdiction. He referred to Paul Lagarde's *Explanatory Report* (HCCH, 1997) and then held at [40]:

> "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."

31. In *LB of Hackney* (above) Moylan LJ giving judgment with which the other members of the Court agreed, identified the principal issue for determination to be whether the date by reference to which the court determines whether it has jurisdiction based on a child's habitual residence, pursuant to the provisions of article 5 of the 1996 Convention, is the date of the hearing or the date on which the proceedings were issued. At paragraph [113] he concluded that the date on which habitual residence should initially be determined is the date on which proceedings were commenced. He held it to be clear that jurisdiction may be lost under article 5 during the course of proceedings – paragraph [116] but:

> "There is, however, a clear difference between a move to a contracting state and a move to a non-contracting state. In the former case, the other state acquires article 5 jurisdiction. In the latter case, the other state does not. The consequence is that, in the former, the original state cannot retain jurisdiction by reference to domestic law, while in the latter case, it can." [117]

32. Previously, Peel J had held in *H v R* (above) :

> "If habitual residence lies in England at the date of trial before me, Art 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 Art 5 ceased to apply, and national law became operative." [45]

33. In the present case, as I have found, at the time when both sets of proceedings were issued, CX remained habitually resident in England. If CX remains habitually resident in England to this day there is no dispute that the courts of England and Wales retain jurisdiction. But even if, after issue but before this hearing, his habitual residence has changed, it can only have changed to a non-Contracting state, namely TRNC. Adopting the reasoning in the case law referred to above, Art 5 is of no application and domestic law becomes operative.

34. In relation to an application under the inherent jurisdiction, Peel J held at paragraph [46] of *H v R*:

> "Ss 1, 2, 3 and 7 of the FLA 1986 … 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 … and
>
> (ii) The children were habitually resident in England and Wales at the relevant date which is defined as the date of the application."

35. In fact, as may be relevant to the present case if not in *H v R*, a s1(1)(d) order is one which gives care of the child to any person "or provides for contact with, or the education of, any child."

36. By the same reasoning as set out by Peel J, in relation to a s8 application FLA 1986 ss1, 2, 3, and 7 cumulatively provide that the court has jurisdiction under English law if:

> (i) the order sought is a s1(1)(a) order and

> (ii) the children were habitually resident in England and Wales at the relevant date which is defined as the date of that application.

37. Dealing first with the s8 application, there is no dispute that this was a s1(1)(a) order under the FLA 1986 and that at the date of the application, which was before CX was removed from England, he was habitually resident in this jurisdiction. I am therefore satisfied that the court has jurisdiction in relation to the ongoing s8 proceedings.

38. As for the inherent jurisdiction proceedings, I must have regard to the judgment of Baroness Hale in *A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening*) [2013] UKSC 60, [2014] AC 1 in which she considered it to be quite clear that an order making a child a ward of court and directing their return to the jurisdiction was not a s1(1)(d) order under the 1986 Act because it did not give care of the child to any person not provide for contact with, or the education of any child. One might have thought that a wardship order made in a case such as the present one was inextricably linked with giving day to day care of a child to a person, but Baroness Hale's judgment is clear and binding – a wardship and return order, without more, is not a s1(1)(d) order.

39. In *H v R*, Peel J considered that the application before him *was* in substance for an order giving care of the children to the mother. That was because although the application was for wardship and a return order, the mother's supporting statement sought for the children to be returned to her care. Furthermore, an initial court order under the inherent jurisdiction included recitals about returning the children to the mother's care.

40. In *WB v VM* (above) Cusworth J similarly construed an application under the inherent jurisdiction which on its face sought only the return of the child to the jurisdiction, as an application for an order giving care of the child to the applicant mother. He relied upon court orders within the proceedings for the obtaining of evidence about the mother's mental health, and assessments from the Local Authority, as well as a recorded agreement for contact upon return. He held:

> "So here, as in *H v R* … the mother "did not seek solely an inward return order: she sought substantive child arrangements orders" thus avoiding the lacuna identified in *A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening*) [2013] UKSC 60, [2014] AC 1 …. Where Baroness Hale of Richmond 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 1986 Act." [19]

41. In *In Re A (A Child)* [2023] EWCA Civ 659, Moylan LJ noted Peel J's judgment in *H v R* and other authorities and observed:

> "The above cases demonstrate that, in each case, it will be necessary for the court to decide on which side of the line the application and/or the orders made by the court fall. Are they within the scope of either subsection 1(1)(a) or subsection 1(1)(d) or not? In my view this should be more a matter of substance than form and will include, as Peel J did in *H v R*, consideration of the applicant's statement"

42. In the present case, the application made on 29 March 2022 was made by the Guardian on behalf of AZ because of his funding difficulties. AZ had an ongoing s8 application in the Family Court and, after the wrongful removal of CX to TRNC, and before 29 March 2022, had secured a revised child arrangements order with a lives with order in his favour. On 24 November 2021 the s8 proceedings were allocated to a High Court Judge in the Family Court to be heard at the same time as any hearings in relation to the child in the High Court. In fact none of the orders subsequently made in the High Court, on the inherent jurisdiction application, recorded that the Family Court proceedings were being heard at the same time. Nevertheless, the Family Court proceedings were closely linked to the inherent jurisdiction proceedings.

43. Peel J recorded the "lives with" order made in the Family Court in his order of 9 May 2022, the first order on the inherent jurisdiction application. He also gave directions permitting the Guardian to contact social services in TRNC. It should be noted that the order refers to the return of CX to England and Wales so that the courts here can "*continue t*o make decisions about [CX]'s future welfare." The Guardian's statement in support of the application does not seek an order for CX to be placed in the care of any person on return but, in this case, it is of importance that the inherent jurisdiction application was made by the Guardian on behalf of the father who had earlier filed a position statement in the family Court seeking the return of CX to the jurisdiction. His position statement of 30 September 2021 invited the court to make CX a ward of court and to make a return order. It ended at paragraph 17, "for the avoidance of all doubt, [AZ] seeks the urgent return of [CX] to his care. He invites the Court to take all steps necessary to secure this". So the subsequent inherent jurisdiction application was indeed for CX to be placed in AZ's care. At later hearings within the proceedings, in order to entice BY to bring CX back to this jurisdiction, reassurances were given and recorded that CX would continue to live with her upon return and until any further orders were made in his best interests. That confirms that previously AZ had sought the return of CX to his care but changed his position so that at least he could secure CX's return to the jurisdiction and then allow further consideration of his welfare needs.

44. I can distinguish this case from the facts of *A v A* (above) because the supporting statement of AZ, albeit made some months before the inherent jurisdiction application, due to delay caused in part by his funding difficulties, sought the return of CX to his care. The s8 proceedings were re-allocated so they could be heard alongside the inherent jurisdiction proceedings. The purpose of the application for a return order was to give effect to the CAP made in the concurrent s8 proceedings. I conclude that the application was for a s1(1)(d) order.

45. Accordingly, since I have found that CX was habitually resident in England at the time when the application under the inherent jurisdiction was made, there is no prohibition on exercising jurisdiction under the FLA 1986 and the court has jurisdiction in the inherent jurisdiction proceedings as well as the Children Act proceedings.

46. I turn to the issue of whether, once the court has jurisdiction it can lose it. In *Hackney LBC* (above) Moylan LJ held at [117] that the court may lose jurisdiction if habitual residence moves to a Contracting State but if it moves to a non-Contracting State the original state "can" retain jurisdiction. He went on:

> "In my view, this is unlikely to cause difficulties if the child has moved from the state in which the proceedings have been taking place, because the court would be likely to have sanctioned the move and would have needed to consider the consequences of such a move, including as to jurisdiction and recognition/enforcement before it was sanctioned. There may, of course, be more complex cases in which there has been a wrongful removal or retention but I do not propose to address what might happen in such a situation. "

47. If CX's habitual residence remains in England and Wales, the question of a change of jurisdiction would not arise. Similarly, if his habitual residence moved to a Contracting State, then Arts 5 and 7 of the 1996 Convention would operate to determine jurisdiction. The more difficult question is whether, if the court has jurisdiction at the issue of proceedings, but habitual residence moves during the proceedings to a non-Contracting State after a wrongful removal or retention, the court loses jurisdiction. That is the issue which I have to address. Moylan LJ said that he did not propose to address the issue but he had earlier endorsed Peel J's dicta at paragraph [40] of *H v R* in which he had said that it was "logical" that if habitual residence moved to a non-Contracting State between issue and final hearing "jurisdiction should not transfer to the non-Contracting State.

48. I adopt Peel J's reasoning as approved by Moylan LJ and, it seems to me, it applies to the present case even though Moylan LJ had also said in *Hackney LBC* that he would not address the situation of a wrongful removal or retention to a non-Contracting State causing a change of habitual residence.

49. As I hope is clear from the earlier parts of this judgment, if habitual residence moves to a non-Contracting State then, as Peel J put it in *H v R* (above) "the 1996 Hague Convention gives no answer … [and] the position then reverts to domestic law." Under domestic law contained within FLA 1986, jurisdiction by reference to habitual residence is determined at "the relevant date" which, by FLA 1987 s7(c), is the date when an application is made for an order to be made or varied or, if no application is made, the date when the court is considering whether to make or vary the order. Hence, domestic law provides that in the present case the court had jurisdiction when each application was made because CX was habitually resident in England both when the s8 application was made and, on my finding, when the inherent jurisdiction application was made.

50. The domestic law under FLA 1986 makes no provision for the loss of jurisdiction upon a change of habitual residence. Thus, once the Court has jurisdiction in respect of an application for an order, there is no mechanism under the 1986 Act by which a change of habitual residence deprives the Court of jurisdiction. Indeed, the provisions of FLA 1986 ss1 to 3, and 7 clearly provide that when jurisdiction is fixed by reference to habitual residence then if the child is habitually resident in England at the date when the application is made, the court has jurisdiction to make the relevant order *whenever* the order is made.

51. The domestic statutory provisions mean that jurisdiction sticks – the concept of *perpetuatio fori*. Were it otherwise, then a parent who wrongfully removes a child from the jurisdiction even during the currency of court proceedings, would know that if they were obdurate for long enough, then their actions could result in the court losing jurisdiction. As Peel J put it in *H v R,* there would be an opportunity for "unscrupulous abductors to take advantage of delay, or indeed to manufacture delay, so as to engineer a change in habitual residence."

52. I am satisfied that in the present case, domestic law applies to fix the courts of England and Wales with jurisdiction in respect of both the s8 and inherent jurisdiction applications irrespective of whether CX is now habitually resident in TRNC.

53. No point was taken that TRNC is not a state. Habitual residence is a question of fact and it was not contended that the legal status of TRNC is material to the determination of CX's habitual residence.

54. No point was taken against AZ that he has chosen to make an application for time with CX in the courts in TRNC and has the benefit of a consent order there.

55. No argument was raised about *forum conveniens*.

56. In the circumstances I do not need to consider whether, in any event, the High Court may exercise its *parens patriae* jurisdiction. Dealing therefore with that issue very shortly:

    a. CX is a British citizen
    b. I have no doubt that the Court does have *parens patriae* jurisdiction
    c. I would have declined to exercise that jurisdiction on the facts of this case, applying *Al Habtoor v Fotheringham* [2001] 1 FLR 951, *Re N (A Child)* [2013] 1 FLR 457, and *Re M (A Child)* [2020] EWCA Civ 922. CX 's life or personal safety is not in peril. There are some troubling aspects of his care in TRNC but he is living with his mother, is housed, and is not in imminent or ongoing danger. The circumstances are not sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction.

57. BY invites the Court nevertheless to dismiss both sets of proceedings because they are, in effect, futile. At first sight it is an unattractive submission to make by or on behalf of a party whose disobedience of court orders has produced the situation

which she now says renders the proceedings futile. Nevertheless, I have to consider the purpose of continuing each set of proceedings.

58. The s8 proceedings were allocated to High Court level to be heard together with the inherent jurisdiction proceedings. They have not been recognised as ongoing in the orders made since the inherent jurisdiction proceedings were first heard but they are ongoing. Hence, there are two sets of proceedings that are presently continuing and, as I have found, the court has jurisdiction in respect of both.

59. The private law proceedings in the Family Court have been ongoing now for nearly four and a half years. The CAO made on 9 August 2021 is that CX shall live with AZ. That order has not been varied or discharged. On the one hand, AZ has made concessions that CX should live with BY on his return to this jurisdiction, at least until a further welfare determination by the court. On the other hand, he does not now agree to the discharge of the existing order. His position, in relation to both sets of proceedings is that they should be adjourned generally to be restored on return of CX to this jurisdiction and with liberty to apply. The Guardian supports his position.

60. Orders in this jurisdiction have been ignored by BY and she has obstructed the operation of justice within the Family Court and the High Court. She has taken her son away from his home, from his home country, and from his father and wider family. She has done so to put herself out of the law's reach. She did so during the course of proceedings. AZ's conduct which he admitted and which was recorded in the judgment of 7 June 2021, had all occurred more than two and half years earlier. The parties were no longer in a relationship and lived independently of each other. However, the Court's current concern is to protect CX's welfare and to manage the proceedings appropriately, not to penalise BY's conduct.

61. In my judgment it is not futile to maintain the wardship and the existing return orders. They send a clear message that CX ought to be returned to this jurisdiction. It would send the wrong message to BY and to CX, if the Court simply washed its hands of CX because of his mother's intransigence and obstruction. CX should know that his father has taken extensive steps to secure his return to England and that the Court considers that his return is required. Everyone involved in CX's life, and CX himself, can know that he is a ward of the court and therefore that his welfare is the court's concern. The inherent jurisdiction allows the court to take practical steps to secure CX's return when the circumstances are right and then to make arrangements in his best interests. I do not believe that it is futile to continue the High Court proceedings. However, I agree that they should now be stayed generally to be restored within seven days of CX returning to this jurisdiction and with liberty to apply. Further hearings will be avoided until something practical can be achieved to protect and enhance CX's welfare.

62. As for the s8 proceedings, it seems to me that in all the circumstances, including the ongoing inherent jurisdiction proceedings, they serve no ongoing purpose. A "lives with" order has been made. There have in fact been no further orders made in the s8 proceedings since November 2021. The "lives with" order could be overridden or varied by the High Court upon or in advance of CX's return. No proper welfare assessment can be carried out whilst CX is in TRNC and whilst BY takes the stance that she takes. A final s8 order cannot meaningfully be made. The s8 proceedings

could be stayed but, given that the inherent jurisdiction proceedings will be stayed, there is no additional benefit to CX in keeping them open. I must consider the overriding objective which includes allotting to a case an appropriate share of the court's resources and saving expense. I have considered the Court's duty to manager cases – FPR r1.4. – and general case management powers – FPR Part 4.

63. In *A v A* (above) Baroness Hale said at paragraph [26]:

> "The court has power to make any section 8 order of its own motion in any "family proceedings" in which a question arises with respect to the welfare of any child: see section 10(1)(b). Proceedings under the inherent jurisdiction of the High Court are family proceedings for this purpose: see section 8(3)(a). So, assuming for the moment that an order to return or bring a child to this jurisdiction falls within the definition of a specific issue order, the judge might have made such an order even though this was not what the mother applied for. But that is not what he did. There are many orders relating to children which may be made either under the Children Act 1989 or under the inherent jurisdiction of the High Court…"

I am satisfied that CX's best interests can be protected within the stayed inherent jurisdiction proceedings and that the s8 proceedings should now be concluded. I shall do so by dismissing the application because in the present circumstances there are no issues that can now, or in the foreseeable future, be determined, continuing the proceedings would serve no purpose, and would be unnecessary and disproportionate. Accordingly, I shall dismiss the s8 proceedings and stay the inherent jurisdiction proceedings.

64. CX is a young boy who has been uprooted from his home and family and whose freedom is restricted because his mother has chosen to take flight. His education is now all on-line. He cannot leave TRNC. This is not a case where the court's interventions had failed to protect CX's mother or him from abuse. It is a case of one parent taking drastic steps to avoid the justice system in this country. I hope that BY will take this further chance to reflect on the impact on CX of his exile in TRNC and to return him home.