Neutral Citation Number: [2022] EWHC 2215 (Fam)

Case No: ZC22P00529

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/08/2022

Before:

THE HONOURABLE MR JUSTICE COBB

- -

Between:

B	**Applicant**
- and -	
L	**Respondent**

- -

B v L (Removal to Poland: Unmarried Father: Rights of Custody: Declarations)

- -

Alistair Perkins (instructed by **Josiah-Lake Gardiner**) for the Applicant (father)
Philip A. Bowen (instructed by **Direct Access**) for the Respondent (mother)

Hearing dates: 16-17 August 2022

- -

Approved Judgment

I direct that 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. The applications before the court concern one child, a girl aged approximately 2½, who I shall refer to as 'M'. M's father is the Applicant (hereafter "the father"); M's mother is the Respondent ("the mother"). The mother (aged 36) is Polish but has lived in England for nearly all of her adult life; the father (aged 31) is American, and since March 2021 has lived in England. M lives with her mother and, since 7 March 2022, they have been in Poland.

2. By primary application issued on 6 April 2022, and supplemented by subsequent applications – made both formally and informally – the father seeks the following relief:

   i) A declaration that M was habitually resident in England as at 7 March 2022 (the date she left England); alternatively, that M was habitually resident in England as at 6 April (the date of his primary application) and/or 7 April 2022 (the date of the first order);

   ii) A declaration that at the time M was removed to Poland on 7 March 2022, the father (who does not have parental responsibility for M under English law) nonetheless had 'rights of custody' in respect of her, and that he was exercising those rights of custody;

   iii) A declaration that the removal of M from the jurisdiction was in breach of those rights of custody and therefore wrongful;

   iv) A declaration that this court has jurisdiction to make substantive orders in respect of M (including a child arrangements order, prohibited steps and specific issue orders, including an order that M is returned forthwith from Poland) under *sections 1 – 3* of the *Family Law Act 1986* and/or under *Articles 5* and *7* of the *Convention on Jurisdiction, Applicable Law, Recognition and Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996* ("the *1996 Hague Child Protection Convention*");

   v) A declaration that the removal of M from this jurisdiction to Poland was wrongful within the meaning of *Article 3* of the *1980 Hague Convention*; this relief is sought in order to assist the father's claim in Poland, see below (see *section 8* of the *Child Abduction and Custody Act 1985* and *Article 15* of the *1980 Hague Convention*);

   vi) An order vesting parental responsibility of M with the father pursuant to *section 4(1)* of the *Children Act 1989.*

3. For the purposes of determining these applications, I read the statements of the parties, some selected inter-solicitor correspondence, the skeleton arguments of counsel, and I heard oral argument. The hearing was conducted in a hybrid format.

4. At the outset of the hearing, Mr Bowen invited me to adjourn the hearing to await the outcome of the father's newly-issued application for summary return issued in Poland under the *1980 Hague Convention*. Mr Perkins opposed the application; as indicated

above (§2(v)), he asked me to make a determination which, he argued, could be of assistance to the Polish Court. I rejected the adjournment application on the basis that, in my judgment, this court could properly proceed to determine whether it could exercise substantive jurisdiction in relation to the child based on her habitual residence.

5. Mr Bowen made a secondary, tentative, application for me to hear oral evidence relevant to the question of habitual residence and/or rights of custody; I pressed him to identify the specific issues on which oral evidence may be probative. At the end of that exercise, I concluded that oral evidence would not in fact assist.

6. At an earlier case management hearing before Keehan J (on the 18 May 2022), I note (it is recorded on the face of the order) that the parties had agreed to attend mediation. Following that hearing, I am advised that the father submitted the relevant documentation to the Reunite Mediation Service. Earlier this month, Reunite Mediation Service informed the father's solicitors they had not been able to make contact with the mother. Mediation has therefore not happened. This is more than disappointing: it is a wasted opportunity for the parties to take some collective responsibility for the future arrangements for their child.

Background

7. The mother and father met in Spain in or about 2019. Their relationship was extremely short-lived, and they separated even before the mother knew she was pregnant. In 2020, M was born; she is their only child. DNA evidence confirms the father's paternity. During 2020, the father made a number of visits to the UK from America (where he then then lived) to visit M.

8. In 2021, the father relocated permanently from America to the UK, so that he could live closer to M. He was able to see M regularly. There is some dispute on the face of the papers as to the precise amount of time which the father spent with M, but it is reasonably clear – and I so find – that his contact with her was regular, extensive, and mutually enjoyable. I find (indeed this is not really in dispute) that in the period immediately after his relocation to this country, he saw her approximately three times per week during the week, and he often stayed with the mother on a Saturday night so that he could spend Sunday with the mother and M. The mother agrees that Sundays would be a 'family' day involving all three of them. Over a period of two weeks, I find that he looked after M for eight consecutive half-days on his own (when M was ill) while the mother worked[1].

9. By February 2022, the father's contact with M had settled to an arrangement whereby he would be with her between 5pm and 7.30/8.00pm on Wednesdays and Thursdays and between 9.30/10am and 5pm on Sundays, at the mother's home. Through solicitors, the parties were negotiating a more formal shared care plan, *inter alia* providing for M to stay overnight at the father's home.

10. Additional to the visits described above, the mother, father, M, and members of the father's family spent time away together in 2021 – in October and at Christmas. In an undated statement filed with the court (believed to be May 2022), the mother refers to

[1] See the Post-Script to this judgment. After the judgment, I heard some limited evidence about the time the father has spent with M; both parents gave brief evidence about this period. I preferred the evidence of the father.

the father's contact with M in England as "sporadic"; in light of the agreed position on contact, I reject that description.

11. Some of the relevant inter-solicitor correspondence has been placed before me. I note that on 16 February 2022, the mother's solicitors corresponded with the father's solicitors in these terms:

> "[The mother] … hopes that arrangements for [M] can be reached in an amicable and constructive way by agreement without the need for court proceedings …
>
> … [The mother] fully supports [the father] having a full relationship with [M] but in the best interests of [M] contact must be built up gradually and at a pace suitable for her given her age …. [the mother] has never been opposed to [M] having a relationship with [the father]…
>
> [Specific proposals for the father's time with M are set out in the letter, then…]
>
> At the end of the 3-month period and provided that [M] has settled into the new routine [the mother] is agreeable to discuss overnight staying contact.".

12. On 22 February 2022, in setting out the father's specific counterproposals for the build up of contact, the father's solicitor wrote:

> "There is no question/dispute as to [M]'s paternity and it makes sense therefore for her birth certificate to reflect that fact and for her father's name to be entered on the certificate. Please confirm that this is agreed…"

In the same letter, the father's solicitor set out the financial provision offered by the father, including a willingness to submit to assessment by the Child Maintenance Service.

13. On 3 March 2022, the mother's solicitors set out further detailed counterproposals for the build up of the father's time with M. The proposals expressly contemplated:

i) That the father would play a "significant" role in M's life;

ii) Contact routinely taking place at the father's partner's home in London;

iii) Contact taking place on sequential days of the week.

I pause to observe that all of the mother's proposals set out in this correspondence would be utterly inconsistent with M living in Poland and the father living in England.

14. In the same letter, it was said:

> "The sooner [the parents] can agree arrangements the sooner overnight contact can commence. [The mother] will discuss

> re-registering [M]'s birth directly with [the father] once overnight contact commences."

Interestingly, on the mother's proposal in this letter, overnight contact was scheduled to begin on 9 July 2022.

15. On or about 3 March there was an argument between the parties. It is agreed that voices were raised, and that relations became 'heated'. The argument appears to have been about the future progress of relationship between the father and M; the father said that he was frustrated that the mother was back-tracking on the proposals.

16. On 7 March 2022, the mother took M to Poland. She took a suitcase of clothes. It is agreed that the mother had taken no steps to clear the property where the mother and M lived. I have seen no evidence that the mother gave notice either to her employer, or the child's nursery, and/or her landlord of her intention to leave these shores for good.

17. On 9 March 2022, the mother's solicitor contacted the father (via his solicitor) by e-mail. The short message simply confirmed that the mother:

> "… has had to travel to Poland at short notice as her mother is unwell".

18. It is accepted that the mother's removal of M to Poland was undertaken without notice to the father, and without seeking his consent; the urgent manner in which she had left, without even contacting father (and having her solicitor do so only after she had left the country), led the father to believe that the maternal grandmother was critically/very seriously unwell. It later in fact transpired that the maternal grandmother was suffering knee problems and that surgery for the same was booked for 15 June 2022. In her witness statement filed in these proceedings (7 June 2022), the mother suggests that a move to Poland – on a permanent basis – had been planned *prior* to her leaving this country on 7 March 2022; I should observe here that none of the surrounding contemporaneous evidence supports this assertion.

19. Mr Bowen told me, on specific instructions, that at some stage between the middle to the end of March 2022 the mother decided to stay in Poland with M. She was apparently influenced in making this decision by reference to the illness of her mother (knee complaint) and the family support network which she was enjoying.

20. Thus, it was that on 4 April 2022 the mother sent the father a WhatsApp message in these terms:

> "Just to update you after long consideration I have decided to remain in Poland . M is much happier surrounded the family and so am" (sic.)

21. The mother has placed no evidence before the court to demonstrate that she had 'put down roots' or otherwise became integrated into Polish life when she had arrived in Poland. She reports that M has been *enrolled* in a nursery and was *waiting* for a place; the mother told me that she did not start work in Poland until May 2022, and then only on a trial basis.

22. On receipt of the WhatsApp message, the father applied in the English Family Court for child arrangements, specific issue and prohibited steps orders.

23. On 13 May 2022, the father issued proceedings under the *Hague Convention 1980* in Poland. The proceedings are at an early stage, but a hearing is scheduled to take place there imminently.

24. In the last few months, the father has travelled to Poland on at least two occasions (June and August) to see M. He has spent approximately three hours with M on three sequential days. The father's family and his partner have been involved in recent contacts. The mother has insisted on being present (at a distance) during such contacts.

The father's case: jurisdiction

25. The father's case is that at 7 March 2022, M was habitually resident in England and Wales; she was significantly 'rooted' here. In making this point, he specifically referred to the following:

    i) The mother had lived in England for approximately 18 years;

    ii) For about 9 years, until March 2022, the mother had been working in England, latterly for an international school;

    iii) The mother was clearly habitually resident in England prior to the removal and arguably at the point of retention;

    iv) The father having emigrated from America in March 2021 had thereafter lived in, worked in, established a relationship with an English woman and become habitually resident in England;

    v) M was born, and had always lived, in England (aside for three short holidays to Poland) from her birth in March 2020 until her removal on or about 7 March 2022;

    vi) M is a UK citizen and has a British passport;

    vii) M had been attending a nursery in England on a daily basis for nearly one year at the point she was removed to Poland;

    viii) M was registered with HM DWP, and the mother was receiving child benefit and assistance with the nursery fees in relation to M;

    ix) M was registered with a GP and had attended and been treated by the NHS;

    x) At the point of the removal M was spending 2/3 hours twice a week and 10-5pm every Sunday with her father.

26. The father points to the fact that the mother does not appear to have given notice of her intention to leave England permanently either to her employers, or to her landlord, or to M's nursery; I note that the mother did not respond to the father's express invitation (in his witness statement) to her to provide evidence of when she issued these notifications. The mother's solicitors had told the father that the mother had to travel

to Poland in March 2022 "as her mother is unwell"; only after the removal did the mother communicate to the father that she had intended to remain. The father points to all these facts as illustrative of the fact that the mother's departure was unplanned, even impulsive.

27. It is the father's further case that M's habitual residence did not change even after she left these shores, and that she was still habitually resident in England as at 6/7 April 2022. Although physically present in Poland, the father contends that M was not 'integrated' there; she was not in nursery (awaiting a place) and there is no evidence that she had any social relationships. I am told very little about M's life in Poland save that she was being cared for, from time to time, by her mother' relatives.

28. The father's case is that by the time of M's removal from this country he had acquired 'inchoate' rights of custody; Mr Perkins has referred me to a line of authorities relevant to this issue, which I address in the next section of the judgment. The father invites me to conclude that the removal was in breach of those rights of custody, which he was exercising at the time; and that the removal was therefore 'wrongful'.

The mother's case: jurisdiction

29. Mr Bowen opened his submissions by advising me that the mother wishes the father to play a full and large part in M's life; she wishes this to take place in Poland. She wishes to remain resident in Poland for the foreseeable future. He went on to concede, on behalf of the mother, that M was habitually resident in England as at 7 March 2022.

30. However, he submitted that the English Court does not have jurisdiction to make any orders in relation to M as she is now, and was as at 6/7 April, habitually resident in Poland. She argues that the Polish Court should determine welfare issues concerning M.

31. The mother further asserts that:

    i) the father has no effective legal rights ('rights of custody') in respect of M;

    ii) she is the sole legal guardian and

    iii) she has / had the inalienable right to relocate M to Poland.

    Mr Bowen disputes that the father can demonstrate inchoate rights of custody.

32. It is the mother's case that between the middle and end of March 2022 her own habitual residence changed, and that M's habitual residence changed too. She argues that by the time the father issued his application, the mother was no longer habitually resident in this jurisdiction and nor was M. Mr Bowen submits that the mother and M were integrated into life in Poland by early April 2022. He maintains that this is in part reflected in the daily care which M received/receives from members of the mother's extended family.

The legal principles: Jurisdiction

33. This court would be prohibited from making a *section 8 Children Act 1989* Order and/or an order in the exercise of its inherent jurisdiction in relation to care or contact in relation to M unless I were to be satisfied that I have jurisdiction either:

    i) under the *Convention on Jurisdiction, Applicable Law, Recognition and Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996* ("the *1996 Hague Child Protection Convention*"),

    or

    ii) if the *1996 Hague Child Protection Convention* does not apply, at the relevant date (namely when the father's application was made), the child is habitually resident in England and Wales (*section 2, 3* and *7* of the *Family Law Act 1986*).

34. The *1996 Hague Child Protection Convention* makes the child's habitual residence the basis on which the state assumes jurisdiction. Notably *Article 5* 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".

35. *Article 7* of the *1996 Convention* provides:

> "(1) In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and
>
> (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
>
> (b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.
>
> (2) The removal or the retention of a child is to be considered wrongful where –
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under

> the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> …
>
> (3) So long as the authorities first mentioned in paragraph 1 keep their jurisdiction, the authorities of the Contracting State to which the child has been removed or in which he or she has been retained can take only such urgent measures under Article 11 as are necessary for the protection of the person or property of the child.

36. It will have been noted (see §2(v) above) that the father seeks a declaration under *Article 15* of the *1980 Hague Convention*. *Section 8* of the *Child Abduction and Custody Act 1985* permits for this:

> "The High Court or Court of Session may, on an application made for the purposes of *Article 15* of the Convention by any person appearing to the court to have an interest in the matter, make a declaration or declarator that the removal of any child from, or his retention outside, the United Kingdom was wrongful within the meaning of *Article 3* of the Convention".

Article 15 provides

> "The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant *obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention*, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination" (italics added for emphasis).

And for completeness' sake, *Article 3* (referenced in *Article 15*) provides:

> "The removal or the retention of a child is to be considered wrongful where –
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State".

37. I was addressed by counsel at some length (both orally in writing) about the legal principles engaged here. I have endeavoured to distil the key principles applicable in relation to each ingredient in the paragraphs which follow (§38 to §49).

38. *Habitual residence*. Habitual residence is a question of fact: the court needs to consider whether the residence of a particular person in a particular place has acquired the necessary degree of stability (permanent is the word used in the English versions of the two CJEU judgments) to become habitual. Counsel agree that the determination of a child's habitual residence depends on an assessment of the degree of integration of the child in a social and family environment in the country concerned. This depends upon numerous factors.

39. These principles follow a line of authority starting with *Proceedings brought by A* (Case C-523/07) [2010] Fam 42, and affirmed by in *Mercredi v Chaffe* (Case C-497/10PPU) [2012] Fam 22, para 47 and then the decision of the Supreme Court in *A v A (Children: Habitual Residence)* [2013] UKSC 60, [2013] 3 WLR 761, notably at §54.

40. In the *Mercredi* case it had been said that:

> "53 The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant.
>
> 54 As a general rule, the environment of a young child is essentially a family environment determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.
>
> 55 That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent..."

41. In this case, as I have earlier indicated (§29), there is rightly no dispute that the mother and M were habitually resident in England as at 7 March 2022. However, a question arises as to whether M's habitual residence had changed during March 2022 (as the mother contends). It would be particularly relevant for me to consider this issue if I

were to find that *Article 7* of the *1996 Hague Child Protection Convention* did not apply; in such an event, the basis of the father's claim for jurisdiction would be founded on habitual residence at the later time, namely the time of his application/first order.

42. It is in those circumstances that it would be necessary to consider:

i) As a matter of fact, the degree of integration which the mother and/or M had achieved in Poland during March 2022 (up to 6 April 2022);

ii) As a matter of law, whether, if the mother's habitual residence *had* indeed changed during March 2022 as she contends (she having resolved to remain in Poland as she indicated to the father in the WhatsApp message), M's habitual residence necessarily changed with her mother; or could she nonetheless retain her habitual residence in England.

43. On this latter point, I remind myself that the determination of habitual residence has to be

> "… a child-centred approach. It is the child's habitual residence which is in question. It is the child's integration which is under consideration. Each child is an individual with his own experiences and his own perceptions" (Baroness Hale: *Re LC* [2014] UKSC 1 at §62).

In this context, Mr Perkins referred me to *Re B (A child) (abduction: habitual residence)* [2020] EWCA Civ 1187, in which the Court of Appeal (Moylan LJ delivering the lead judgment) held (at §127) that – even with a child aged 2 years – "*all* the relevant circumstances" of the child need to be considered (emphasis in the original), and not just the situation of the parent with care:

> "… it was necessary to look at the family's situation including that of the father… the circumstances of both parents and not just one parent, even the primary carer, are relevant" (ibid.).

44. *Rights of Custody*. The rights of the father are a matter for the law of the state of the child's habitual residence (see *PD12F FPR 2010, §2.16 et seq.*). At *§2.17* of *PD12F* the following is stated:

> "In England and Wales a father who is not married to the mother of their child does not necessarily have 'rights of custody' in respect of the child. An unmarried father in England and Wales who has parental responsibility for a child has rights of custody in respect of that child. *In the case of an unmarried father without parental responsibility, the concept of rights of custody may include more than strictly legal rights and where immediately before the removal or retention of the child he was exercising parental functions over a substantial period of time as the only or main carer for the child he may have rights of custody.* An unmarried father can ask ICACU or his legal representative for advice

> on this. It is important to remember that it will be for the State which is being asked to return the child to decide if the father's circumstances meet that State's requirements for the establishment of rights of custody." (emphasis by italics added).

45. Under the *1980 Hague Convention*, 'rights of custody' are described as including "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence" (*Article 5*). The case law under the *1980 Hague Convention* (which is obviously relevant to the *1996 Hague Child Protection Convention*) encourages courts to construe the term liberally and purposively (see §3 of *Re K* cited below), encouraging the court to consider whether the 'rights' would have been legally recognised had the question arisen before the removal or retention in question. I see no reason to take a different approach in this case.

46. Given that the father did not have formal 'rights of custody', I have taken as my starting point, as Macdonald J did in *T v T (Inchoate Rights)* [2021] EWHC 3231 (Fam), the decision of the Court of Appeal in *Re B (A Minor) (Abduction)* [1994] 2 FLR 249. In that case, it was held (Waite LJ giving the lead judgment) that the rights within *Article 3* of the *1980 Hague Convention* may extend to '*inchoate*' rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child, at least to the point of refusing to allow it to be disturbed, abruptly or without due opportunity of a consideration of the claims of the child's welfare, merely at the dictate of a sudden reassertion by another of their official rights. Waite LJ had observed as follows:

> "The objective [of the 1980 Hague Convention] is to spare children already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are taken *arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base*. The expression "rights of custody" when used in the Convention therefore needs to be construed in the sense *that will best accord with that objective*. In most cases, that will involve giving the term the *widest sense possible*." (pp.260-261) (Emphasis by underlining added).

47. In the case of *Re K (Inchoate Rights)* [2014] UKSC 29, [2014] 2 FLR 629, Baroness Hale reflected the willingness of the English Court (as opposed to other members of the Hague community), to find rights of custody as an essentially 'inchoate' right ("to protect children from the harmful effects of international abduction and to secure that disputes about their future are determined in the state where they were habitually resident before the abduction" §57). Baroness Hale discussed in her judgment the categories of person who may possess 'inchoate rights', and suggested that they would include the following (§58):

> "(a) They must be undertaking the responsibilities, and thus enjoying the concomitant rights and powers, entailed in the primary care of the child. Thus, for example, our law

> recognises the obvious truth that people who are actually looking after a child, even if they do not have parental responsibility, may "do what is reasonable in all the circumstances of the case for the purpose of safeguarding and promoting the child's welfare" (*Children Act 1989, s 3(5)*).
>
> (b) They must not be sharing those responsibilities with the person or persons having a legally recognised right to determine where the child shall live and how he shall be brought up. They would not then have the rights normally associated with looking after the child.
>
> (c) That person or persons must have either abandoned the child or delegated his primary care to them.
>
> (d) There must be some form of legal or official recognition of their position in the country of habitual residence. This is to distinguish those whose care of the child is lawful from those whose care is not lawful. Examples might be the payment of state child-related benefits or parental maintenance for the child.
>
> And (e) there must be every reason to believe that, were they to seek the protection of the courts of that country, the status quo would be preserved for the time being, so that the long-term future of the child could be determined in those courts in accordance with his best interests, and not by the pre-emptive strike of abduction".

48. It is Mr Perkins' further argument that at the very latest, rights of custody were vested in the English Family Court, when the court made the first order on 7 April 2022. I was referred to the decision of Bodey J in *A v B (Abduction: Declaration)* [2008] EWHC 2524 (Fam), in which the court held that even interim orders made without notice could nonetheless vest rights of custody with the court, and even so before service had been effected on the respondent (applying *Re J (Abduction: Declaration of Wrongful Removal)* [1999] 2 FLR 653). At §22 of the judgment, Bodey J said this:

> "…in the 'ex parte' situation (before service of the originating process) the court at any rate obtains rights of custody once there has been some judicial determination, even if only by way of judicial case-management".

Conclusion and orders: jurisdiction

49. *Habitual residence*. As I have mentioned above, it is conceded by Mr Bowen (rightly in my judgment) that as at 7 March 2022, M was habitually resident in England and Wales. I concur and so find, essentially for the reasons which the father has relied on and which I have reproduced at §25 above.

50. For reasons expanded on a little below, I do conclude that M's removal from England was "wrongful" within the meaning of *Article 7* of the *1996 Child Protection*

Convention. In the circumstances I really am only concerned with M's habitual residence "immediately before the removal", i.e., at 7 March 2022.

51. But before I examine whether the father had rights of custody and whether he was exercising them, I consider it helpful briefly to explain that I reached the further view, on the evidence, that M's habitual residence had not changed over the period between 7 March 2022 and 6/7 April 2022.

52. In reaching this conclusion, I have to acknowledge that I have had to work from precious little evidence before the court about M's life, and/or the mother's life, in Poland in that period. What I *do* know is that:

i) M remained in the primary care of the mother;

ii) M was staying/living, with her mother, in the grandmother's home;

iii) M was not in nursery, though was on a waiting list for a place;

iv) The mother was applying for work;

v) On 4 April 2022 the mother signalled her intention to remain in Poland permanently.

In relation to this evidence, I make three points.

53. First, this evidence (such as it is) falls far short of persuading me that either the mother or M had lost their habitual residence in England and/or acquired the necessary degree of stability or permanence in Poland for their residence to become 'habitual' there in the 4 weeks following their unscheduled move. I remind myself that prior to leaving England, the degree of connection which the mother and M both had with England was substantial; in particular, M was settled, integrated and stable in her life in England, in nursery, and seeing her father regularly.

54. Secondly, although on 4 April the mother signalled her intention to remain in Poland permanently, her *intention* to remain there is of only modest consequence in the determination of habitual residence. As Baroness Hale said in *Re LC* (above) at §59, whether a particular person has acquired a residence in a particular place of the necessary degree of stability…:

> "…is not a matter of *intention*: one does not acquire a habitual residence *merely by intending to do so*; nor does one fail to acquire one merely by not intending to do so. An illegal immigrant may desperately want to become habitually resident in this country, but that does not mean that he does so". (Italics added for emphasis).

55. Thirdly, even if, contrary to my conclusion at §54 above, the mother's habitual residence in England *had* been lost by 6 April 2022 and/or she had acquired a habitual residence in Poland by that date, I am not persuaded that M's habitual residence had followed that of her mother. As I discussed at §43 above, I must look at *all* of the circumstances of M's family life, including the relationship which she enjoyed with her father and his family, and not just the situation of her primary care giver (mother). I

remind myself (again see §43 above) that it is *M's* habitual residence which is in question; it is *M's* integration which is under consideration. M retained very many strong connections with England which in the relevant period were not lost; there is scant evidence that she had acquired the necessary degree of stability/integration there.

56. It follows that as at date of the father's application, quite apart from what I had said earlier about M's habitual residence as at 7 March, this Court had jurisdiction under *Article 5* of the *1996 Child Protection Convention*.

57. *Rights of Custody*? Having regard to the caselaw set out above (§44-48) and on a fine balance I have reached the conclusion that the father *had* acquired inchoate 'rights of custody' in respect of M at the point at which M was removed from this jurisdiction. These rights of custody were established, as the father has argued, by a combination of factors. Those identified at (i) to (iv) below, in my judgment, establish important context for the establishment of 'rights of custody'; those at (v) to (vii), taken together, establish the requisite status:

i) The father was spending increasing amounts of time with M, and the parties were actively planning to extend his time to include overnight staying visits;

ii) The father and M spent time alone together in my finding; for a short period of about (in my finding) 8 days, the father cared for M (when M was unwell) while the mother worked;

iii) The father was plainly engaged with M's nursery provision, and while there was a dispute of fact (which I did not try) about whether he was involved in the choice of nursery, he plainly attended at the nursery from time to time;

iv) The father was involved in M's health provision; again, while there is some dispute about the *extent* of his involvement in medical appointments and matters, I accept the father's case (which the mother did not wish to challenge) that he did attend a number of medical appointments for M, and was present while she had her routine vaccinations.

Crucially, in my finding:

v) There is agreed evidence that the father made regular payments, together with additional capital payments, towards the maintenance/upbringing of M; with the mother's agreement these payments were made initially informally (she was concerned about the impact of payments made through the Child Maintenance Service on her benefits), though latterly the father agreed to be subject to an assessment by the Child Maintenance Service;

vi) It was the express common objective of the parents that the father would play a "full" and "significant" role in M's life going forward with regular weekly visiting and staying contact *in England*; the parents' solicitors were actively engaged in working out the mechanism by which a form of shared care arrangement could be achieved at the point when the mother abruptly removed M from the country;

vii) The mother was, I find, of the view that the father could, indeed should, have formal legal parental responsibility in English law; she had merely stipulated that this should be arranged only when overnight contact had started (which was, on her case, to start sometime between May and July 2022).

58. I further find that the father was exercising his rights of custody at the time that the mother moved M to Poland. The father was actively engaged in the life of his daughter, and pressing (through solicitors) for more and more time with her.

59. For completeness' sake, I should add that I further find that 'rights of custody' were vested in the court, but not in the father, by the order of 7 April 2022; at that time, M was still habitually resident in England. Mr Perkins argued that the father would at the latest have obtained rights of custody at the same time as the court on 7 April, and he relied on Bodey J's judgment at §25:

> "I cannot … discern any logical reason for distinguishing between the rights of a father and the rights of the court".

On this submission I disagree with Mr Perkins; in *A v B* the Family Court had granted the father parental responsibility on a without notice basis before the mother had left the country. In the instant case, the Recorder merely made an order re-listing the case for an urgent *inter partes* hearing. In fact, the point has no bearing on the ultimate outcome.

60. Was the removal of M to Poland in breach of those rights of custody? In my judgment, the removal was in breach of those rights of custody. The mother left England peremptorily, without any notice to, let alone agreement from, the father. The e-mail from the mother's solicitor of 9 March is very clear that the expectation was that the mother and M would be away only temporarily. The situation later changed, when the mother decided not to return. It follows that the removal was 'wrongful'. The father has demonstrated to my satisfaction that he is entitled to his declaration under *Article 5* and *7* of the *1996 Hague Child Protection Convention* and under *Article 15* of the *1980 Hague Convention*.

61. In light of the foregoing, I propose to make the following orders/declarations:

i) M was habitually resident in England and Wales as at 7 March 2022.

ii) M was in fact still habitually resident in England and Wales on 6 April 2022 when the father issued his application and on the following day when the court made its first order;

iii) At the time that M went to Poland, the father had rights of custody, and was exercising them.

iv) The mother's removal of M was therefore 'wrongful' and in breach of the rights of custody enjoyed and exercised by the father on 7 March 2022;

v) Further, or in the alternative, the mother wrongfully retained M in Poland on 4 April when she indicated by WhatsApp that she would not be returning M to this jurisdiction;

vi) Further or in the alternative M's retention from England and Wales on or about 7 April 2022 and thereafter to date was in breach of rights of custody attributed to this court and at the time of the retention those rights were actually exercised or would have been so exercised but for the retention;

And

vii) Pursuant to *article 5* & *7* of the *1996 Hague Child Protection Convention*, I will further declare

a) M was wrongfully removed from and/or wrongfully retained from England and Wales the state in which the child was habitually resident immediately before her removal or retention,

b) the applicant father having rights of custody has not acquiesced in the removal or retention,

c) M has not resided in the Republic of Poland for a period of at least one year following the father having knowledge of the whereabouts of the child and in any event has issued a request for a return pursuant to the *Children Act* 1989 in this jurisdiction and pursuant to *article 12* of the *1980 Hague Convention* in the Republic of Poland, both applications are still pending.

d) In the circumstances the courts of England and Wales retain jurisdiction in relation to parental responsibility.

viii) I will make a declaration under *Article 15* of the *1980 Hague Convention* that the removal of M from this jurisdiction to Poland was wrongful within the meaning of *Article 3* of the *1980 Hague Convention*;

ix) I shall adjourn the father's application for an order for the return of M to this jurisdiction and will review this again in approximately 8 weeks time following the determination of the father's *1980 Hague Convention* application in Poland (see §47 & 48 of *S (Abduction - Hague Convention Or BIIa)* [2018] EWCA Civ 1226)

Parental responsibility

62. The father seeks an order for parental responsibility for M. His application is framed under *section 4(1)(c)* of the *Children Act 1989.*

63. Mr Perkins has referred me to the decisions of *Re H (Parental Responsibility)* [1998] 1 FLR 855 and *Re G (Shared Residence Order: Biological Mother Of Donor Egg)* [2014] EWCA Civ 336 [2014] 2 FLR 897, and of course to the judgment of Balcombe LJ in *Re H (minors) (Local authority; Parental Rights) (Number 3)* [1991] Fam 151, (identified as the 'starting point' for any consideration of this issue) in which:-

i) the degree of commitment which the father has shown towards the child;

ii) the degree of attachment which exists between the father and the child;

iii) the reasons of the father for applying for the order

were specifically referenced as key ingredients in the determination of the relevant application.

64. As long ago as February 2022 (possibly before) the father proposed that his name should appear on M's birth certificate so that he could acquire parental responsibility and status as M's father.

65. The mother's position, as set out by her former solicitors in February 2022 was that "[The mother] will discuss re-registering [M's] birth directly with [the father] once overnight contact commences". On the mother's own proposals, that overnight contact could have started as early as May 2022, or by July 2022. In either event, it would have been happening by now, were it not for the mother's wrongful removal of M from this country.

66. The mother's primary argument is that I do not have jurisdiction to determine this point. Jurisdiction in this regard (i.e., the grant of parental responsibility) is founded under the *Family Law Act 1986* and the *1996 Hague Child Protection Convention*: see specifically *Article 1(1)(c), Article 1(2), Article 3(a)* of the *1996 Hague Child Protection Convention*. I have already found that I do have that jurisdiction on two alternative bases:

i) that M was habitually resident in England immediately prior to her wrongful removal on 7 March 2022 (*Article 7, 1996 Hague Child Protection Convention*);

ii) that M was habitually resident in England when the court was first seised of jurisdiction on 7 April 2022 (*Article 5, 1996 Hague Child Protection Convention*).

67. The mother's secondary argument is that it would be wrong for the court to make an order at this stage; although she acknowledges that she had earlier indicated her intention to consider the grant of PR, she is not prepared to agree to the making of an order in this regard now. Mr Bowen submitted that the mother was influenced in taking this position by the following factors:

i) The father told the mother in 2019 that he did not want the pregnancy to proceed;

ii) The father had no contact with M for the first few months of her life;

iii) The mother is concerned about the father's commitment to M. She argues that there should be a further period in which he can demonstrate his commitment.

68. As to the points above, the father has accepted that he did make a comment to the mother along the lines set out in §67(i) above, which he subsequently greatly regrets. As to §67(ii), the father was living in the USA when M was born, but he did travel here on about three occasions to see her. As to §67(iii), I find that the father has shown a high level of commitment to M. As I say, he travelled from the USA to see her on up to three occasions in her first year, before he relocated permanently from the USA to the UK in March 2021 to be nearer to her. This, in my assessment, shows very significant commitment in itself. Since then, I find that he has shown a high level of

commitment to contact (including visiting Poland in recent months), and it appears that the attachment of the father and daughter is growing. There is no real dispute that he has made proper financial provision for her. I am satisfied that he (supported by his wider family) wishes to play a full part in M's life, a view which – significantly – is shared by the mother.

69. The issue is one on which I must take into account all the relevant circumstances relevant to M, bearing in mind that *section 1* of the *Children Act 1989* applies and the welfare of M is therefore paramount.

70. For the reasons set out above, I am satisfied that it is indeed in M's best interests that I should make the relevant order bestowing parental responsibility on the father, and I do so.

71. I shall further direct that the child's birth shall be re-registered forthwith, so as to record the applicant father as the father of M.

72. That is my judgment.

Post-script

73. Following the judgment, I was invited by the father to vary the existing orders for contact between the father and M in Poland, pending determination of the father's application under the *1980 Hague Convention* there and/or enforcement proceedings in this country. The mother opposed the father's application; she proposed that the father should continue to have limited supervised contact with M on his weekend visits. I heard short evidence from the parties.

74. For reasons outlined in summary to the parties at the time, I concluded that the father should have extended contact of up to 5 hours per day on the weekends when he visits Poland, unsupervised.

75. That is the end of the post-script.