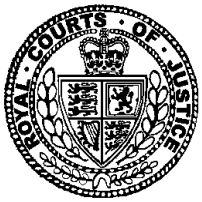

**This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30am on 12 July 2022**

Neutral Citation Number: [2022] EWHC 2322 (Fam)

**Re XX (A Child) (Jurisdiction; Hague Convention 1980; Hague Convention 1996)**

Case No: FD21P00623 / CV21C01255
(formerly CV21C50083)

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2022

**Before** :

**MRS JUSTICE LIEVEN**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**AA**

**Applicant/Second Respondent**

**and**

**BB**

**First Respondent**

**and**

**COVENTRY CITY COUNCIL**

**Second Respondent/**
**Cross-Applicant**

**and**

**XX**
**(by his Children's Guardian)**

**Third Respondent**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Intervener**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr Jonathan Sampson QC and Professor Rob George** (instructed by **Best Solicitors Online**) for the **Applicant / Second Respondent**
**Ms Rachel Langdale QC and Ms Lubeya Ramadhan** (instructed by **Goodman Ray Solicitors**) for the **First Respondent**
**Mr Aidan Vine QC and Mr Nick Brown** (instructed by **Coventry City Council**) for the **Second Respondent / Cross Applicant**
**Ms Ruth Kirby QC and Jennifer Steele** (instructed by **Jackson West Solicitors**) for the **Third Respondent**
The attendance of the Intervenor was excused

Hearing dates: **8 – 10 June 2022**

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# Approved Judgment

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MRS JUSTICE LIEVEN

This judgment is being handed down in private on 12 July 2022.

The Judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates, the solicitors instructing them, or persons (other than the parties, members of their extended families and their children) identified by name in the judgment itself, may be identified by name or location. In particular the anonymity of the children and the adult members of their family must be strictly preserved. If reported, it shall be the duty of the Law Reporters to anonymise this judgment.

**Mrs Justice Lieven DBE :**

1. This case concerns XX, a boy, born in 2019 (now aged 2). There are two sets of proceedings concerning XX. An application by his Father, under the Hague Convention 1980 ('HC/80') for XX's summary return to the USA, and care proceedings under Part IV of the Children Act 1989 ('CA') brought by the Local Authority, Coventry City Council ('LA').

2. The case has had a difficult procedural history and at a 3 day hearing in June 2022 I heard submissions concerning the HC/80 application and issues of jurisdiction concerning the CA care proceedings. Those are the matters dealt with in this judgment.

3. The Local Authority was represented by Aidan Vine QC and Nick Brown, the Mother ('M') was represented by Rachel Langdale QC and Lubeya Ramadhan, the Father ('F') was represented by Jonathan Sampson QC and Professor Robert George, and the child was represented through the Children's Guardian, by Ruth Kirby QC and Jennifer Steele.

4. On my analysis, the following issues arise at this stage:

    a. Under the HC/80:

        i. Was the F exercising rights of custody over XX at the date of removal from the US?

        ii. Was the US (Oklahoma) Court exercising rights of custody over XX?

        iii. If the answer to either question is yes – is there a grave risk to XX if he is returned to the USA?

    b. In respect of the care proceedings, the first issue is whether the English Court has jurisdiction to hear care proceedings:

        i. What is the basis of the English Court's jurisdiction?

            1. Brussels II Revised or

            2. The Family Law Act 1986 or

            3. Common law principles applied to the Children Act 1989?

        ii. If the test for jurisdiction is habitual residence, at what date is habitual residence to be tested?

    c. If the English Court does have jurisdiction, what is the *forum conveniens* for the determination of matters concerning XX?

The Facts

5. The parents met online in 2015 and began a relationship. The F describes the relationship as "casual" and continuing for some years before breaking down in acrimony. On any analysis the relationship was highly acrimonious from what appears to be an early stage with numerous abusive messages passing between them, some of which I will refer to below. The F lived throughout in California. The M owns a property in Oklahoma, was born in H and has moved on a number of occasions. According to the chronology, she moved to Oklahoma in May 2019.

6. On 20 February 2017, a warrant of arrest and mandatory protection order was issued in Colorado against the F due to his alleged behaviour against the M. I do not intend to record all the texts/messages that have passed between the parties, but this extract gives something of a flavour:

> Message F to M: *'I am going to destroy you completely until you have nothing left but your shotgun and an open field. And no one to call for help'. 'In 20 minutes I can make your life so terrible you might end it'. 'I feel nothing towards you. I am making the call to VA tomorrow. That is the most damaging. And work my way down'. 'I have more evidence on my phone. You will lose your job'*
>
> Message M to F: *'This is your last chance to be reasonable. I'm having to file a restraining order…I've notified my employers of your threats'.*
>
> Message F to M: *'It's the medicine. I didn't get back on it. I'm sorry. I'm going to kill myself so I can't cause you harm'. 'I'm driving to my hiking spot. I'm jumping from the peak'.*

7. It should be noted that there are also messages where M contacts F, sees him and they have sexual relations. This judgment necessarily focuses more on the conduct and behaviour of the F than the M because it is his HC/80 application for summary return. It is however only fair to set out that there has been a large amount of abuse and apparently false allegations flowing from the M towards the F.

8. In March 2019 the M tells the F that she is pregnant. The F said the M told him she was pregnant by her ex-husband. A particularly unpleasant text was sent by F on 11 April 2019:

> F message to M: *'That isn't a baby, that's a retarded autistic velociraptor. You're a fucking FOOL to give birth. Enjoy the retard!'*
>
> F encourages M to take an abortion pill: *'I reiterate that you should take the pill before Saturday. If you haven't by then I'll assume you never will and that will be that. Contact me ONLY if/when you are no longer pregnant and only then can we salvage our relationship whether as friends or romantically'.*

9. On 17 May 2019 the F messaged the M:

> *"There is nowhere on Earth you can hide if you are in fact pregnant and do give birth. I will find you and you will lose that child. I will never stop until it is removed from your arms and you will never see it again. I will make it my life's mission to save it from your sociopathy by any and all means necessary. You'll never see me coming. Whenever you feel like I've finally given up and you're finally safe… that will be the time I act."*

10. On 25 September 2019 the F messaged the M:

> *"… stop emailing me. I will take full custody of my son. No visitations without my discretion. Period. Now stop your bullshit and go fuck yourself. I will not reply to you again. Ever."*

11. On 23 October the F made an application for a protective order against the M in Oklahoma, which was dismissed.

12. XX was born in 2019 in Denver, Colorado, USA. The F said that the M had booked a flight for him to attend the birth but then cancelled the flight to prevent him attending the birth. In the period after the birth the F raised the M's mental health with various statutory agencies. There was an investigation by the relevant Oklahoma authority, but no Court interventions were requested.

13. On 2 January 2020 the M made an application in Oklahoma for a Victim Protective Order. The Court made an order, but the F was not successfully served. On 7 March the F made an application for a Temporary Custody Order in respect of XX in Oklahoma.

14. Throughout this period there are copious references to the F raising concerns about the M's ability to parent XX, and that she was threatening the F and people connected to him. There are also references to the M raising concerns that the F was harassing her.

15. On 8 July 2020 the F made an application for a Temporary Custody Order and a petition for paternity. The application was served, and the M responded.

16. On 29 July the M applied for temporary orders in Oklahoma - to prevent either party molesting the other, removing the XX from Oklahoma, and various other protective orders. Ms Henson (the Oklahoma law expert who gave evidence to this Court) said these applications did not apply to paternity issues because the parents were not married. On 17 August a Victim Protective Order was made to protect the M and XX.

17. On 29 October 2020 the F made an application for an Emergency Custody Order. The F sought sole custody of XX, or alternatively an order that M and XX remain in Oklahoma during the proceedings and provide a genetic sample from XX. The motion was denied by the Court without hearing as it did not meet the statutory criteria. Ms Henson said it was dismissed because the Court did not consider the allegation would subject the child to "irreparable harm". As she put it, at this stage in Oklahoma law the F was a "legal stranger" to the child because paternity had not been established.

18. On 17 December 2020 the Oklahoma Court (Judge Kerr) granted the F's application for DNA testing and an order that the M must submit XX for such testing.

19. On 18 March 2021 the M and XX entered the UK from Seattle. She then claimed asylum both on her behalf and that of XX. They were provided with asylum seekers' accommodation. From 11 April onwards the M was accessing NHS care for XX.

20. I do not intend to set out all the matters which will be relevant in the care proceedings and will rather focus on the matters that go to jurisdiction, including grave risk under Article 13b of the HC/80.

21. On 19 March the Oklahoma Court ruled that F was XX's father, the M having failed to make the child available for DNA testing. On 26 May there was a hearing in the Oklahoma Court at which the M was ordered to appear.

22. On 19 May the M and XX moved to a mother and baby unit provided by the Home Office. On 27 May, XX was made subject to a Child Protection Plan by the LA due to concerns about the M's mental health and whether XX was being neglected. Throughout this period the LA were raising concerns about the accommodation the M was living in and the M's mental health.

23. On 8 July 2021 the F applied for paternity and a temporary order in the Oklahoma Court.

24. On 31 July the police exercised emergency powers to take XX into police protection and he was placed in foster care by the LA. The paramedics and social worker were concerned about the M's erratic and uncooperative behaviour.

25. On 3 August the F raised a motion for emergency custody in the Oklahoma Court. The F was granted a full Emergency Custody Order and a Writ of Assistance to remove XX from the M's care. The M signed a motion objecting to this order.

26. On 10 August an Interim Care Order was made in the Coventry Family Court by consent.

27. On 11 August the Oklahoma Emergency Custody Order was registered in the State of California.

28. On 8 September the F made an application in the UK under HC/80 for summary return. On 19 September HHJ Watson found she had jurisdiction to make a care order under s.3(1)(b) of the Family Law Act 1986 ('FLA') on the basis of presence in England.

29. On 17 September the Court in California filed criminal charges against the M on the grounds of child deprivation of custody and issued an arrest warrant with bail for $200,000.

30. On 4 November the Oklahoma Court ceded jurisdiction to the State of California.

31. On 6 December 2021 the Hague proceedings came before Holman J. He was concerned about whether the M had capacity and found on an interim basis that the M lacked litigation capacity.

32. There is then a period when the M suffered from significant mental health issues. She was detained under s.2 of the Mental Health Act 1986 on 24 March. There are a number of references through this period to the M making threats to kill the F.

33. On 23 December DNA testing confirmed the F's paternity of XX. This was also the last date that the M attended direct contact with XX. She said that she was fearful for her safety.

34. On 11 March 2022 the Home Office refused the M's and XX's asylum applications.

35. On 16 March the Official Solicitor agreed to act as litigation friend of the M. However, it was subsequently determined that the M had regained capacity and the OS was discharged on 25 May.

36. On 24 March the M was admitted to hospital under s.2 Mental health Act 1983.

37. On 12 April 2022 during the course of discussions with the LA about the F coming to the UK to be involved in the parenting assessment, the F emailed the LA in the following terms:

> *"I also do not need any "building of parenting skills", let alone from your corrupt institution that has proven not to give a damn about my son's emotional wellbeing or early childhood development. If you did care, you'd release him to his father immediately so he can have overdue stability. That would be putting my son first, but you'd rather milk him for additional public funding. There is nothing to be learned from self-righteous, woefully incompetent monsters like yourself. I will be suing you and your business into the ground and going public when the time is right. Coventry will deeply regret this ongoing injustice. I swear on my life I will not rest until you and your disgustingly mismanaged institution is bankrupted and/or thoroughly reformed…release my boy immediately."*
> F also states he will release a tell-all book.

38. I understand that the F felt frustrated by the process, and perhaps by reason of differences between the US and UK systems of child protection, struggled to understand the English Court system. However, by any standards, this was an aggressive and very ill-judged email which does not give me confidence in the F taking a child focused approach.

39. In the meantime, the F had made a number of applications to the Court in California where he resides. This is not relevant to the jurisdictional points but does go to the position if XX is sent to California. There is an arrest warrant for the M in California made on 17 September 2021, with bail of approximately $200,000.

40. Part of background to this case is the M's reliance on various matters from the F's past. In July 2012 the F was convicted of offering a false instrument and was sentenced to a period in prison. In 2015 he was sentenced to 90 days in prison for driving offences. In 2016 he received another 90 day sentence for driving under the influence of drugs and causing bodily harm. There is some reference to the F having mental health problems around this time.

Is the Hague Convention 1980 engaged?

41. The F accepts that at the date XX moved to England (18 March 2021) he did not have rights of custody. Therefore, the answer to the first question set out above is no, the F

was not exercising rights of custody at the date of removal. However, he relies on the rights of custody attributed to the Court for the purposes of Article 3 HC/80.

42. The relevant parts of the 1980 Hague Convention are as follows:

> **Article 1**
>
> The objects of the present Convention are -
>
> a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
>
> **Article 3**
>
> 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.
>
> **Article 4**
>
> The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.
>
> **Article 5**
>
> For the purposes of this Convention -
>
> a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
>
> b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

43. The leading case on when rights of custody are vested in the Court in a way sufficient to create an unlawful removal under Article 3 is the decision of the House of Lords in *In re H* [2000] 2 AC 91. The child had had irregular contact with the father in Ireland. The father filed an application for guardianship and access in Ireland and this was adjourned by consent. However, the mother then removed the child from Ireland and moved to England. The House of Lords accepted that a Court could be an "other body" for the purposes of the Convention and the Irish Court had a right of custody within the meaning of the Convention because the guardianship application was pending before the Court.

44. Lord MacKay, who gave the leading speech, referred to *B v B (Abduction: Custody Rights)* [1993] Fam 32, where Sir Stephen Brown P said at p.38:

> *"It seems to me that the Court itself had a right of custody at this time in the sense that it had the right to determine the child's place of residence, and it was in breach of that right that the mother removed the child from its place of habitual residence."*

45. Lord MacKay then quoted a useful passage from a Canadian case:

> *"The matter has also received detailed consideration by the Supreme Court of Canada first in Thomson v Thomson [1994] 3 S.C.R. 551 in which La Forest J. quoting the passage I have already quoted from Sir Stephen Brown P. said, at p. 588:*
>
> *"I am fully in agreement with this statement. It seems to me that when a Court has before it the issue of who shall be accorded custody of a child, and awards interim custody to one of the parents in the course of dealing with that issue, it has rights relating to the care and control of the child and, in particular, the right to determine the child's place of residence. It has long been established that a Court may be a body or institution capable of caring for the person of a child. As I explained in E. (Mrs) v. Eve [1986] 2 S.C.R. 388, the Court of Chancery has long exercised wardship over children in need of protection in the exercise of its parens patriae jurisdiction. But I see no need to rely on jurisdiction emanating from this doctrine, which has understandably 'puzzled and concerned' other contracting parties . . ."*

46. He then said at p.304D:

> *"There are two aspects to this matter. First of all the application to the Court must raise matters of custody within the meaning of the Convention and that will require in every case a consideration of the terms of the D application. Secondly, a question arises as to the time at which the Court acquires such right. It is clear that the interpretation which has been accepted of the Convention which allows the possibility of a Court having rights of custody does not contemplate that happening unless there is an application to the Court in a particular case raising the issue of the custody of one or more children. The date at which such application confers these rights is a matter which has not been the subject of detailed consideration ^ in relation to the Convention. For the purposes of the Civil*

> *Jurisdiction and Judgments Act 1982, Schedule 1, article 21 and the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters which is scheduled to that Act (Schedule 1) it has been held that an English Court becomes definitively seized of proceedings for the purposes of that Convention on the date of service of the writ at F which point it has jurisdiction over the merits of the dispute: Neste Chemicals S.A. v. D.K. Line S.A [1994] 3 All E.R. 180 and Dresser U.K. Ltd. v. Falcongate Freight Management [1992] QB 502".*

47. In my view, the policy justification, or the mischief being addressed in this decision is clear. Where the Court has the issue of custody before it, and one parent pre-empts the final decision by removing the child unilaterally, the HC/80 should be interpreted to prevent this unilateral action being determinative.

48. In *Re C (Abduction: Wrongful Removal* [1999] 2 FLR 859 Hale J (as she then was) considered a case where the father did not hold parental responsibility but had been having regular contact with the child before it was removed to Majorca. She referred to her comments in the earlier case of *Re W (Abduction: Father's Rights)* [1999] Fam 1.

49. There have been a large number of first instance authorities that touch on the issue of rights of custody of the Court, most of which turn on their own facts. The most important Court of Appeal case which relates to the issue before me is *Re VB (Abduction Custody Rights)* 1999 2 FLR 192. In that case the issue was the rights of custody of the father not the Court, but Ward LJ drew the distinction between rights of custody and rights of access at p.198:

> *"One needs, therefore, to look wider. One goes to the preamble which expresses the desire of the States signing the Convention: '... to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of habitual residence, as well as to secure protection for rights of access.' One sees at once a sharp distinction drawn between rights of custody and rights of access. The distinction was exposed in the trenchant judgments of Hale J in S v H (Abduction: Access Rights) [1998] Fam 49, [1997] 1 FLR 971 and Re W; Re B (Child Abduction: Unmarried Father) [1998] 2 FLR 146, with which I agree. In the latter she said at 157F:*
>
> *'Thus a deliberate distinction is drawn between rights of custody and rights of access ... Rights of custody are protected under Art 12 by the remedy of speedy return to the country where the children were habitually resident before they were removed. Rights of access are protected under Art 21 by remedies to organise and secure their effective exercise in the country where the children are now living.' Speedy return of the children wrongfully removed is required to give effect to that purpose of the Convention best expressed in para 19 of the Explanatory Report by Professor Pèrez-Vera as follows: 'The Convention rests implicitly upon the principle that any debate on the merits of the question, ie of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal ...'*

> *It seems to me, therefore, that the proper approach to the consideration of whether or not the father's rights amount to rights of custody is to view the expression broadly, endeavouring to give it a universal meaning but one which preserves the essential distinction between, on the one hand, the rights of custody which should only be varied by the Courts of the child's habitual residence for the purpose of which consideration the child should be speedily returned, and, on the other, the rights of access, the protection of which do not require so Draconian a remedy and which can be safeguarded 198 Ward LJ Re V-B (Abduction: Custody Rights) (CA) [1999] 2 FLR C7 in the country to which children will have been lawfully and not wrongfully removed."*

50. In *Re P* [2004] EWCA Civ 971 Ward LJ returned to the issue and explained how the domestic Court should approach the task:

> *"60. Accordingly on this aspect of the case, we conclude that (1) the Hague Convention requires the Court to give the expression "rights of custody" an autonomous interpretation; (2) the reference in article 3 to "rights of custody attributed to a person . . . under the law" of the child's habitual residence is not a choice of law of that state in the sense that if the domestic law, still less the conflict of laws rule, does not characterise the C right as a right of custody, then it will not be such a right for Hague Convention purposes; (3) the task of the Court is to establish the rights of the parents under the law of that state and then to consider whether those rights are rights of custody for Hague Convention purposes; (4) in considering whether those rights are rights of custody, the Court is entitled and bound to give a purposive and effective interpretation to the Hague Convention; (5) the rights given by the New York order to the father are rights of custody D for Hague Convention purposes, whether or not New York state or federal law so regards them either for domestic purposes or Hague Convention purposes."*

51. The relevant tests were considered by Munby J (as he then was) in *Re C (Unmarried Father: Custody Rights)* 2003 1 WLR 493, and at [55] he said:

> *"55. But what of his reference to interim orders and special cases? For this purpose it is necessary to go back to earlier authorities: see in particular B v B (Child Abduction: Custody Rights) [1993] Fam 32 and Re B (Abduction) (Rights of Custody) [1997] 2 FLR 594 , considered and applied by Hale J in In re W , Re J and Re C . From these authorities one can, I think, derive the proposition that, even if the proceedings have not been served, rights of custody will be vested in the Court if, in proceedings of the appropriate kind (as to which see In re W at p 19B, Re J at p 655H and Re C at p 864A) the Court:*
>
> *i) has made an interim order for residence or prohibiting the removal of the child from the jurisdiction or*
>
> *ii) even if it has not yet made any such order, has considered the matter and given directions for the future conduct of the proceedings: see In re*

*W at pp 5A–D, 12E, 16C–17D, Re J at pp 654F–H, 657C–E, and Re C at pp 860C–F, 863C–G."*

52. Mr Sampson argues that the Court was "seised" of the issue of custody because there were relevant matters before the Court including the F's application for DNA testing, and the M's applications for protective orders. These are sufficient to establish jurisdiction within the principles in ***Re H***. Mr Sampson submits that Ms Henson's reliance on there being no power for the Oklahoma Court to make a custody order in the F's favour until paternity is determined is irrelevant to whether the Oklahoma Court was exercising rights of custody. The fact that there is a condition precedent to the making of the order does not mean the Court is not seised. He draws an analogy with the need under the CA for section 10 CA to be crossed before a section 8 order can be made; or that Court cannot make a care order until threshold is crossed. These requirements do not mean that the Court is not seised of the matter.

53. Mr Sampson says that so long as there is an application before the Court which goes to custody issues, it does not matter that the Court is not in a position to make an order at that stage.

54. Ms Langdale, supported by Mr Vine and Ms Kirby, submits that the Oklahoma Court was not seised of the issue of rights of custody. Ms Langdale submits that the correct approach is to consider what rights were actually being exercised (see Article 3b) and what the Court could do at that stage.

55. She relies on the evidence of Ms Henson who said that the F's application of 8 July 2020 was an application for paternity. Until that was determined, the Court could not make an order for custody (certainly not one to him in reliance on his acting as the father), or indeed even entertain such an application. Therefore, that application and the Court's consideration of it, were not concerned with "rights of custody".

56. In terms of the F's application for emergency custody, which had been made on 29 October 2020, this had been dismissed. Further, Ms Henson gave evidence that the M's emergency application was invalid in Oklahoma law, and certainly could not form the basis of the Court exercising any rights of custody.

57. Ms Langdale relied on ***VB*** for the proposition that the Court might be seised of related issues, such as access, but that was not the same as the Court being seised with an application relating to custody. The latter was required for Article 3 to be engaged.

58. In my view, Ms Langdale's submissions are correct. The caselaw on what amounts to rights of custody attributed to the Court does not set out clear tests to be applied, and some of the cases refer to somewhat different stages of proceedings and the forms of proceedings vary across jurisdictions. However, trying to find a principled approach to the issue, it is clear that the Court must, as a minimum, have before it for determination an application for it to make an order relating to rights of custody, and to have the power to make such an order.

59. The purpose of the Convention is to protect children against abduction contrary to the rights of the left behind parent. The mischief that ***Re H*** and subsequent cases were seeking to deal with was where the left behind parent did not have legal rights of custody but was in the process of obtaining them through the home Court. If such an

interpretation was not adopted, then the abducting parent would be incentivised to flee the jurisdiction before the Court made orders. However, in my view, it must be the case that the court is materially engaged in the issue of rights of custody. For that reason, I agree with Ms Langdale that the Court needs to have before it an application (in whatever form) that would allow it to make an order concerning rights of custody. This accords with the approach of Munby J in ***Re C*** at [55] where he refers to the Court making some direction for a future hearing.

60. In the present case there were no such directions at the relevant date. The F's application for ex parte interim custody had been dismissed and had not been renewed. If such a test is not applied, I fail to understand how the Court can be said to have "rights of custody attributed to any other body" which, in any real sense, it could be said to be "exercising" for the purposes of Article 3(b). I do not understand any of the cases, when their facts are considered, to be positing any more tenuous a test.

61. I appreciate that Lord McKay referred to service being a requirement. However, I do not read his speech as setting a test that service alone would be sufficient. It is clear from ***VB*** that the matter in which the Court is seised must relate to rights of custody and not rights of access. Therefore, by analogy, the fact that there were some proceedings relevant to XX before the Oklahoma Court is not of itself sufficient to engage Article 3.

62. The situation here is that the Oklahoma Court, as at the date of removal, did not have before it an application by the F which would have allowed the Court to make an order for custody in his favour. The F's application for a paternity order does not itself relate to or establish rights of custody, so that application alone would not have allowed the Court to give the F rights of custody. This was Ms Henson's clear view, and she is the single joint expert on Oklahoma law. I do not accept Mr Sampson's argument that I should not consider paternity to be a condition precedent, and that an analogy with the need to establish threshold before a care order can be made. Paternity does not necessarily give rise to rights of custody and the two jurisdictions are so different in their analyses that I do not consider the analogy useful.

63. I agree with Ms Langdale that the provisions only make sense if the application, or the exercise of Court's powers, are made on behalf of the F. There has to be a "breach" of the rights of custody, and that would not be the case where the only relevant application was made by the M and not the F.

64. For these reasons I do not think that Article 3 is engaged and there was no unlawful removal. However, for the purposes of completeness I will set out my conclusion on grave risk.

Grave risk and intolerable situation

65. Article 13b of the HC/80 states that the requested State is not bound to order the return of the child if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

66. There is a vast amount of caselaw, including at the highest levels, on what amounts to an Article 13b defence. I agree with Ms Kirby that each case is fact specific. As Lady

Hale said in *Re E (Children) (Abduction Custody Appeal)* [2012] 1 AC 155 at [33]–[34]:

> *"Second, the risk to the child must be grave. It is not enough, as it is in other contexts such as asylum, that the risk be real. It must have reached such a level of seriousness as to be characterised as grave. Although grave characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as grave while a higher level of risk might be required for other less serious forms of harm. (In Re E (Children) (SC(E)) [2012] 1 AC 144).*
>
> *34. Third, the words physical or psychological harm are not qualified. However, they do gain colour from the alternative or otherwise placed in an intolerable situation (emphasis supplied). As was said in In re D [2007] 1 AC 619, para 52, intolerable is a strong word, but when applied to a child must mean a situation which this particular child in these particular circumstances should not be expected to tolerate. Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent."*

67. Ms Langdale and Ms Kirby make extensive reference to the psychiatric assessment of the M, her fragile mental health and the impact that her fear (whether justified or not) of the F has had and apparently continues to have on her mental health. However, in my view, it is not necessary for me to consider that part of the evidence in any detail. The more obvious, immediate and in some ways less contentious issue, is that if I order the return of the child to California then there is a very significant possibility that he will be separated from his mother for a prolonged period and quite possibly irrevocably. That in my view would be a grave risk of psychological harm and place him in an intolerable situation.

68. The F has made it abundantly clear in his statements, in the parenting assessment and in numerous texts and messages, some of which are referred to above, that he will strenuously resist the M having any contact with XX. Doubtless he takes this stance because he believes it to be in the child's best interests. It is not impossible that he will change that position in the future, and he may accept professional advice. However, there can be no doubt that if I ordered XX to return to the USA to the care of his F, then as matters stand at the moment, the F would take steps to ensure a complete cessation of any contact, even letterbox contact, with the M.

69. Further, the M is currently subject to an arrest warrant in California, with a bond of $200,000 and there is a Californian order which gives custody to the F with no rights of contact to the M. This means that it is very unlikely as matters stand that the M will go to California, and her ability to fight for custody or even access to XX will be very limited. I note that the F, most unusually in these cases, does not put forward any

protective measures for the M to accompany XX and does not suggest that he will seek to withdraw any allegations against the M or to persuade the police or the Courts to lift the arrest warrant.

70. The F has had successful indirect contact with XX, and some limited direct contact with him when the F was in England for the parenting assessment. The evidence is that this contact has gone well. However, XX does not have a strong bond with him. If this was an issue in care proceedings, and there was a carefully undertaken welfare balance, then it might be wholly acceptable to move XX to California with a transition plan in place. However, these are summary proceedings, and no detailed welfare balance has been undertaken.

71. The M was, until he was taken into care, XX's primary carer. The evidence is that they had a strong bond despite the issues that are raised in the care proceedings. In any event, to separate a child from his primary carer, being the only parent he has known in any caring sense and then to send him to a parent who he has only had limited contact with is a very significant step, certainly in a summary process. I would be severing his links to his M for a very long time, if not irrevocably. This is particularly the case given the arrest warrant and the intense difficulties the M is likely to have fighting the F for contact/custody in California.

72. I also accept the submission of Mr Vine that if I summarily return XX to California to the care of F then I am putting him back into a situation of extreme conflict between his parents. As he says, this is a case of truly enormous levels of acrimony which go way beyond unpleasant texts and some inappropriate social media comment. The F has sent some of the most vicious and aggressive communications that I have had the misfortune to have had to read. The M has made outlandish and plainly untrue allegations and has suffered a severe mental health crisis, apparently in large part because of this conflict.

73. For these reasons I conclude that XX would be at grave risk of serious psychological harm and would be placed in an intolerable situation if he was returned to California pursuant to this application.

Jurisdiction for the Care Proceedings

74. Mr Sampson raises a complex issue concerning the nature of the Court's jurisdiction to consider the care proceedings. I will outline the issue below, however for the reasons I will explain, it is not necessary for me to determine the matter in this case.

75. Under Part IV of the Children Act 1989 there is no provision setting out the basis of the Court's jurisdiction. The Act does not state whether jurisdiction is based on habitual residence or mere presence. However, all parties accept that the Court has jurisdiction whether on the basis of "presence" under the common law or habitual residence under the Hague Convention 1996 ('1996 Convention').

76. Mr Sampson argues that jurisdiction does not arise under the 1996 Convention because that route is only available in disputes over jurisdiction between two contracting States, and the USA has not ratified the 1996 Convention. He therefore says that jurisdiction should be based on the tests set out in the Family Law Act 1986 ('FLA'), namely

habitual residence or, failing that, presence in England, and he accepts that at all relevant dates XX was present in England.

77. The argument that the 1996 Convention only applies in cases with two signatory states was considered by MacDonald J in *Warrington BC v T* [2021] EWFC 68, where he rejected the argument. Mr Sampson seeks to persuade me that that decision was wrong, and he relies on a passage in Clarke, Hall and Morrison on Children (2022 para 934-936).

78. The only reason that it would be relevant whether jurisdiction was based on the 1996 Convention or the FLA is that there is a difference in the caselaw between MacDonald J in *Warrington BC v T* [2021] EWFC 68 and Cobb J in *NH (1996 Child Protection Convention Habitual Residence)* [2015] EWHC 2299 (Fam) who have found that for the 1996 Convention habitual residence should be considered on the date of the hearing; and Williams J in *FA v MA* [2021] EWHC 3024, who thought the relevant date was the date proceedings commenced.

79. All parties accept that XX is now habitually resident in England having been here since March 2021. However, Mr Sampson argues that XX was not habitually resident in England on 9 August 2021 when proceedings were issued.

80. Therefore, if I found that the relevant test was habitual residence and not presence, and then found XX was not habitually resident on 9 August 2021, the Court would not have jurisdiction.

81. However, in my view XX was habitually resident in England on 9 August 2021 and therefore this entire debate is academic in the present case. The caselaw on habitual residence within the family jurisdiction is extremely well known and does not need extensive repetition. It was addressed by the Court of Justice of the European Union in *Proceedings brought by A [Case C-523/07)* [2010] Fam 42 at [38] to [41]:

> *"38. Having regard to the wording and objectives of Council Regulation (EC) No 2201/2003 and the relevant multilateral Conventions, the concept of habitual residence in article 8(1) of the Regulation should therefore be understood as corresponding to the actual centre of interests of the child.*
>
> *39. In order to ascertain the actual centre of interests, the referring Court must take account of all factors present "at the time the Court is seised". It is unclear, however, what is to be regarded as becoming seised in a case such as the present in which the authorities have clearly acted on their own authority. (On the concept of the institution of proceedings, for the purposes of article 64(2) of Council Regulation (EC) No 2201/2003, see my opinion in Proceedings brought by C (Case C-435/06) [2007] ECR I-10141:*
>
> *"62. The third question concerns the temporal scope of application of Council Regulation (EC) No 2201/2003. According to the transitional provisions in article 64(2) the Regulation applies to recognition and enforcement of judgments subject to three conditions: … [second requirement] the proceedings resulting in the judgment must have been*

*instituted before the date of application of Council Regulation (EC) No 2201/2003 but after the date of entry into force of Council Regulation (EC) No 1347/2000 …"*

*"67. As regards the second requirement (see above, para 62), the national Court proceeds on the footing that the proceedings were instituted in autumn 2004 when the Social Welfare Board initiated the investigation. By contrast, the commission submitted that the proceedings were instituted only by the Social Welfare Board's application to the Länsrätt on 25 February 2005 for confirmation of its decision.*

*"68. Article 16 of Council Regulation (EC) No 2201/2003 specifies only when a Court is to be regarded as seised, that is to say-in short-at the time when the document instituting the proceedings is lodged with the Court, or if the document has to be served before being lodged with the Court, at the time when it is served on the respondent. By contrast, the provision does not directly cover the case in which an authority acts on its own authority and takes measures to protect children. However, if the date of the relevant decision is not that of the order of the Social Welfare Board of 23 February 2005 but that of its confirmation by the Länsrätt on 3 March 2005, that would suggest, as the commission submits, that for the purposes of article 64(2) the proceedings should be regarded as instituted only by the Social Welfare Board's application to the Länsrätt.")*

*The relevant act could in particular be the taking into care on 16 November 2005, since it was by that measure that the authorities first acted with external effect. (Concerning the institution of proceedings for the purposes of article 64(2) of Council Regulation (EC) No 2201/2003, the Court of Justice seems to focus on an even earlier date, namely the start of the authorities' internal investigations: see Proceedings brought by C (Case C-435/06) [2008] Fam 27, para 72.)*

*40. In this case, the duration and regularity of residence and the child's familial and social integration may in particular be significant for determining the place of habitual residence.*

*Duration and regularity of residence.*

*41. To distinguish habitual residence from mere temporary presence, residence must normally be of a certain duration. Council Regulation (EC) No 2201/2003 does not prescribe a particular time limit in this connection. When residence is sufficiently permanent depends instead on the circumstances of the individual case. Important factors here may be in particular the age of the child and the familial and social circumstances described below."*

82. The most helpful domestic case is Hayden J in *Re B (A Minor: Habitual Residence)* [2016] EWHC 2174 (endorsed by Moylan LJ in *Re M* [2020] EWCA Civ 1105), save for point viii, which is not relevant in the present case:

*"17. I think that Ms Chokowry's approach is sensible and, adopt it here, with my own amendments: (i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (A v A, adopting the European test). (ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual inquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A, In re L). (iii) In common with the other rules of jurisdiction in Council Regulation (EC) No 2201/2003 ("Brussels IIA") its meaning is "shaped in the light of the best interests of the child, in particular on the criterion of proximity". Proximity in this context means "the practical connection between the child and the country concerned": A v A, para 80(ii); In re B, para 42, applying Mercredi v Chaffe (Case C-497/10PPU) EU:C:2010:829; [2012] Fam 22, para 46. (iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (In re R). (v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (In re LC). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration. (vi) Parental intention is relevant to the assessment, but not determinative (In re L, In re R and In re B). (vii) It will be highly unusual for a child to have no habitual residence. Usually a child lose a pre-existing habitual residence at the same time as gaining a new one (In re B). (viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the Court must weigh up the degree of connection which the child had with the state in which he resided before the move (In re B —see in particular the guidance at para 46). (ix) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (In re R and earlier in In re L and Mercredi). (x) The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (In re R) (emphasis added). (xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (article 9 of Brussels IIA envisages within three months). It is possible to acquire a new habitual residence in a single day (A v A; In re B). In the latter case Lord Wilson JSC referred (para 45) to those "first roots" which represent the requisite degree of integration and which a child will "probably" put down "quite quickly" following a move. (xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both*

> *parents to reside there permanently or indefinitely (In re R). (xiii) The structure of Brussels IIA, and particularly recital (12) to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; As such, "if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the Court should adopt the former" (In re B supra)."*

83. Mr Sampson focuses on the words "some degree of integration in a social and family environment" and says that XX was not integrated into such an environment in England by 9 August.

84. In my view, XX was plainly habitually resident in England by 9 August 2021. He was a young child and was still being breastfed. He had no relationship with his F and no close family ties in the USA. As Ms Kirby puts it, his M was effectively his world. His M had come here and sought asylum for both XX and herself, so plainly she wished to settle in the UK. As is well known, parental intention is not determinative and may carry varying degrees of weight. With such a young child, and in the absence of any other real home base, in my view the M's actions and intentions are important in determining where XX was integrated into a home environment.

85. It is also the case that the M and XX were necessarily accommodated in England and were accessing health and social care services. Although this is a relatively low level of social integration, given XX's young age and the lack of family ties either here or in the USA, that is hardly surprising.

86. Mr Sampson argued that XX continued to be habitually resident in the USA. He accepted that XX could not be habitually resident in California because he had never been there. Therefore, the only place he could have been habitually resident was Oklahoma. However, in my view this is unarguable given that the M had unequivocally left there and there were no remaining social or family ties in Oklahoma.

87. Given that I have found that XX was habitually resident in England on the date that proceedings were issued, it is not necessary for me to determine whether that or the date of the hearing are the relevant date. On either basis he was habitually resident in England at those dates, and he was obviously present in England. It is therefore also not necessary for me to determine whether my jurisdiction arises under the 1996 Convention or by analogy under the FLA 1986.

Forum Conveniens

88. The final issue to be considered is that of the most convenient forum for the case. The legal test is that set out in ***Spilliada v Consulex*** [1997] AC 460. The relevant principles were summarised by MacDonald J in ***W v L*** [2019] EWHC 1995 and are not contentious; at [30]:

    i) It is upon the party seeking a stay of the English proceedings to establish that it is appropriate;

ii) A stay will only be granted where the Court is satisfied that there is some other forum available where the case may be more suitably tried for the interests of all parties and the ends of justice. Thus, the party seeking a stay must show not only that England is not the natural and appropriate forum but that there is another available forum that is clearly and distinctly more appropriate;

iii) The Court must first consider what is the 'natural forum', namely that place with which the case has the most real and substantial connection. Connecting factors will include not only matters of convenience and expense but also factors such as the relevant law governing the proceedings and the places where the parties reside;

iv) If the Court concludes, having regard to the foregoing matters, that another forum is more suitable than England, it should normally grant a stay unless the other party can show that there are circumstances by reason of which justice requires that a stay should nevertheless be refused. In determining this, the Court will consider all the circumstances of the case, including those which go beyond those taken into account when considering connecting factors.

89. Again, I consider the answer to this issue to be straightforward. Firstly, Mr Sampson accepts that if one narrows the issue to the determination of the care proceedings, then England must be the most convenient forum. They are English proceedings, with an English local authority as the applicant. However, even if one considers the issue to be simply that of where XX should live and with whom, in my view it is plain that the answer remains England. XX is living and settled with carers in England. Therefore, any assessment of him and his welfare will turn on evidence of what is happening in England. Any English social worker or equivalent is in a far better position to assist the Court than anyone in California. His mother is in England and effectively cannot travel to California because of the arrest warrant.

90. Applying the ***Spilliada*** principles – England is the natural and appropriate forum. The child is in England and it will be far more convenient to consider the case in England, both in respect of the law and practical convenience.

91. The only participant in these proceedings who is in California is the Father. The decision as to where XX is to live is between the two jurisdictions but, on the basis that decision is yet to be made, I can see no argument that the Californian Court is in a better position to decide than the English Court. Therefore, I reject Mr Sampson's application for a stay and a transfer of proceedings to California.