Neutral Citation Number: [2015] EWCA Civ 886

Case No: B4/2014/2859

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MRS JUSTICE HOGG

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 August 2015

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE BLACK
and
LORD JUSTICE UNDERHILL

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Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)

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Mr David Williams QC and Mr Alistair Perkins (instructed by Freemans) for the appellant
Mr William Tyler QC and Miss Hannah Markham (instructed by Goodman Ray) for the respondent
Mr Richard Harrison QC, Miss Madeleine Reardon and Miss Jennifer Perrins (instructed by Farrer and Co LLP) for the intervener Reunite International Child Abduction Centre

Hearing dates : 13-15 May 2015

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Judgment

Lady Justice Black :

1. This is the judgment of the court to which we have all contributed.

2. P was born in April 2008 and is now 7 years old. She was conceived by IVF, her father being an unknown donor. At the time of her conception, her mother (the respondent to this appeal) was in a relationship with another woman (the appellant) with whom she was living. This appeal arises from the appellant's attempts to have contact with P following the parties' separation. It is an appeal from Hogg J's dismissal, on 31 July 2014, of the appellant's applications under the Children Act and under the inherent jurisdiction of the High Court.

The factual background in outline

3. From birth, P was brought up in the household of the appellant and the respondent. The respondent was at all times her primary carer but the appellant played a role in her care when she was available. Since December 2011, when the appellant and the respondent separated, P has lived with the respondent. To begin with, the appellant moved out of the parties' jointly owned home and the respondent remained living there with P. On 3 February 2014, however, the respondent left this country to take up residence in Pakistan, taking P with her. They have remained in Pakistan since then.

4. The adults have been in conflict since their separation. The appellant continued to see P but it was not always easy to arrange contact and over time it reduced so that by the time the respondent went to Pakistan, the appellant was seeing P only once every three weeks for about two hours. The appellant had been trying to obtain more contact with P. In October 2013, she wrote to the respondent proposing a shared residence order and saying that she would take proceedings if that was not agreed. The parties attended a mediation session in January 2014 and there was to be another in February but then the appellant found herself unable to communicate with the respondent. Not knowing that the respondent had departed for Pakistan, she commenced Children Act proceedings on 13 February 2014, also seeking orders to assist her to locate P.

5. The Children Act proceedings came to the respondent's attention by early May 2014 and her solicitors then informed the appellant that the respondent and P had been in Pakistan since 3 February. The respondent challenged the jurisdiction of the English court to entertain the proceedings and, on 12 May 2014, directions were given with a view to the issue being determined by the High Court.

6. On 6 June 2014, the appellant made an application for an order under the inherent jurisdiction. The relief sought was that P should be made a ward of court and her summary return to this jurisdiction should be ordered. By way of explanation as to why the application was made, the application form said:

> "The Applicant seeks a summary return of her daughter under the inherent jurisdiction. She is concerned about P's welfare having been removed from England and Wales and taken to Pakistan [sic]. A return to England and Wales would also facilitate contact with her daughter."

7. The proceedings culminated in the hearing before Hogg J, who was to consider the question of jurisdiction, whether P should be a ward of court during her minority, whether summary return should be ordered, and the question of contact (see §7 of the order of Moylan J of 9 June 2014). The respondent was ordered to attend the hearing before Hogg J in person but she did not comply with this, nor had she complied with an order to attend at an earlier stage in the proceedings. She was represented, however, and she gave evidence by telephone during the two-day hearing. The appellant gave evidence in person.

Jurisdiction in outline

8. Two alternative bases for jurisdiction were asserted, namely habitual residence and nationality, P being a British national. Habitual residence was the preferred option. If P was habitually resident here on 13 February 2014 when the Children Act proceedings were begun, and there was therefore jurisdiction for those proceedings, there would be a comparatively straightforward route by which the appellant could achieve a resolution of the issues over P. However, if it could not be established that P was habitually resident here on 13 February 2014, the appellant asked Hogg J to exercise the inherent jurisdiction on the basis of nationality.

9. Hogg J considered the provisions of the Family Law Act 1986 sections 1 to 3 which she cited in her judgment. As relevant, these provide as follows:

> "**S.1 Orders to which Part I applies**
>
> (1) Subject to the following provisions of this section, in this Part "Part I order" means—
>
> (a) a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order;
>
> …..
>
> (d) an order made by a court in England and Wales in the exercise of the inherent jurisdiction of the High Court with respect to children—
>
> (i) so far as it gives care of a child to any person or provides for contact with, or the education of, a child; but
>
> (ii) excluding an order varying or revoking such an order;
>
> ….
>
> **S. 2 Jurisdiction: general**
>
> (1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless –
>
> (a) it has jurisdiction under the Council Regulation [No 2201/2003] or the Hague Convention [1996], or

> (b) neither the Council Regulation nor the Hague Convention applies but –
>
> (i) [matrimonial or civil partnership proceedings]
>
> (ii) the condition in section 3 of this Act is satisfied.
>
> ….
>
> (3) A court in England and Wales shall not make a section 1(1)(d) order unless –
>
> (a) it has jurisdiction under the Council Regulation or the Hague Convention, or
>
> (b) neither the Council Regulation nor the Hague Convention applies but –
>
> (i) the condition in section 3 of this Act is satisfied, or
>
> (ii) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of the powers is necessary for his protection."
>
> **S. 3 Habitual residence or presence of child**
>
> (1) The condition referred to in section 2(1)(b)(ii) of this Act is that on the relevant date the child concerned –
>
> (a) is habitually resident in England and Wales, or
>
> (b) is present in England and Wales and is not habitually resident in any part of the United Kingdom or a specified dependent territory,
>
> ……."

10. Hogg J found that P was not habitually resident here on 13 February 2014, in essence because she had lost her habitual residence in this country upon her departure with the respondent for Pakistan, albeit that, in the judge's view, she had probably not yet acquired a habitual residence in Pakistan. In the light of her finding as to habitual residence, the judge held that there was no jurisdiction to entertain the Children Act proceedings.

11. As for the inherent jurisdiction, in light of P's British nationality, there is no doubt that it did exist, in so far as it had not been removed by the jurisdictional provisions of the Family Law Act 1986 which are set out above. An order made in the exercise of the inherent jurisdiction, which gives care of the child to any person or regulates contact, would come within section 1(1)(d) of the Act and, on the facts of this case, there would not be jurisdiction to make such an order because the jurisdictional provisions of the Act would not be satisfied. However, a return order is not caught by section 1(1)(d) (see *A v A and another (Children: Habitual Residence)(Reunite*

International Child Abduction Centre and others intervening) [2013] UKSC 60, [2014] AC 1, hereafter *A v A*) and is therefore not within the jurisdictional prohibitions in section 2(3) of the Family Law Act 1986. This explains the application made by the appellant on 6 June 2014 for such an order. The question for Hogg J in relation to the inherent jurisdiction was, accordingly, not whether the jurisdiction existed, but whether this was an appropriate case in which to exercise it. The appellant argued that it was, principally because she would be unable to litigate about P in Pakistan because of the approach in that country to homosexuality which meant, she said, that the only forum to resolve issues over P's welfare was the courts of England and Wales.

12. Hogg J declined to exercise the inherent jurisdiction. She reviewed certain of the authorities on the question of when it is appropriate to do so but concluded that the facts of the present case did not justify such a course, it being "[a]t heart a contact application which does not come within the 'extreme circumspection' or 'dire circumstances' as referred to" in the jurisprudence.

Grounds of appeal

13. The appellant appealed on two grounds. She complained, first, that the judge's finding as to habitual residence was wrong. She argued that P remained habitually resident in England and Wales as at the relevant date, 13 February 2014, because she was still integrated in a social and family environment here. Her second ground of appeal was that Hogg J was wrong to conclude that she should not exercise the inherent jurisdiction, in particular failing to have regard to P's best interests as a primary consideration in reaching her determination and to recognise that the obstacles to the appellant litigating about P in Pakistan meant that England was the only available jurisdiction which could determine the dispute about P's welfare. It was argued that the refusal to exercise the jurisdiction was a breach of the appellant's article 6 and article 8 rights.

Habitual residence

Common ground

14. The parties agreed before Hogg J, as before us, that habitual residence is a question of fact and that it corresponds to the "place which reflects some degree of integration by the child in a social and family environment". They were also in agreement that, at least in theory, habitual residence can be lost on departure from a country without a new habitual residence necessarily being acquired instantly elsewhere, so that there can be a period of time when a person has no habitual residence. It will be necessary to look at the law relating to habitual residence in a little more detail in due course, because the appellant criticised Hogg J's approach to it. However, these agreed propositions are sufficient for present purposes.

15. The starting point for Hogg J's examination of habitual residence was the agreed fact that the respondent and P were habitually resident in this country until their departure on 3 February 2014. The parties were also agreed that the respondent was the sole legal parent and the sole person with parental responsibility for P and also that the removal of P from the jurisdiction was not wrongful (§13).

Some further facts

16. Hogg J's judgment contains a considerable amount of information which is pertinent to the question of habitual residence. Some has been referred to already but some further facts need to be outlined here to complete the context for our decision. There has been no attempt on appeal to challenge the facts found by the judge or set out in her judgment, the concentration being rather on her application of the law to the facts.

17. Early on in her judgment (§2), the judge set out the parties' origins. The respondent was born in Africa of Pakistani origins and is a British citizen. Her immediate family live in England but there are other members of the wider family living in Pakistan. The appellant was born in England, her mother being a Kenyan Indian and her father an Indian from the Punjab.

18. The appellant and the respondent met in 2003 and, in the course of their relationship which lasted between 2004 and 2011, they bought their own home in their joint names. They did not enter into a civil partnership and, until she made her Children Act application in February 2014, the appellant had not made any application for parental responsibility or made any other application under the Children Act.

19. At §5 of the judgment, Hogg J said of the period following the parties' separation:

> "After December 2011, when the applicant left, there has only been conflict. The applicant has not played any role in the childcare or arrangements for the child's welfare. She has not played a part or exercised any parental responsibility. P continued with her mother to live in the jointly owned home. Both the ladies paid an equal share of the mortgage throughout that time and since her departure the mother continued to pay her share of the mortgage to maintain her asset."

20. At §4, the judge described how the respondent had been in part time employment following the separation but finding life difficult financially and struggling with work, home and childcare. Then, in July 2013, she was made redundant and received a redundancy payment which gave her time to think and reassess her life. It was suggested to her that there might be business opportunities for her in Pakistan and in November 2013, she went without P on a fact-finding trip to Pakistan, to see whether she could relocate there. Between the end of November 2013 and February 2014, she decided to do so. She had a job, she had researched English-speaking schools there, and she could stay with a friend until she found a home. The appellant's case was that the respondent fled to Pakistan from the forthcoming mediation and the potential litigation over P. Hogg J rejected that (§§6 and 28). She accepted that the respondent intended to create a new life for herself and P in Pakistan.

21. At §7, Hogg J described what happened at the time of the respondent's departure for Pakistan as follows:

> "On 3 February the mother left, she says permanently with no intention to return. The application made by the applicant is dated 13 February, ten days later. The mother was not aware of that application until shortly after 29 April this year when it

> was received by her parents. By then the mother had settled to some extent in Pakistan. On … she had entered a tenancy for a home for herself and P and moved to that home. On … she located an English speaking school for P, paid the fees and P commenced at that school on … The mother also applied for an ID card on her arrival. She obtained that on … and that card gives her indefinite leave to remain and with that P has the right to remain. Up until then they had entered via the family visa card for British citizens who are of Pakistani origin. That gave her about three months' leeway. She has also been working and had been working since the date of her arrival."

22. The keys to the home in England were sent to the appellant with a covering letter which said nothing about the move to Pakistan. The respondent told the judge that she had the support of her family who knew about her plan (§27). At §14, the judge set out the respondent's case as to P's perception of the move as follows:

> "P knew they were going on a long-term basis, she had said goodbye to her family and school, she had packed up her home and possessions and she was going with her mother, her primary carer."

23. The appellant argued (see §15) that P was still integrated here. She focused particularly upon P's relationship with her and the impact of the move upon it. She said that P had written her a note at Christmas 2013 saying that she was missing her and that during the last contact visit, at the end of January 2014, P told the appellant that they were going away, that she was sad and scared that the appellant would not be able to find her. The judge proceeded on the basis that, as everyone accepted, the appellant was "a significant person in P's life" (§28) and that P wanted to keep in touch with her.

Hogg J's determination

24. Hogg J considered the possibility that the habitual residence position of P and her mother might be different. She specifically asked herself whether P's wish to remain in touch with the appellant was enough to indicate that she retained her habitual residence in England. She set out her conclusion at §29:

> "I must look at the facts. The mother is the sole legal parent and in moving [P] she had planned a life away from this country. It was not a wrongful removal. She was exercising her parental responsibility. P's wish to remain in touch is something that I must consider. It does not necessarily mean that the child has to remain in the country. There are many children throughout the world who remain in touch with families or members of a family or even friends when they are relocated by their parents. This is another relocation and a child wishing to remain in touch with a significant person. In my view her wish to remain in touch with the applicant does not justify making or continuing an individual habitual residence in this country when the mother has abandoned her own. I therefore find that

> not only did the mother lose her habitual residence but so did P from upon their departure from this country…. I am not saying that they had acquired a new habitual residence by then….they lost their habitual residence in this country and in my view probably they had not acquired habitual residence in Pakistan at that stage."

25. This conclusion had been preceded, in §§26 to 28, by a review of the evidence which made it clear that Hogg J was aware that her factual investigation required an analysis of all the facts surrounding the respondent's move to Pakistan, not confined to the question of her relationship with the appellant which she examined in §29.

The appellant's criticism of Hogg J's approach

26. The appellant sought to persuade us that although Hogg J had referred to most of the relevant authorities, she had omitted to cite (and to consider) the central passages which should guide a judge when determining an issue of habitual residence and had got the emphasis wrong in relation to the law. In particular, it was submitted that she had focused on what Lord Brandon said in *In re J (a minor) (abduction: custody rights)* [1990] 2 AC 562 when she should have made reference to the decision of the Supreme Court in *A v A*, especially at §54 of Baroness Hale's judgment, and to two European decisions, namely *Proceedings brought by A* [2010] Fam 42 and *Mercredi v Chaffe* [2012] Fam 22.

27. Fundamental respects in which Hogg J erred, in the appellant's submission, included failing to carry out a comparative balancing exercise of what P had left behind in this country and what awaited her in Pakistan, and concentrating too much on the respondent's intention rather than evaluating the whole picture. That picture included, in the appellant's submission, the factors listed by Mr Perkins (who represented the appellant on his own before Hogg J) in his closing submissions, such as the short period of time between the departure from England and the relevant date, the fact that this was P's first visit to Pakistan and that she does not speak Urdu, the contrast between her settled existence in this country where she was attending school and the temporary arrangements that there were initially in Pakistan, and that her family and social relationships were in this country not Pakistan, particularly (but not only) with the appellant. It was submitted that as a matter of fact it is only in the most carefully planned move of a whole family unit that habitual residence will be lost in a day and that it did not happen here, given P's lifetime integration into a family, school and social environment in this country.

28. There is clear guidance from the Supreme Court on the question of habitual residence, the matter having been considered on no fewer than four occasions since 2013, namely in *A v A*, *In re L (A Child) (Custody: Habitual Residence)* [2013] UKSC 75, [2014] AC 1017, *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1, [2014] AC 1038 and, in a decision which was handed down after the hearing in the instant case, *In re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2015] UKSC 35, [2015] 2 WLR 1583. In these circumstances, it is unnecessary for this court to restate the principles. The European formulation of the test (to be found in *Proceedings brought by A* at §2, as quoted in *A v A* at §48) is the correct one, namely that "the concept of habitual residence …. must be interpreted as meaning that it corresponds to the place which

reflects some degree of integration by the child in a social and family environment". The inquiry is a factual one, requiring an evaluation of all relevant circumstances in the individual case. It focuses upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It should not be glossed with legal concepts. And, as Lord Reed observed at §18 of *In re R*, when the lower court has applied the correct legal principles to the relevant facts, its evaluation will not generally be open to challenge unless the conclusion which it reached was not reasonably open to it.

29. The arguments advanced by the appellant and also on behalf of the intervener, Reunite, appeared at times to amount to an invitation to swathe habitual residence in sub-principles, or glosses, or comments, in a way which would fly in the face of the determinedly factual approach of the European jurisprudence and the Supreme Court. So, for example, we were invited to say that it would only be in exceptional cases that a child would lose one habitual residence before acquiring another. And that if someone in the child's life can be classed as their "psychological parent", they may carry greater weight in the factual evaluation than another person who is significant in the child's life. As to the first proposition, it may be that there will turn out to be relatively few cases in which the habitual residence of a child does not transfer seamlessly from one country to another, but if so, that will be because the facts tend to be that way and not because the courts impose upon themselves the artificial discipline of only finding it otherwise in exceptional circumstances. As to the latter, anything which encourages satellite litigation over labels is to be avoided. It is quite unnecessary, and unhelpful, to engage in such a process when what matters is the individual facts which are likely to vary infinitely from case to case.

30. In our view, Hogg J's approach to the question of habitual residence was in line with the authorities. She conducted a factual inquiry focused on the correct meaning of the concept. There is no evidence that she was deflected from contemporary methodology by anything in *In re J (a minor) (abduction: custody rights)* (above). She recognised that P and the respondent may be habitually resident in different countries and specifically considered P's position separately. She took into account P's relationship with the appellant as a significant person in her life and she was well aware that the appellant did not know about, let alone agree to, the move to Pakistan. She described in her judgment the situation in this country and the situation in Pakistan in such a way as to show that she had looked both at what P was leaving and what was awaiting her in Pakistan. In short, she applied the proper principles to the relevant facts and there is no reason to interfere with her finding that P lost her habitual residence here when she left for Pakistan.

The inherent jurisdiction

31. We turn now to consider the inherent jurisdiction.

32. It is clearly established by the authorities, including authority at the highest level, that the court may make a child who is a British subject a ward of court even if, at the time the order is made, the child is outside the jurisdiction. The starting point is usually taken to be the decision of Lord Cranworth LC in *Hope v Hope* (1854) 4 DeGM&G 328. Very recently the principle has been accepted by the Supreme Court in *A v A*. The older authorities frequently cited in this context include *In re Willoughby (An Infant)* (1885) 30 ChD 324, *In re Liddell's Settlement Trusts* [1936] Ch 365 and *In re*

P(GE) (An Infant) [1965] Ch 568. Cases on the corresponding exercise of jurisdiction by the old Probate, Divorce and Admiralty Division or under the Guardianship of Infants Acts 1886 and 1925 include *Harris v Harris* [1949] 2 All ER 318, *R v Sandbach Justices ex p Smith* [1951] 1 KB 62 and *Harben v Harben* [1957] 1 WLR 261.

33. There is equally no doubt as to the basis upon which this jurisdiction is exercised in such cases. It was explained by Lord Cranworth LC in *Hope v Hope* (1854) 4 DeGM&G 328, by Kay J and, on appeal, by Cotton LJ *in In re Willoughby (An Infant)* (1885) 30 ChD 324 and again by Sachs J in *Harben v Harben* [1957] 1 WLR 261. For present purposes, however, we can go straight to the judgment of Pearson LJ in *In re P(GE) (An Infant)* [1965] Ch 568, page 587. Referring to the three cases just mentioned, Pearson LJ said this:

> "It is clear from the authorities that the English court has, by delegation from the Sovereign, jurisdiction to make a wardship order whenever the Sovereign as parens patriae has a quasi-parental relationship towards the infant. The infant owes a duty of allegiance and has a corresponding right to protection and therefore may be made a ward of court: *Hope v Hope*. Subsequent cases confirm that that is the basis of the jurisdiction.
>
> An infant of British nationality, whether he is in or outside this country, owes a duty of allegiance to the Sovereign and so is entitled to protection, and the English court has jurisdiction to make him a ward of court."

That this remains the basis of jurisdiction was recognised by Baroness Hale in *A v A*, §§ 60-61.

34. It may be noted, this being the basis of jurisdiction, that the power of the court to make a child who is out of the jurisdiction a ward of court extends to a child who although not a British national is travelling on a British passport: see *In re P(GE) (An Infant)* [1965] Ch 568, pages 585, 589, 593, applying the principle in *Joyce v Director of Public Prosecutions* [1946] AC 347.

35. Two features of the case-law are both prominent and pertinent to the issues we have to decide. The first is the repeated stress on the need for "extreme circumspection" (the phrase used by Thorpe LJ in *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951, § 42) in deciding to exercise the jurisdiction where the child is outside the jurisdiction. In *A v A*, § 62, Baroness Hale helpfully collected some examples of recent phraseology:

> "… in *Al Habtoor v Fotheringham* [2001] 1 FLR 951, para 42 Thorpe LJ advised that the court should be "extremely circumspect" and "must refrain from exorbitant jurisdictional claims founded on nationality" over a child who was neither habitually resident nor present here, because such claims were outdated, eccentric and liable to put at risk the development of understanding and co-operation between nations. But in *In re B*

> *(Forced Marriage: Wardship: Jurisdiction)* [2008] 2 FLR 1624, Hogg J did exercise the jurisdiction in respect of a 15-year-old girl born and brought up in Pakistan, who had never been here but did have dual Pakistani and British nationality. She had gone to the High Commission in Islamabad asking to be rescued from a forced marriage and helped to come to Scotland to live with her half-brother. The High Commission wanted to help her but felt unable to do so without the backing of a court order. Hogg J made the girl a ward of court and ordered that she be brought to this country. The half-brother was assessed as offering a suitable home and in fact she went to him. Hogg J explained that she thought the circumstances "sufficiently dire and exceptional": para 10. In *In re N (Abduction: Appeal)* [2013] 1 FLR 457, para 29 McFarlane LJ commented that "if the jurisdiction exists in the manner described by Hogg J then it exists in cases which are at the very extreme end of the spectrum". The facts of that case were certainly not such as to require the High Court to assume jurisdiction over the child in question."

36. But the principle in play here goes far back beyond the authorities referred to by Baroness Hale. Thus in *In re Willoughby (An Infant)* (1885) 30 ChD 324, page 331, Cotton LJ said:

> "Of course it is only under extraordinary circumstances that the Court would make an order when the infant is not here, and when there is no property here, and when the persons who have the custody of the infant are not subject to the jurisdiction, as they would be if resident in this country."

In *Harris v Harris* [1949] 2 All ER 318, page 322, Lord Merriman P said:

> "It is the rarest possible thing for a judge of this Division of the High Court to make a custody order in respect of a child who is out of the jurisdiction."

In *R v Sandbach Justices ex p Smith* [1951] 1 KB 62, page 67, Lord Goddard CJ said:

> "In view of … the expression of the President's opinion already quoted, we think that we must take it that the court has jurisdiction to make such an order though it would be very unusual to do so, and in many cases a most undesirable thing, more especially for justices, to make it. It is a strong thing for a court of summary jurisdiction to make an order which the High Court makes only in most exceptional circumstances."

In *Harben v Harben* [1957] 1 WLR 261, page 265, Sachs J said that the "facts have to be really exceptional before an order is made." In *In re P(GE) (An Infant)* [1965] Ch 568, Lord Denning MR said (page 582) that the jurisdiction would be exercised only "where the circumstances clearly warrant it". Pearson LJ (page 587) said the

jurisdiction should be exercised "sparingly". Russell LJ (page 595) used the word "exceptional".

37. The other striking feature of the case-law is the extreme rarity of reported cases in which the jurisdiction has in fact been exercised in such cases. Orders were made in *Hope v Hope* (1854) 4 DeGM&G 328, in *In re Willoughby (An Infant)* (1885) 30 ChD 324, in *In re Liddell's Settlement Trusts* [1936] Ch 365, and in *Harben v Harben* [1957] 1 WLR 261. *In re Willoughby (An Infant)* (1885) 30 ChD 324 provides little assistance, for what was there in issue was the appointment of a guardian, though it is to be noted that the circumstances, which there is no need to go into, were variously described as "remarkable" (Kay J, page 329), "special" (Cotton LJ, page 334) and "very special and very unusual" (Lindley LJ, page 336). The other three cases each involved what we now think of as abduction. In *Hope v Hope* (1854) 4 DeGM&G 328, the mother had retained the child in France against her husband's wishes. In *In re Liddell's Settlement Trusts* [1936] Ch 365, the wife had removed the children to New York. In *Harben v Harben* [1957] 1 WLR 261, the father had removed the children to Jersey.

38. Since those days there have been two important developments. First, the effect of the provisions of the Family Law Act 1986 to which we have already referred, is that the jurisdiction cannot be exercised where the claim is for "care of … or … contact with" the child within the meaning of section 1(1)(d)(i): see *F v S (Wardship: Jurisdiction)* [1991] 2 FLR 349. In that case, Ward J, as he then was, considered (page 356) whether it was nonetheless open to him to make a *return order*:

> "If proceedings in wardship were instituted, but … no application was made for care or control or for access, and where, by definition, no custody order was being sought, it could be argued that the habitual residence basis of jurisdiction did not apply. That would leave the court in wardship free to order the minor's return to the jurisdiction; once returned to the jurisdiction, the plaintiff could then apply for a custody order. Arguably, in that event, jurisdiction could arise on the ground provided by s. 2(2)(b), namely that the ward is present in England or Wales on the relevant date – the date of the new application – and the court considers that the immediate exercise of its powers is necessary for his protection. By this procedural device, the court might then make the custody order. But should that be permitted? Whilst this ancient prerogative jurisdiction survives, I shall scrupulously and rigorously enforce it where I can. Nevertheless, despite this reluctance to curtail my jurisdiction, I consider that to exercise these powers would be wrong, and that I cannot justify what could be a devious entry to the court by the back door where Parliament has so firmly shut the front door to custody orders being made in these circumstances."

One corollary of this is that, whatever may have been the position before the 1986 Act, the focus nowadays must be on the *protective* rather than the *custodial* aspect of the inherent jurisdiction.

39. The second development is that referred to by Thorpe LJ in *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951, and described by Baroness Hale in *A v A*, §§ 64-65 as "important general considerations which may militate against" exercise of the jurisdiction:

> "64 … It is inconsistent with and potentially disruptive of the modern trend towards habitual residence as the principal basis of jurisdiction; it may encourage conflicting orders in competing jurisdictions; using it to order the child to come here may disrupt the scheme of the 1986 Act by enabling the child's future to be decided in a country other than that where he or she is habitually resident. In a completely different context, there are also rules of public international law for determining which is the effective nationality where a person holds dual nationality.
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> 65 All of these are reasons for, as Thorpe LJ put it in *Al Habtoor v Fotheringham* [2001] 1 FLR 951, para 42, extreme circumspection in deciding to exercise the jurisdiction."

40. Reported examples of the exercise of the jurisdiction since 1986 (indeed, since 1965) are few and far between. The only ones of which we are aware are the decisions of Singer J in *Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542, of Hogg J in *Re B, RB v FB and MA (Forced Marriage: Wardship: Jurisdiction)* [2008] EWHC 1436 (Fam), [2008] 2 FLR 1624 and, very recently, of the President in *Re M (Children)* [2015] EWHC 1433 (Fam). No doubt there have been other unreported examples, for instance in cases of forced marriage. In the latter case the President said this (§ 32):

> "Recognising that for all the reasons articulated in *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951, para 42, and, more recently, in *Re N* and in *A v A*, there is need for "extreme circumspection in deciding to exercise the jurisdiction", I have no doubt that the jurisdiction was properly exercised in both *Re KR* and *Re B*, just as I have no doubt that it can properly be exercised in the circumstances with which I am here faced. This is not the occasion, and there is no need for me, to explore the range of circumstances in which it may be appropriate to make a child who is outside the jurisdiction a ward of court. I merely observe that cases such as this demonstrate the continuing need for a remedy which, despite its antiquity, has shown, is showing and must continue to show a remarkable adaptability to meet the ever emerging needs of an ever changing world. I add that the use of the jurisdiction in cases where the risk to a child is of harm of the type that would engage Articles 2 or 3 of the Convention – risk to life or risk of degrading or inhuman treatment – is surely unproblematic. So wardship is surely an appropriate remedy, even if the child has already left the jurisdiction, in cases where the fear is that a child has been taken abroad for the purposes of a forced marriage (as in *Re KR* and *Re B*) or so that she can be subjected

> to female genital mutilation or (as here) where the fear is that a child has been taken abroad to travel to a dangerous war-zone. There is no need for me to go any further, so I need not consider whether there are other kinds of situation where a child who is already abroad should be made a ward of court or whether wardship is an appropriate remedy where the risk to the child is of harm falling short of harm of the type that would engage Articles 2 or 3 of the Convention."

41. It was argued on behalf of the appellant that the decision in *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951, marked a "significant shift" in the use of the inherent jurisdiction and that in *A v A* the jurisdiction was "resuscitated" and freed from the "inhibiting effect" of *Al Habtoor v Fotheringham*. The argument that the jurisdiction can and should be exercised in the present case was founded on the expansive reading which counsel sought to attribute to what Baroness Hale said in *A v A*, §§ 63, 65:

> "63 In my view, there is no doubt that the jurisdiction exists, in so far as it has not been taken away by the provisions of the 1986 Act. The question is whether it is appropriate to exercise it in the particular circumstances of the case …
>
> 65 … all must depend on the circumstances of the particular case. Among the factors which may be relevant in this case are:
>
> (i) The father is now estopped from denying that the three older children are habitually resident here. There is no obstacle to their future being decided in this country, which is undoubtedly the country with which they had the closest connection until they were prevented from leaving Pakistan to return here in November 2009.
>
> (ii) The basis on which the father proposed to mount a forum non conveniens argument in relation to the older children was that the High Court did not have jurisdiction in relation to Haroon. If it is determined that the High Court should exercise its jurisdiction in relation to Haroon, that argument disappears. The father should not be permitted to raise any other arguments in relation to the older children which he could have raised at first instance.
>
> (iii) Nevertheless, arguments as to the appropriate forum in which to decide Haroon's future will be relevant to whether it would be right for the High Court to exercise its inherent jurisdiction based on nationality in his case.
>
> (iv) Among those arguments will be the practicability of the mother litigating the children's future in Pakistan, in the light of the findings already made by the judge. How reasonable is it to expect her to return to that country, given

> what happened to her there previously? Conversely, how reasonable is it to expect the father to return here, where he was born and has lived for most of his life and has property and other family members?
>
> (v) The circumstances in which these children came to be in Pakistan, and the coercion to which their mother was subject, while not determinative, are highly relevant factors."

42. We do not read Baroness Hale as intending to overthrow more than 150 years of settled jurisprudence. She said nothing by way of disapproval of any of the phraseology she had quoted in § 62. On the contrary, in § 65 she expressly adopted Thorpe LJ's use of the words "extreme circumspection". She expressed no disapproval of the decision in *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951 and, in § 62, expressly endorsed the correctness of the decision in *Re N (Abduction: Appeal)* [2012] EWCA Civ 1086, [2013] 1 FLR 457 – both cases where the jurisdiction was invoked unsuccessfully despite the difficulties the applicant mother would have had in litigating in the foreign court, Dubai in the one case, Lebanon in the other. Moreover, Baroness Hale explicitly recognised, in § 63, the effect of the 1986 Act in taking away part of the jurisdiction and, in § 64, the significance of the "the modern trend towards habitual residence as the principal basis of jurisdiction."

43. In these circumstances, Baroness Hale's use, in §§ 63, 65, of the phrases "the particular circumstances of the case" and "the circumstances of the particular case" simply do not bear the weight which counsel seek to attribute to them. Of course, one has to focus on the particular circumstances of the particular case, but that does not mean that the court can make an order whenever it thinks it might be appropriate. The point is illustrated by what Sachs J said in *Harben v Harben* [1957] 1 WLR 261, page 265:

> "Whether or not this court makes an order in relation to a child outside the jurisdiction depends on the particular facts of the case, but, of course, those facts have to be really exceptional before an order is made."

44. Nor, in our judgment, does an analysis of the particular features identified by Baroness Hale in *A v A*, § 65, assist the appellant in this case. *A v A* was remitted for hearing by Parker J, who described the circumstances of the case as being "if not unique, certainly of a very special nature": *A v A (Return Order on the Basis of British Nationality)* [2013] EWHC 3298 (Fam), [2014] 2 FLR 244, § 13. Nothing said, whether by Baroness Hale or by Parker J, supports the view that the decision in *A v A* turned on questions of forum (non) conveniens alone. The two driving considerations seem to have been, first, the fact that the English court undoubtedly had jurisdiction in relation to the three older children and, secondly, the father's coercion of the mother. Parker J put the point very clearly (§§ 15, 17):

> "15 …. The only reason … why H remains [in Pakistan] is because of coercive measures by the father …

> 17 It is obvious that the three eldest children's future should be litigated here … H is one of a sibling group of four. Their futures should be decided together."

In the present case, in contrast, we are concerned with a single child of whom, as already noted, the respondent was the sole person with parental responsibility and whose removal of the child to Pakistan was not wrongful.

45. In our judgment, the use of the inherent jurisdiction in cases where the child is outside the jurisdiction remains subject to the long-established and consistent jurisprudence. Various words have been used down the years to describe the kind of circumstances in which it may be appropriate to make an order – "only under extraordinary circumstances", "the rarest possible thing", "very unusual", "really exceptional", "dire and exceptional", "at the very extreme end of the spectrum." The jurisdiction, it has been said, must be exercised "sparingly", with "great caution" (the phrase used by Lord Hughes JSC in *A v A*, § 70(v)) and with "extreme circumspection." We quote these words not because they or any of them are definitive – they are not – but because, taken together, they indicate very clearly just how limited the occasions will be when there can properly be recourse to the jurisdiction.

46. Moreover, and as we have already explained, those occasions will in modern times be even more limited than previously, given, first, the effect of the 1986 Act and, secondly, the other recent developments noted by Thorpe LJ and Baroness Hale. The importance of the 1986 Act in limiting recourse to the inherent jurisdiction is plain. In our judgment, the analysis of Ward J in *F v S (Wardship: Jurisdiction)* [1991] 2 FLR 349, and his warning against using a return order as an artificial device to found jurisdiction, are as valid now as then, and remain unaffected by anything said in *A v A*.

47. In the present case, the essential dispute between the parties relates to the appellant's claim for contact and, in our judgment, Hogg J was entirely accurate in her description of this as being (§ 36) "At heart … a contact application". On the face of it, therefore, notwithstanding the application for a return order, the appellant's attempt to invoke the inherent jurisdiction founders on section 1(1)(d)(i) of the 1986 Act and involves an impermissible attempt, using Ward J's expressive phrase, to make "a devious entry to the court by the back door."

48. The appellant seeks to escape from this conclusion by pointing to what she says is the fact that there would be "no opportunity" for either party to litigate in the courts of Pakistan, in particular "given the risks to all involved of the disclosure of the sexuality of the appellant and the respondent and P's origins." After the President pointed out that there was no expert evidence in support of a proposition which was based on little more than her bare assertion, the appellant filed a further skeleton argument referring to the June 2014 report of the International Gay and Lesbian Human Rights Commission, *Experience of Lesbian and Bisexual Women in Asia: Pakistan*. Even then, there was no reference to any of the objective country materials whose forensic deployment in the Administrative Court is routine in immigration and asylum cases but which, for reasons we have never been able to understand, are rarely deployed, as they should be, in the Family Division. We have in mind, in particular, the country reports regularly issued by the Home Office, the United States Department of State, Amnesty International and Human Rights Watch.

49. After we pointed this out we were provided with extracts from four further documents: the UK Border Agency's January 2013 *Operational Guidance Note: Pakistan*, the Home Office's July 2014 *Country Information and Guidance – Pakistan: Sexual orientation and gender identity*, the State Department's, *Pakistan 2013 Human Rights Report*, and a paper by Shafi'i Abdul Azeez Bello, *The Punishment of Homosexuality in Islamic Contemporary World [Malaysia, Iran, Pakistan and Saudi Arabia as a case study]*.

50. The material provided does not justify us in reaching any firm conclusions about what, if anything, the law of Pakistan has to say about lesbianism or what the stance of the courts of Pakistan is in cases involving lesbianism. Section 377 of the Pakistan Penal Code, which dates back to 1860 and plainly reflects the then English criminal law, penalises "carnal intercourse against the order of nature with any man, woman or animal" and explains that "Penetration is sufficient to constitute the carnal intercourse necessary to the offence." It would appear unlikely that this provision would itself render unlawful sexual acts between two women. It seems that the issue of sexual relations between women is very unexplored territory in Pakistani law and has not been tested in the courts: see the Home Office's July 2014 *Country Information and Guidance*, § 2.2.7, and the International Gay and Lesbian Human Rights Commission's report, page 19.

51. Having said that, the material does establish that there is widespread, indeed pervasive, societal and state discrimination, social stigma, harassment and violence against both gay men and lesbian women in Pakistan, together with a lack of effective protection by the state from the activities of non-state actors. The official view in Pakistan appears to be that same-sex relationships involve "abnormal sexual behaviour"; materials we have seen suggest that lesbians are "invisible" in Pakistani society: see the Home Office's July 2014 *Country Information and Guidance*, §§ 2.3.3, 2.4.5.

52. Overall, unsatisfactorily general though the evidence is, we are prepared to proceed on the basis that it is very unlikely that the courts in Pakistan would be prepared to recognise the appellant as having any relationship with P that would entitle her to relief. She could hardly hope to demonstrate the necessary kind of parental, or in any event familial, relationship with P unless she were tolerably frank about the nature of her relationship with the respondent. But in that case, even if the Court evinced no actual hostility to the appellant, the evidence about societal attitudes strongly suggests that her consequent relationship with P would not be recognised as one which justified any legal protection. Thus, while we need reach no conclusion about the alleged "risks to all concerned", what matters is that the appellant will have no realistic opportunity to advance her claim in the Pakistani courts.

53. However, in our judgment that state of affairs is not by itself enough to justify the intervention of the English court. The fact that local judicial processes are, to our perception, inadequate does not in any way lessen the difficulties about seeking to invoke the inherent jurisdiction when a child is abroad. As a matter of principle, such a claim to jurisdiction sits most uncomfortably not merely with the long-established jurisprudence but more particularly with the provisions of section 1(1)(d)(i) of the 1986 Act and the decisions in *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951, and *Re N (Abduction: Appeal)* [2012] EWCA Civ 1086, [2013] 1 FLR 457. We would not wish to lay down any rigid boundaries for the exercise of the

jurisdiction; all must depend, as always, on the circumstances of the particular case. However, we are satisfied that the present case does not approach the very high threshold necessary to justify the exercise of the jurisdiction. We are very willing to accept that the attenuation or even – if this is, regrettably, what happens – the ultimate loss of her relationship with the appellant will be a real detriment to P, quite apart from being a great grief to the appellant herself. But it has to be recognised that the respondent has always been P's primary carer, that the appellant had not been part of the household for some time before P and the respondent left for Pakistan and that the appellant has never even in this country had any legal parental rights. The situation falls short of the exceptional gravity where it might indeed be necessary to consider the exercise of the inherent jurisdiction.

54. Even taking account of this aspect of the case, therefore, the circumstances, in our judgment, are simply not such as to justify the exercise of the inherent jurisdiction, having regard to what we have said in paragraph 45 above. It follows that Hogg J was entirely justified in refusing to exercise it. The appeal on this point accordingly fails.

55. Although this has not formed part of our reasoning in dismissing the appeal on this point, we should add that there is an inherent difficulty in such a case which may in any event rule out recourse to the inherent jurisdiction, assuming, as here, that both the parent and child are in the foreign jurisdiction and unwilling to return. If the foreign jurisdiction is such as to deny any effective remedy to someone in the appellant's position, what reason can there be to think that it will be willing to enforce an order obtained from the English court? At the very point at which the inadequacy of the foreign court might be such as to persuade the English court to assume jurisdiction, the English court would surely be inclined to decline to exercise it on the basis of anticipated futility.

56. We acknowledge the principle, articulated by Romer LJ in *In re Liddell's Settlement Trusts* [1936] Ch 365, page 374, that "It is not the habit of this Court in considering whether or not it will make an order to contemplate the possibility that it will not be obeyed." On the other hand, as Kerr LJ put it in *Hamlin v Hamlin* [1986] Fam 11, page 18, "our courts will not make orders which they cannot enforce." These are matters which the President considered in *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [2014] 1 FLR 523, §§ 60-64. As in that case, so here, we do not think there is any need for us to come to a concluded view on a point which does not in fact arise for decision and which, if it had to be decided, would call for fuller argument than was appropriate here. We merely note, as the President did, that in *Wookey v Wookey, In re S (A Minor)* [1991] Fam 121, page 130, Butler-Sloss LJ said that "there must be a real possibility that the order, if made, will be enforceable," while in *Dadourian Group International Inc v Simms and others (Practice Note)* [2006] EWCA Civ 399, [2006] 1 WLR 2499, § 35, Arden LJ said that "the court must be astute to see that there is a real prospect that something will be gained." And we are inclined to agree with the President's view (§ 63) that in such cases the court will need evidence as to the applicable law and practice in the foreign court, in particular, evidence as to whether the foreign court would be likely to enforce the order.

57. Before parting from the inherent jurisdiction we add this. We agree with the President that both *Re KR (Abduction: Forcible Removal by Parents)* [1999] 2 FLR 542 and *Re B, RB v FB and MA (Forced Marriage: Wardship: Jurisdiction)* [2008] EWHC 1436

(Fam), [2008] 2 FLR 1624, were correctly decided, as was also the case recently before the President, *Re M (Children*) [2015] EWHC 1433 (Fam). And, for the avoidance of misunderstanding, we make clear that nothing we have said is intended to throw any doubt on the President's identification of wardship as an appropriate remedy, even if the child has already left the jurisdiction, in cases where the fear is that a child has been taken abroad for the purposes of a forced marriage or so that she can be subjected to female genital mutilation or to travel to a dangerous war-zone. These are all, in principle, situations in which recourse can properly be had to the inherent jurisdiction in its protective, rather than its custodial, aspect and without falling foul of the 1986 Act. Of course, whether the inherent jurisdiction should actually be exercised in such a case will depend upon the particular circumstances of the particular case.

Conclusion

58. For the reasons set out above, the appeal is dismissed. We express the hope that the respondent will recognise the value to P of her maintaining her relationship with the appellant and will not only permit but encourage continuing contact between them.